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THE
ALL ENGLAND
LAW REPORTS

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LAW TIMES
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REPORTS

1957

VOLUME 3

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LONDON
BUTTERWORTH & CO. (PUBLISHERS) LTD.

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- Criminal Justice Act, 1925 (*c.* 86), *s.* 14 (2) 669
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be expected to visit No. 25 should not be exposed to danger by the contractors' acts, and as between the contractors and R. the contractors could not rely on any speciality of the duty owed by an occupier to his licensee (see p. 5, letter B, post); A

(b) neither a warning given (if it had been given) by the contractors to visitors to No. 25 nor the visitors' knowledge of the danger would have exculpated the contractors where, as here, they had prevented safe access B to the premises, but, if R. knew of the danger, the contractors would escape liability if, in using the route over No. 26, R. was exposing herself to so great or immediate risk that no sensible person would have incurred it, that is to say, if R. had shown want of ordinary prudence (see p. 6, letter D, p. 7, letter A, post);

(c) R. had not acted unreasonably in accepting the advice to enter by the C route over No. 26, and the contractors could not disclaim responsibility for that advice since their servants had advised the use of this route, nor had R. acted unreasonably in leaving by the same route (see p. 9, letters B to G, post);

(d) the contractors were negligent in not mitigating the result of their interference with the former safe access to the premises, e.g., by laying down D a plank walk, but R. was also negligent on leaving No. 25, and in the circumstances the contractors and she were equally to blame.

Clayards v. *Dethick & Davis* ((1848), 12 Q.B. 439), and *Mooney* v. *Lanarkshire County Council* (1954 S.C. 245) applied.

Malone v. *Laskey* ([1907] 2 K.B. 141) overruled so far as it dealt with negligence; *Ball* v. *London County Council* ([1949] 1 All E.R. 1056) criticised E (see p. 8, letter A, and p. 14, letter B, post).

(ii) (per LORD KEITH OF AVONHOLM) R. was precipitated from No. 25 into danger on No. 26 when using a route which had been made possible by the contractors' servants, who had provided no safe alternative route and who should have contemplated that the route over No. 26 might be F used by other persons than the caretaker's wife (see p. 13, letter G, post).

Decision of the COURT OF APPEAL (sub nom. *Riden* v. *A. C. Billings & Sons, Ltd.*, [1956] 3 All E.R. 357) affirmed.

[As to the duty of persons creating dangerous conditions to take precautions for the safety of others, see 23 HALSBURY'S LAWS (2nd Edn.) 582, para. 834; and for cases on the subject, see 36 DIGEST (Repl.) 24, 25, *102-112*. G

As to the defence of acceptance of risk where there was not full appreciation of danger, see 23 HALSBURY'S LAWS (2nd Edn.) 718, para. 1007.]

Cases referred to:

(1) *Clayards* v. *Dethick & Davis*, (1848), 12 Q.B. 439; 116 E.R. 932; 36 Digest (Repl.) 154, *809*. H

(2) *Thompson* v. *North Eastern Ry. Co.*, (1860), 2 B. & S. 106; *affd.* Ex.Ch., (1862), 2 B. & S. 119; 31 L.J.Q.B. 194; 6 L.T. 127; 121 E.R. 1012; 36 Digest (Repl.) 189, *1000*.

(3) *Malone* v. *Laskey*, [1907] 2 K.B. 141; 76 L.J.K.B. 1134; 97 L.T. 324; 36 Digest (Repl.) 14, *56*.

(4) *Ball* v. *London County Council*, [1949] 1 All E.R. 1056; [1949] 2 K.B. 159; 113 J.P. 315; 2nd Digest Supp. I

(5) *Heaven* v. *Pender*, (1883), 11 Q.B.D. 503; 52 L.J.Q.B. 702; 49 L.T. 357; 47 J.P. 709; 36 Digest (Repl.) 7, *10*.

(6) *Mooney* v. *Lanarkshire County Council*, 1954 S.C. 245.

(7) *Slater* v. *Clay Cross Co., Ltd.*, [1956] 2 All E.R. 625; [1956] 2 Q.B. 264; 3rd Digest Supp.

(8) *Kimber* v. *Gas Light & Coke Co.*, [1918] 1 K.B. 439; 87 L.J.K.B. 651; 118 L.T. 562; 82 J.P. 125; 36 Digest (Repl.) 24, *105*.

A (9) *Corby* v. *Hill*, (1858), 4 C.B.N.S. 556; 27 L.J.C.P. 318; 31 L.T.O.S. 181; 22 J.P. 386; 140 E.R. 1209; 36 Digest (Repl.) 67, *370*.

(10) *Haseldine* v. *Daw & Son, Ltd.*, [1941] 3 All E.R. 156; [1941] 2 K.B. 343; 111 L.J.K.B. 45; 165 L.T. 185; 2nd Digest Supp.

Appeal.

B Appeal by building contractors, A. C. Billings & Sons, Ltd., from an order of the Court of Appeal (DENNING and BIRKETT, L.JJ., and ROXBURGH, J.), dated July 26, 1956, and reported sub nom. *Riden* v. *A. C. Billings & Sons, Ltd.*, [1956] 3 All E.R. 357, reversing an order of HALLETT, J., dated Feb. 7, 1956. The respondent, Mrs. Riden, had been injured from a fall into a basement area while leaving a house occupied by the second and third defendants, following the C destruction of the normal safe means of access to the house by the appellants in the process of removing a sloping ramp and restoring a footpath and steps to the house underneath it. She brought an action for damages against the appellants and against the Ministry of Works and the Commissioners of Customs and Excise, as second and third defendants. The Court of Appeal, reversing HALLETT, J., held that the respondent was entitled to recover damages from the D appellants (reduced by one half on account of her own negligence) which they assessed at £1,200, to which was added special damage of £22 16s. The respondent did not proceed with her appeal in the Court of Appeal against the second and third defendants. The facts appear in the opinion of LORD REID.

N. R. Fox-Andrews, Q.C., and *R. C. Hutton* for the appellants.
G. G. Baker, Q.C., and *M. E. Kempster* for the respondent.

E The House took time for consideration.

July 25. The following opinions were read.

VISCOUNT SIMONDS: My Lords, in this case I have had an opportunity of reading the opinion of my noble and learned friend, LORD REID, and, as I concur in it, I do not think it necessary to add any words of my own.

F I shall move that this appeal be dismissed with costs.

LORD REID: My Lords, the respondent sues the appellants, a firm of contractors, for damages for injuries sustained by her through falling into an unfenced sunk area when she was leaving No. 25, Cambray Place, Cheltenham, at about 10 p.m. on Nov. 17, 1953. This house is part of a terrace set back some G thirty feet from the street. Prior to Nov. 16 the access to the front door had been a long sloping ramp with a railing on each side. The original access had been a level path leading to four or five steps up to the front door, but, many years before, an occupier of the house who used a wheeled chair had had the path and steps covered by the ramp. In 1953 the house was used as a government office and caretakers Mr. and Mrs. Privett lived on the top floor. H The respondent had been visiting Mrs. Privett before her accident.

It had been decided by the Office of Works to restore the original form of access and remove the ramp, and the appellants were employed as contractors to do this. They started work on Nov. 16 and, by the afternoon of Nov. 17, they had removed the part of the ramp nearest the street and had laid down a foundation of rough stones for the new level path; they had also covered the I small lawn belonging to No. 25 with materials and tools. It was, therefore, impracticable to approach the front door over any part of the ground belonging to No. 25. Looking from the street towards the house the lawn was on the right, and the boundary with No. 26 was immediately to the left of the ramp. The boundary railings had been removed during the last war and a row of shrubs ran along most of the boundary. The only practicable approach to the front door of No. 25 from the street was to go up the forecourt of No. 26 on the other side of the shrubs and then to pass between the last shrub and the front wall of the houses over some muddy ground and to step up two or three feet from it on to the ramp near the front door of No. 25. In taking this route it was necessary to go within a very few feet of the small sunk area of No. 26 which was unfenced, and at the same time to brush past the branches of the last shrub. This route had been made possible by the appellants having removed the railings at the sides of the ramp. They had replaced the railings by a wooden board on the right side of the ramp, but had left open the left side of the ramp nearest to No. 26.

When the appellants' workmen ceased work about 4.30 p.m. on Nov. 17 they did nothing to provide a safe or convenient access to No. 25. The defence at the trial was that an access had been provided by means of a plank walk, but this was denied by the respondent and her witnesses and the defence witnesses were not believed by Hallett, J., the trial judge. At about 3 p.m. on the day of the respondent's accident, Mrs. Privett came out of her house by this route between the shrub and the sunk area and over the ground of No. 26 and asked the workmen: "How are we going to get in and out?", and she says that they told her " we can always go " on the No. 26 side, and that that side was the best way in. Apparently one of the workmen also went upstairs to see Mr. Privett. Admittedly it was the best way in, in the circumstances, and I cannot regard this as anything else than advice to use the access by the ground of No. 26. Hallett, J., so interpreted Mrs. Privett's evidence. He said: " Then she says further that . . . she herself was advised by the [appellants'] workmen that that was the best way to go "; and earlier in the judgment he had referred to " Mrs. Privett's allegation that she had been advised to use the way she did use ", and said that he accepted her evidence without hesitation.

Some time after Mrs. Privett returned, her brother Mr. Brown, who is a builder, came with his wife to visit her. He found that the ramp had gone and, when he was looking for an alternative access, Mrs. Privett called to him and advised him to go by the route which she had taken herself. Mr. Brown found that the ground near the bush was muddy and brought over a plank which he put down to enable his wife to cross. About 7 p.m. the respondent and her daughter were walking along the street. Mrs. Privett saw them and invited the respondent to come in, again advising her to go by the same route. The respondent made the journey without much difficulty. About 10 p.m. she left. Mrs. Privett's son offered to accompany her but she thought that unnecessary. She took no precautions such as getting a torch and, after waiting a moment on emerging from the house to accustom her eyes to the darkness, she stepped down off the ramp on to the plank. She had no recollection of what happened then but she fell into the sunk area and sustained considerable injuries.

The main controversy in the case has been over the nature and extent of the duty owed by the appellants to the respondent. The appellants maintain that their duty was no higher than that of a licensor to a licensee and, in particular, that their duty ceased once a visitor had become aware of all the facts constituting the danger. They contend that their only duty was to give adequate warning to a person who was unaware of those facts. Admittedly they did not warn the respondent but, as the respondent knew all the facts when she left the house, they say that giving a warning to her was unnecessary. Hallett, J., assumed rather than decided that, because the respondent was a licensee vis-à-vis the occupiers, her rights against the appellants were only the rights of a licensee in a question with an occupier. In this I think that he was wrong; but it may well be that this point was not fully argued or not argued at all before him. On all other matters in the case his judgment was full and detailed, and I see no reason to disagree with it on any of these other points. It may well be that this matter was overlooked because, in addition to the appellants, the respondent sued the occupiers and against them, of course, her rights were limited to the rights of a licensee.

It is not alleged that the appellants were authorised by the occupiers to prevent safe access to the house at times when their men were not working, and it is plain that the nature of their work did not require this because the defence which they sought to establish at the trial was that they had, in fact, provided a safe access by means of a plank walk. The only reasonable justification I know of for the rights of a licensee being limited as they are is that a licensee generally gives no consideration for the rights which the occupier has given him and must not be allowed to look a gift horse in the mouth. That cannot apply to the appellants, who gave no concession to the respondent. I need not pause to consider what the position would be if an occupier authorised a contractor to prevent safe access for a licensee. In the present case, I see no reason why the contractor who chooses to prevent safe access by visitors should be entitled to rely on any speciality in the law of licensor and licensee.

In my opinion, the appellants were under a duty to all persons who might be expected lawfully to visit the house, and that duty was the ordinary duty to take such care as in all the circumstances of the case was reasonable to ensure that visitors were not exposed to danger by their actions. It was argued that, even so, that duty was adequately discharged in all cases by giving warning of the danger and that, if a visitor in full knowledge of the danger chose to incur it, she did so at her own risk and the contractor cannot be held liable. I do not agree. There may be many cases in which warning is an adequate discharge of the duty. There may be another safe and reasonably convenient access only a short distance away, or the situation may be such that with knowledge of the danger the visitor can easily and safely avoid it. But there are other cases where that is not so. Let me take the example of a doctor called to an urgent case in a house the only access to which has unnecessarily been made dangerous by a contractor. It cannot be right that he should be entitled to say to the doctor: " Now I have shown you the danger and if you choose to go on you do so at your own risk ".

I do not think that there is anything new in what I have just said. The principle was at least adumbrated a century ago in *Clayards* v. *Dethick & Davis* (1) ((1848), 12 Q.B. 439). A cab proprietor had stables in a mews from which the only road to the street was a long narrow passage. The Commissioners of Sewers employed the defendants to open a trench along the passage and gave notice to the occupiers of stables in the mews that the trench would be open for a day or two and that they must put up with it; the notice advised them to get other stables. The part of the passage not excavated was obstructed by earth and gravel thrown out from the trench. The cab proprietor safely led out one of his horses but the next fell into the trench owing to the earth and gravel giving way. The danger was obvious and there was evidence that a warning had been given, but the case was left to a jury and the cab proprietor succeeded. LORD DENMAN, C.J., in the first place left it to the jury to say whether the defendant had been guilty of negligence and then observed (ibid., at p. 442)

> ". . . that it could not be the plaintiff's duty to refrain altogether from coming out of the mews merely because the defendants had made the passage in some degree dangerous: that the defendants were not entitled to keep the occupiers of the mews in a state of siege till the passage was declared safe, first creating a nuisance and then excusing themselves by giving notice that there was some danger: though, if the plaintiff had persisted in running upon a great and obvious danger, his action could not be maintained."

On a rule nisi, PATTESON, J., said (ibid., at p. 446):

> ". . . the defendants had clearly no right to leave a trench open in the passage to this mews without a proper fence, and, having done so, to tell the plaintiff ' You shall keep your horse in the stable till we inform you that you may remove him.' But whether or not the plaintiff contributed to the mischief that happened by want of ordinary caution, is a question of degree. If the danger was so great that no sensible man would have

> incurred it, the verdict must be for the defendants . . . The whole question was, whether the danger was so obvious that the plaintiff could not with common prudence make the attempt."

Coleridge, J., said (ibid.):

> " The question is, not only whether the defendants did an improper act, but also whether the injury to the plaintiff may legally be deemed the consequence of it . . . The plaintiff was not bound to abstain from pursuing his livelihood because there was some danger. It was necessary for the defendants to show a clear danger and a precise warning."

Wightman, J., said (ibid., at p. 447):

> " If it had appeared that the plaintiff, in defiance of warning, would persevere in the attempt to pass, I cannot suppose that the jury would have found a verdict in his favour."

Lord Denman, C.J., added (ibid., at p. 448):

> " I certainly told the jury that the plaintiff was not bound to keep his horse back unless the danger was imminent . . ."

As I read these judgments, Lord Denman, C.J., and Patteson, J., did not think that a warning would exculpate the defendants if the danger was not so great or immediate that, on its being pointed out, no sensible man would have incurred it. The judgments of Coleridge, J., and Wightman, J., can be read as indicating an opinion that warning would be sufficient, but Coleridge, J., at least adds the qualification that the danger must be clear and the warning precise. Neither says expressly that, if the danger was only such that a reasonable man, though warned, would still go on, still a warning would be sufficient to exclude any liability on the defendants.

In *Thompson* v. *North Eastern Ry. Co.* (2) ((1860), 2 B. & S. 106), Cockburn, C.J., stated his understanding of the decision in *Clayards*' case (1) in these terms (ibid., at p. 114):

> " *Clayards* v. *Dethick* (1) is a direct authority that where danger has been created by the wrongful or negligent act of another, if a man, in the performance of a lawful act, voluntarily exposes himself to that danger, he is not precluded from recovering for injury resulting from it, unless the circumstances are such that the jury are of opinion that the exposing himself to that danger was a want of common or ordinary prudence on his part. Now that issue was not proposed by the defendants [in *Thompson's* case (2)] to be put to the jury. They stood upon the fact that the knowledge of the state of the basin by the pilot was the knowledge of the plaintiffs, and was in point of law an answer to their claim. But that is not so, unless the circumstances were such that the attempt to navigate the ship under them was an act which no man of ordinary prudence would have committed . . . "

Blackburn, J., said (ibid., at p. 118):

> " On this point I perfectly concur with what has been said by the Lord Chief Justice and my brother Hill; the point is, in fact, decided by *Clayards* v. *Dethick* (1). It might have been a question to be left to the jury, whether the pilot, with the knowledge which he possessed, was guilty of such want of reasonable care, in attempting to take the ship out, as that no prudent man would have so acted. But no such issue was raised by the defendants . . ."

In the Exchequer Chamber, counsel for the appellants only sought to distinguish *Clayards*' case (1) on the ground that there the acts of the defendants were wilful acts. Plaintiffs' counsel was not called on, and the judgment of the Queen's Bench was unanimously affirmed without comment on this matter.

The conclusion to be drawn from these cases appears to me to be that there is no magic in giving a warning. If the plaintiff knew the danger, either because he was warned or from his own knowledge and observation, the question is whether the danger was such that, in the circumstances, no sensible man would have incurred it or, in other words, whether the plaintiff's exposing himself to the danger was a want of common or ordinary prudence on his part. If it was not, then the fact that he voluntarily or knowingly incurred the danger does not entitle the defendant to escape from liability.

The only cases brought to our notice which are inconsistent with what I have said are *Malone* v. *Laskey* (3) ([1907] 2 K.B. 141) and *Ball* v. *London County Council* (4) ([1949] 1 All E.R. 1056). In *Malone's* case (3), a contractor had put up a water tank insecurely and it fell on the caretaker's wife and injured her. *Heaven* v. *Pender* (5) ((1883), 11 Q.B.D. 503) was cited, but not *Clayards* v. *Dethick* (1). The case, so far as relating to negligence, was decided against the plaintiff on the simple but, in my view, erroneous ground that, as the contractor was not the occupier and there was no contractual relationship between him and the plaintiff, he owed no duty of care to her. In *Ball's* case (4), *Malone's* case (3) was followed as being binding on the Court of Appeal, and it is to be noted that there were other grounds which might also have been fatal to the plaintiff's case.

The whole matter was considered by the Second Division of the Court of Session in *Mooney* v. *Lanarkshire County Council* (6) (1954 S.C. 245). The tenant entered into occupation of a local authority's house before the making of the front path had been completed. A visitor to the tenant coming in at night tripped over a metal obstruction protruding from the path and was injured. She was held entitled to damages from the local authority, who were completing the path and had left the obstruction unprotected and unlighted. She was not their licensee because they were no longer the occupiers of the path. *Malone's* case (3) was not followed. The Lord Justice-Clerk (LORD THOMSON) said (ibid., at p. 251):

> " As the defenders, on this hypothesis, did not have possession and control in the accepted sense, it seems to me to be inappropriate to try to equiparate their position to that of an owner or occupier having such possession and control. I refuse to countenance the idea that contractors employed to carry out a job on somebody else's premises are entitled to say that their liability to a person injured is to be measured in terms of the relationship between the person injured and their employer."

LORD PATRICK said (ibid., at p. 265):

> " If two parties are invited—and I use the word in no technical sense—to resort to premises for different purposes, and if it would be obvious to a reasonable man that the authorised operations of the one may endanger the other in his permitted activities unless they are conducted with reasonable care, a duty is owed by the one to the other to take such reasonable care . . . To such situations the limited duty owed by a person in control and possession of heritage to licensees whom he permits to come on his premises has no application. In my opinion, the only decision which is consonant with the law of reparation, as developed, is that a party invited to do work on a pathway on private ground, which pathway forms the access to the house from the public street, and which he must know will be used by day and by night by the tenant and his invitees and licensees, owes a duty to all these persons to do his work with reasonable care so that their passage may not be rendered perilous. If he erects a dangerous obstruction in the way, it must be made apparent, so that they, using due care for their own safety, may avoid the danger."

In that case warning or lighting would have been sufficient to enable visitors to have access to the house without danger, and the court did not have to consider a case like the present where the obstruction was such that safe access had been totally prevented. In my judgment, *Malone's* case (3) ought to be overruled in so far as it dealt with negligence.

I will at this point deal with two matters which have been referred to in argument but which received little attention at the trial. In the first place there was a back door of the house No. 25, Cambray Place, and, if that had been shown to be a reasonably practicable alternative access, it would have been open to the appellants now to say that the respondent should have gone out that way and so avoided the danger of the route she took. But we know nothing about the back door except that it was locked at 5 p.m.; we do not know who locked it or who kept the key or whether the Privetts were allowed to use it after 5 p.m. No doubt this point was missed at the trial because the only defence then was that a safe access had been provided to the front door. Hallett, J., says: " I think it would have been quite unreasonable to have expected these various people to have used it on this occasion ". And, " She could have asked for the back door to have been opened although I think it was hardly negligent of her not to ". In my opinion, we must now disregard entirely the back door and take it that, when the respondent was invited to come in, her only alternatives were to come in as she did or to go away; and that, when she had come in, her only alternatives were to go out by the route she took or to stay the night where she was. The second matter is the plank laid down by Mr. Brown. The respondent's evidence suggests that she may have slipped off the plank either because it was slippery or because it moved. But no such case was made at the trial. Hallett, J., asked Mr. Brown whether it would not have been safer if the plank had not been there. Mr. Brown said he did not think so and the matter was left there. I am, therefore, of opinion that we must take the case on the footing that, in so far as the danger of the route caused the respondent's accident, that danger was the same as it was when the appellants' workmen were there in the afternoon.

I think that the first question to ask is whether the respondent acted reasonably in accepting Mrs. Privett's invitation and taking her advice to go the way she did. That must depend on whether the knowledge of the route which she then had ought to have made it clear to her that she would incur a degree of risk which a reasonable person in her position would not have incurred—in other words, whether a reasonable person with her knowledge would have declined the invitation and gone home. There was no urgency about her visit, she only happened to be passing when she was invited to come in. The reason why I first consider whether she acted reasonably in going in is that, if she was unreasonable in going in, she cannot found on there being some urgency to get out again so as to entitle her then to incur some greater degree of risk. I agree with Hallett, J., that the question is not whether she realised the danger, but whether the facts which she knew would have caused a reasonable person in her position to realise the danger. But, in considering what a reasonable person would realise or would do in a particular situation, we must have regard to human nature as we know it, and, if one thinks that in a particular situation the great majority of people would have behaved in one way, it would not be right to say that a reasonable man would or should have behaved in a different way. A reasonable man does not mean a paragon of circumspection.

The respondent was a very frequent visitor to No. 25. She knew the sunk area of No. 26 well and knew that it was unfenced—she said so in evidence. She must also have had at least a general idea of the rest of the route she proposed to take, but people differ very much in the degree to which they observe and remember things which they pass every day. When describing her inward journey she said:

> " I could not get through the bushes until I came up to the last bush . . . I saw I could get up through the last bush, and I got up through there ",

which rather suggests that she did not have a clear picture of the route until she traversed it. HALLETT, J., says that " the whole of the facts which constituted the danger were perfectly well known to her when she was coming out ". I agree, but I do not think that they were when she decided to go in. It was unnecessary on his view of the law for him to consider what she knew before she went in, and I do not read his finding as covering this. Indeed, I do not think that the evidence would support such a finding about her knowledge at that stage.

In my judgment, it was not unreasonable for her to accept Mrs. Privett's invitation and follow her directions. She would think, and rightly, that Mrs. Privett knew much more about the route than she did. It is true that the respondent was seventy-one years of age but she seems to have found no great difficulty in getting up a step from the ground to the top of the ramp which other witnesses say was two or three feet high. I think it would have been unreasonable for her to attempt this unknown journey in the dark without Mrs. Privett's invitation and direction and, if the appellants could disclaim all responsibility for Mrs. Privett's direction to the respondent, then it would be another question. But they cannot do that. HALLETT, J., found that their workmen advised the use of the route in question, and I can find no ground for supposing that that advice was confined to Mrs. Privett personally. They must have known that others might wish to come in, and ought to have realised that this advice would be passed on to them. Certainly they gave no warning that no one else should go that way. If they had given a warning instead of an encouragement to Mrs. Privett, we do not know what would have happened. Perhaps she would have insisted that they should lay a plank walk over the rubble path.

The next question is whether, if she acted reasonably in going in, the fuller knowledge of the route which she gained on the inward journey made it unreasonable for her to try to go out the same way. Now there was some urgency about making the return journey for otherwise she would not get home. Here it is relevant to consider the attitude of the other people in the house when she left, Mrs. Privett, her son, and Mr. and Mrs. Brown. They all knew the route. Mrs. Privett's son offered to accompany the respondent but she said she could manage. It did not occur to any of them that she should not go, or that she should not go alone. I find it very difficult to assume that they were all unreasonable people in letting her go alone, and I think that only a minute proportion of ordinary people, put in the respondent's shoes and faced with the choice of staying the night or taking the route she did, would have chosen to stay the night; but I think that most people would have been more careful than she was. She would certainly have been wiser to take the son's offer, and I agree with the finding that there was contributory negligence on her part in not taking enough care when she left the house, but I cannot find that, in seeking to return by this route, she acted unreasonably or so negligently as to lead to the conclusion that her accident was caused entirely by her own fault.

It is sometimes said that, when a visitor goes on knowing the risk, the test is whether he was free to choose or acted under some constraint. My difficulty about that test is that freedom is a word which has come to have very different meanings to different people. If this test leads to the same answer as the question whether, in all the circumstances, the visitor acted reasonably, well and good; but if not, I think that, in cases like the present, reasonableness is the better test and is more in accordance with principle. The defendant is bound to take reasonable care, but he is entitled to expect that a visitor will behave in a reasonable manner. I leave aside cases where children are concerned.

In my view, the accident was caused partly by the danger of the route and partly by the respondent's own negligence. But the appellants argue that they cannot be held responsible for the danger of the route because they had no right to remove that danger or even to enter the grounds of No. 26 where the danger lay. It is true that they could not remove that danger; their fault lay in making it necessary for visitors to use that route. Their duty was to take reasonable care for the safety of visitors. They interfered with the existing safe access as they had a right to do. But, in my opinion, their duty to visitors required them to mitigate the result of their interference in so far as in all the circumstances it was reasonable that they should do so, and I think that their own defence in this case shows that it would have been reasonable when they left off work to lay down a plank walk over the rough rubble path. But, even if I am wrong in that, I think that they were still at fault. I leave aside the point that they made this route possible by removing the railing at the top of the ramp, because that point was not dealt with at the trial and some explanation might have emerged if it had been; but they should have given warning against use of this route instead of advising its use, and, if they had done so, it is by no means improbable that matters would have developed in such a way that the respondent would never have taken this route. I am, therefore, of opinion that, in so far as the danger of the route contributed to cause the accident, the appellants are liable to the respondent. I see no reason to disagree with the decision of the majority of the Court of Appeal that the appellants and the respondent were equally to blame, and I am, therefore, of opinion that this appeal should be dismissed with costs to the respondent.

LORD COHEN: My Lords, I have had the opportunity of reading in print the speeches, one of which has been delivered by my noble and learned friend, Lord Reid, and the other of which is about to be delivered by my noble and learned friend, Lord Somervell of Harrow. I agree so fully with the reasons which they give for thinking that the appeal should be dismissed that I can state quite shortly my reasons for arriving at the same conclusion. I need not recapitulate the facts. They have been fully stated by Denning, L.J., in the Court of Appeal and by my noble and learned friend, Lord Reid.

So far as the law applicable to those facts is concerned counsel for the appellants did not dispute the principle which was stated by Denning, L.J., as follows ([1956] 3 All E.R. at p. 362):

> ". . . a contractor doing work on premises is under a duty to use reasonable care to prevent damage to persons whom he may reasonably expect to be affected by his work."

Nor did counsel deny that the respondent was such a person. But he argued that:—(i) the dangerous condition which caused the accident to the respondent existed not on the premises on which the appellants had been working but on the adjoining premises and had not been created by the appellants. Moreover, the appellants had no control over the adjoining premises. Accordingly the appellants were not responsible for any damage arising from this dangerous condition; (ii) the duty resting on the contractor was confined to a duty to warn against any danger they had created—and, therefore; (iii) though it is admitted that the appellants gave no warning, as the respondent knew all the relevant facts, the breach of duty cannot be said to have caused the accident.

My Lords, the short answer to the first of these submissions is, in my opinion, that the evidence does not lay the necessary foundation of fact for it. The learned judge described the state of the ground when the appellants' workmen ceased work on the day of the accident, and said that there existed theoretically four means of approach to the front door of No. 25, Cambray Place, the premises on which the contractors were working. Three of them were situate entirely on these premises and the learned judge found that none of them was practicable. The fourth started over the forecourt of the adjoining premises No. 26, Cambray Place, but ultimately crossed on to the ramp approach of No. 25 close to the top of the ramp. This undoubtedly involved passing close to the unfenced basement area of No. 26, and it is true that the appellants had no legal right either to fence it or place warning lamps around it. But this is, in my opinion, irrelevant. In the first place, had not the appellants pulled down the fence which was on the same side of the ramp as No. 26 before they commenced work and put nothing in its place, this means of approach would never have existed at all. In these circumstances, I do not think the appellants can be heard to say that they did not create the danger which caused the accident to the respondent. I would add that the evidence of the respondent read in the light of the plan which was before your Lordships indicates that she commenced to fall while still on the premises of No. 25, and, though the consequences of her fall might have been far less serious had there been no basement area in No. 26, the falls seems to have been caused by the state of affairs created by the appellants on the premises of No. 25.

Turning to the second of counsel for the appellants' submissions, I do not think that it is true to say that in all cases the only duty imposed on contractors is a duty to warn. Counsel relied on a series of cases where it was held that the liability of an occupier to his licensee was confined to a duty to warn, but I agree with DENNING, L.J., that the principle of these cases is not applicable when the relationship between the parties is not that of licensor and licensee but the claim is one for breach of a duty of care. In such a case, I think the measure of liability is correctly stated by DENNING, L.J., where he says ([1956] 3 All E.R. at p. 362):

> " The [appellants] are liable, not because they are occupiers, but because they created a dangerous state of things and they are under a duty to use reasonable care to prevent damage from it . . . (They might in some circumstances fulfil their duty of care to visitors by putting up a warning in clear terms ' Danger. Keep Out '; for that might suffice to prevent damage to them. The occupants of the house might then have grounds of complaint for blocking their access, but the visitors would not.) If, however, contractors do provide an alternative route, on or off No. 25, or adopt an alternative route, or point one out, as [the appellants] did here, or if it is an obvious deviation for a visitor to take, the contractors are under a duty to use reasonable care to prevent damage to visitors who take that route. A contractor who creates a dangerous state of things cannot escape the consequences by leading people into another danger."

DENNING, L.J., also said (ibid., at p. 362): " It is true that they are under no duty to visitors to provide an alternative route for getting to the front door." My Lords, I incline to think that this statement is too widely expressed. Take the hypothetical case suggested in the course of the argument by one of your Lordships of a doctor called in to a patient seriously ill. If the contractor knew that the house contained a patient seriously ill, I doubt whether he would fulfil his duty merely by warning the doctor of the danger the contractor had created. It might well be that he must create an alternative route. Even on the facts of the present case I doubt whether the contractor could have discharged his duty without putting an obstruction in the place of the railing which he had removed similar to that which he erected on the opposite side of the ramp to prevent a fall into the basement area of No. 25. It is not, however, necessary to decide this point, since, even if a warning was enough, no warning was in fact given.

This brings me to the third submission based on the respondent's alleged knowledge of all material facts. On this point I agree with DENNING, L.J., that knowledge of a plaintiff of the danger can only excuse the defendant where the tribunal, which is the judge of fact, finds on proper evidence that the injury suffered by the plaintiff can be said to be due solely to his own fault. Before the passing of the Law Reform (Contributory Negligence) Act, 1945, mere contributory negligence of the plaintiff would have afforded a defence to the defendant, but under the present law, as DENNING, L.J., said in *Slater* v. *Clay*

Cross Co., Ltd. (7) ([1956] 2 All E.R. 625 at p. 628), it is not a bar to the action A but only a ground for reducing the damages.

It was argued that the learned judge had found as a fact that the accident was due solely to the fault of the respondent. It is true that in one passage he said: "The whole of the facts which constituted the danger were perfectly well known to her when she was coming out", but in the penultimate paragraph of his judgment he said that "she herself contributed very largely indeed to her B accident". The second passage seems to me to come nearer to representing the effect of the evidence which was before the court. I agree with DENNING, L.J., that the respondent did not fully appreciate the danger of the "fourth route". She admitted that she was a frequent visitor to No. 25, that she had seen the area of No. 26, and that she knew there was no fencing around it, but on the occasion of her previous visits the two premises were separated by a railing, and I see no C reason to suppose that she had ever directed her mind to the question of the distance between the basement area of No. 26 and the bushes between the two properties. Indeed, she herself said she did not know how far the plank from which she fell was from that basement area. The trial judge relied on the knowledge he attributed to her as the result of her entrance to the house by the fourth route. But she entered after it was dark, and I see no reason to suppose D her entry enlarged her knowledge. Indeed, the fact that she had got in safely by that route would, I should have thought, have made her more inclined to think she could safely use the fourth route, especially bearing in mind that the appellants' servants had recommended this route to the occupier of No. 25 and she had passed this advice on to the respondent. On the question of the measure of the contributory negligence of the respondent, I cannot usefully add anything E to what was said by my noble and learned friend, LORD REID. For these reasons I agree with the majority of the Court of Appeal that the accident cannot be attributed solely to the respondent's conduct and that the conduct only affords a reason for reducing the damages.

I would dismiss the appeal.

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LORD KEITH OF AVONHOLM: My Lords, I do not see this case so clearly as some of your Lordships. To begin with, the facts of the case and particularly the nature of the approach on to the ramp at or near the front door of No. 25 are not so clearly brought out in the evidence as to make me fully confident that we can draw the correct inference as to how the respondent met with her accident. I should have liked to know more about the terrain between G the boundary of Nos. 25 and 26 and the side of the ramp of which at least one half from the door of No. 25 towards the street extending to some twenty-seven feet was still in being at the time of the accident. It is quite impossible, in my opinion, to accept the evidence of the respondent, a woman seventy-one years of age, that she stepped up three feet to get on to the ramp. Three feet is a climb not a step. Having said so much, however, I think it is a fair inference to draw H from the evidence that, on leaving No. 25, the respondent fell as she stepped off the side of the ramp on to the plank that had been placed below the ramp by Mr. Brown and that the accident started at least on the property of No. 25, though how the respondent covered the six to eight feet or so intervening between the place of her fall and the area of No. 26 remains one of the unexplained features of this case.

I

Turning now to what are matters of law, I agree that the appellants had a duty to protect members of the public or occupants of No. 25, seeking to enter or leave the house, from harm as a result of their operations. The extent of that duty must, in my opinion, depend, however, on what a reasonable man might contemplate as likely to happen on the property of No. 25 from the state in which it was left. I emphasise the words "on the property", for I am quite unable to accept the view that, if the accident had begun and ended on the property of No. 26, the appellants would have been liable. I say so for various reasons. In the first place, the respondent knew as much, indeed more, about No. 26 than did the appellants or their men. The men had been working at No. 25 only two days before the accident happened. The respondent had been a frequent visitor at No. 25—two or three times a week, she says, for a period of about one year. She knew all about the lay-out of No. 26 and its unprotected basement area. But that is not the chief point. Technically the respondent was a trespasser on No. 26. The trespass was insignificant and certainly excusable; but I cannot see how the appellants' men, assuming that they advised or encouraged the trespass, are in any different position from the respondent. If a person encourages a trespass and another person accepts the encouragement, both being aware of the position, and the actual trespasser is injured by some danger on the land trespassed on, known to both, there is no principle I know of which would attach liability to the instigator or encourager in a question with the trespasser. Deception of, or ignorance of, or inadvertence of, the trespasser might raise difficult questions in certain circumstances or certain dangers, but nothing of that sort is present in this case. So viewing the matter, I find myself unable to agree with a passage in the judgment of DENNING, L.J., where he says ([1956] 3 All E.R. at p. 363):

> " If, however, contractors do provide an alternative route, on or off No. 25, or adopt an alternative route, or point one out, as [the appellants] did here, or if it is an obvious deviation for a visitor to take, the contractors are under a duty to use reasonable care to prevent damage to visitors who take that route. A contractor who creates a dangerous state of things cannot escape the consequences by leading people into another danger."

No case was cited, and I know of none, where a contractor has been held liable for a danger not of his own creation and existing on adjacent property with which he had nothing to do and with which he had no right to interfere. I could go no further than to say that if, in circumstances like the present, a contractor does not provide a reasonably safe approach to the house, he may be liable to a person seeking to enter or leave the house who takes the risk of passing over or on the danger left by the contractor and sustains injury thereby. No case was cited, and I know of none, that would carry the contractor's liability further than this and, in my opinion, the ratio of none of the cases cited can be stretched to cover a peril on adjacent land for which the contractor was in no way responsible.

I think, however, that it is possible to hold that, as a result of operations conducted by the appellants here, the respondent was precipitated from the property of No. 25 into the danger on the adjacent property of No. 26 owing to the dangerous condition of the access to the door of No. 25 created by the appellants, and it is not, I think, a relevant factor that the respondent was intending to trespass on adjacent property. What is material is that the evidence shows that persons were using this route or approach to No. 25, that the appellants' men knew that Mrs. Privett, the caretaker's wife, was using this route and should have contemplated that other persons might use the same route. The appellants had removed the railings alongside the ramp and so made this route possible and they had provided no safe alternative route. I think, therefore, they were liable for the accident that happened.

I would dismiss the appeal.

LORD SOMERVELL OF HARROW: My Lords, I agree with the majority of the Court of Appeal that a person executing works on premises, as were the appellants in this case, is under a general duty to use reasonable care for the safety of those whom he knows or ought reasonably to know may be affected by or lawfully in the vicinity of his work. Some of the phrases in the above statement are taken from the judgment of DENNING, L.J., in this case and some from that of SCRUTTON, L.J., in *Kimber* v. *Gas Light & Coke Co.* (8)

([1918] 1 K.B. 439 at p. 447). I also agree with Scrutton, L.J., that this is laid down plainly in *Corby* v. *Hill* (9) ((1858), 4 C.B. N.S. 556 at p. 567). More recently the principle was applied in *Haseldine* v. *Daw & Son, Ltd.* (10) ([1941] 3 All E.R. 156). I also agree with Denning, L.J. ([1956] 3 All E.R. at p. 362), that *Malone* v. *Laskey* (3) ([1907] 2 K.B. 141) was wrongly decided in so far as it held that the repairers of a water tank owed no duty to the plaintiff to take reasonable care to prevent danger because there was no contract between them and the plaintiff, the plaintiff being a resident on the premises. If and in so far as *Ball* v. *London County Council* (4) ([1949] 1 All E.R. 1056) was based on the decision in *Malone* v. *Laskey* (3) it cannot be regarded as an authority.

The duty being a general duty to use reasonable care, reasonableness is the test of the steps to be taken. In the present case the learned judge held that the appellants were not under a duty *in law* (my italics) to provide an alternative means of access. Denning, L.J., said that the appellants were under no duty to provide an alternative route. With respect, I think this is the wrong approach. Their duty is to do what is reasonable. There may well be cases where it is reasonable to leave the normal route dangerous and to provide a safe alternative. There may be other cases where it is reasonable to make the old route safe by planks or covering or fencing off holes or other appropriate steps. There may be other cases where it is reasonable to make entrance from the front impossible and make everyone go round to the back door. I am only stressing the fact that reasonableness is the test.

Here the learned trial judge thought the appellants ought to have done that which they said they had done, namely, have left a plank walk fenced with ropes and stakes. He held, however, they were under no duty in law so to do. As it was their case that this had been done, it would seem reasonable to hold that it would have been a reasonable step to have taken knowing that there would probably be visitors. I agree with the majority of the Court of Appeal that the appellants were negligent in leaving the premises as they did and in " advising " the route which led round the laurel bush without either fencing or putting lights by the open area of No. 26. The fact that this route was indicated by the appellants' servants seems to me to remove the suggested difficulty as to the danger being on neighbouring land. If the appellants felt unable to put up lights or protection on the land of No. 26, that would be a reason for making a safe route on No. 25 or taking reasonable steps to ensure that everyone used the back door.

Did the appellants' negligence cause the accident? Their negligence caused the use of the No. 26 route by the respondent. That route was described by the learned judge as follows:

> " The fourth and the only other route was to advance by the forecourt [that is of No. 26] until you were almost in the basement . . . You then round the laurel bush in the small space in between dipping or bobbing down or having your face hit by the branches, and then climbing up on to the ramp which you would meet not quite at its top but a few paces down from its top where, as far as I can tell from the evidence, the height would be about three feet."

If, as I have held, the taking of this route was the consequence of the appellants' negligence, prima facie a fall into the unfenced basement in the dark would be a consequence of that negligence. But it is said the respondent knew of the danger. Before the Law Reform (Contributory Negligence) Act, 1945, a plaintiff guilty of contributory negligence could not recover, although the damage was in part due to the negligence of the defendant. The plaintiff's knowledge of a danger was relevant to the question whether he had been guilty of negligence which contributed to the accident. There is often, as there was in *Clayards* v. *Dethick & Davis* (1) ((1848), 12 Q.B. 439), a further question whether, although knowing of the danger, he acted reasonably, in all the circumstances, in taking the risk which he did take. If so, he was not negligent although there was an

A accident. Since the Law Reform (Contributory Negligence) Act, 1945, the question is whether, having regard to his knowledge and the other circumstances, the plaintiff was negligent and, if so, was his negligence the sole cause of the accident or only a contributory cause. The appellants relied on the finding by the learned judge that the respondent at all material times knew that the basement was unfenced and the physical facts of the general lay-out. It would, B of course, have been absurd to suggest that she knew, at any rate before her first journey up the route, what was the exact proximity of the basement when she was pushing round the laurel bush in the manner described by the learned judge. Nor was it put to her in cross-examination that she had any such precise knowledge after reaching the house. The learned judge has found that there was no appreciable light from the street lamps, and she may well have thought C the distance greater than it was. When she left she did not want to trouble anyone to assist her. This may have been negligent. There may have been negligence in the actual way she tried to make her way round the bush. For my own part, the contribution of her own negligence to the accident certainly did not exceed the fifty per cent. attributed to her.

DENNING, L.J., in his judgment, cited and applied a statement of his own in D *Slater* v. *Clay Cross Co., Ltd.* (7) ([1956] 2 All E.R. 625 at p. 628):

> ". . . knowledge of the danger is only a bar where the party is free to act on it, so that his injury can be said to be due solely to his own fault . . . Where knowledge of the danger is not such as to render the accident solely the fault of the injured party, then it is not a bar to the action but only a ground for reducing the damages."

E I think the words " free to act " in the context may be ambiguous. The respondent was " free " to stay the night in No. 25 but the learned lord justice did not mean that her freedom to do this meant that the accident was due solely to her own fault. There may be many cases where a plaintiff is " free " in one sense to avoid the risk altogether but where it would be reasonable to run the risk. F When the plaintiff has full or partial knowledge of the danger the question must always be: Was the injury, in all the circumstances, including the plaintiff's knowledge, due solely to his own negligence or was it due solely to the negligence of the defendant or was it due to the negligence of each?

For the above reasons, which are substantially those given by DENNING, L.J., I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Gibson & Weldon*, agents for *Keith Scott & Co.*, Gloucester (for the appellants); *Syrett & Sons*, agents for *Ivens, Thompson & Green*, Cheltenham (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

HAMMOND *v.* HAMMOND.

[Probate, Divorce and Admiralty Division (Karminski, J.), July 4, 5, 12, 1957.]

Legal Aid—Costs—Taxation—Review of taxation—Jurisdiction of court to order review—Assisted person not financially interested and not having obtained authority of area committee to apply for review—Legal Aid and Advice Act, 1949 (12 *&* 13 *Geo.* 6 *c.* 51), *Sch.* 3, *para.* 4 (1)—*Legal Aid* (*General*) *Regulations,* 1950 (*S.I.* 1950 *No.* 1359), *reg.* 18 (3) (*b*), *as substituted by S.I.* 1954 *No.* 166.

A wife, the petitioner in divorce proceedings, was an assisted person. Her contribution was assessed at a small sum which she paid. The respondent, her husband, was not an assisted person. She was granted a decree nisi and party and party costs. Taxation of her costs was ordered both as between party and party and, under Sch. 3 to the Legal Aid and Advice Act, 1949, as between solicitor and client. On both taxations the wife's counsel's fees were substantially reduced. A summons was issued in the name of the wife to review the taxation. The wife had not sought leave from the area committee under the legal aid scheme to make the application for review of taxation*.

Held: the court had no power to deal with the application for a review of taxation, since the reasoning of Devlin, J., in *Rolph* v. *Marston Valley Brick Co., Ltd.*, [1956] 2 All E.R. at pp. 56-58, should be applied (see p. 18, letter I, to p. 19, letter A, post), viz.,

(i) the jurisdiction to direct the taxing master to tax was confined to that conferred by reg. 18 (3) (b) of the Legal Aid (General) Regulations, 1950, as amended, and

(ii) the proceedings for review of taxation were not proceedings to which an assisted person was a party within that regulation.

[**Editorial Note.** The paragraph in the Legal Aid (General) Regulations, 1950 (S.I. 1950 No. 1359), relevant to the taxation of costs awarded to an assisted person merely provides that the judgment shall include an order for taxation; it does not provide for review of the taxation (see reg. 18 (3) (b), substituted by S.I. 1954 No. 166).

As to taxation of costs in legally aided matrimonial suits, see 12 Halsbury's Laws (3rd Edn.) 464, para. 1038, note (d); and for cases on the subject, see 3rd Digest Supp.

For the Legal Aid and Advice Act, 1949, Sch. 3, para. 4 (1), see 18 Halsbury's Statutes (2nd Edn.) 566.

For the Legal Aid (General) Regulations, 1950, reg. 18 (3) (b), as substituted by S.I. 1954 No. 166, see Supplement to 5 Halsbury's Statutory Instruments 218.]

Cases referred to:

(1) *Gibbs* v. *Gibbs*, [1952] 1 All E.R. 942; [1952] P. 332; 3rd Digest Supp.
(2) *Self* v. *Self*, [1954] 2 All E.R. 550; [1954] P. 480; 3rd Digest Supp.
(3) *Young* v. *Young & Kohler*, [1955] 1 All E.R. 796; 3rd Digest Supp.
(4) *Isaacs* v. *Isaacs*, [1955] 2 All E.R. 811; [1955] P. 333; 3rd Digest Supp.
(5) *Eaves* v. *Eaves & Powell*, [1955] 3 All E.R. 849; [1956] P. 154; 3rd Digest Supp.
(6) *Rolph* v. *Marston Valley Brick Co., Ltd.*, [1956] 2 All E.R. 50; [1956] 2 Q.B. 18; 3rd Digest Supp.

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* The Legal Aid and Advice (General) Regulations, 1950 (S.I. 1950 No. 1359), as amended, do not provide for a review of taxation being had except on the application of the parties themselves, see p. 19, letter B, post.

(7) *Daimler Co., Ltd.* v. *Continental Tyre & Rubber Co.* (*Great Britain*), *Ltd.*, [1916] 2 A.C. 307; 85 L.J.K.B. 1333; 114 L.T. 1049; 9 Digest (Repl.) 573, *3780*.

(8) *Theocharides* v. *Joannou*, [1955] 1 All E.R. 615; 3rd Digest Supp.

Summons.

This was an application by the wife for a review of taxation. The summons was adjourned into open court and the facts appear in the judgment.

Joseph Jackson and *J. C. J. Tatham* for the wife.

B. D. J. Walsh for the husband.

Cur. adv. vult.

July 12. **KARMINSKI, J.,** read the following judgment: On June 11, 1956, the wife petitioner, the applicant on the present summons, was granted a decree nisi of dissolution on the grounds of cruelty, together with an order for party and party costs against the husband and a further order for the taxation of the costs as between solicitor and client under Sch. 3 to the Legal Aid and Advice Act, 1949. The husband is not now, and never has been, an assisted person under that Act. The wife's costs were duly taxed by Mr. Registrar TOWNLEY MILLERS. Reasons for objections to the taxation were lodged thereafter, and were answered by the learned registrar. The present application asks that the matter may be referred back to the registrar with a direction to vary his certificate and that the husband may be ordered to pay the costs of this application.

The matters objected to in the taxation relate wholly to the fees allowed to counsel then appearing for the wife. The suit was contested and lasted for five and a half days. Junior counsel only appeared on each side, and no application was made to the area committee on behalf of the wife for leave to brief leading counsel. The fee claimed for the wife's counsel was £53 15s. on the brief, £32 10s. refresher fee in respect of the second, third, fourth and fifth days of the hearing, and £11 in respect of the short sixth day. On the party and party taxation, the registrar allowed £32 10s., £21 15s. and nil respectively; but in the solicitor and client taxation he allowed £5 5s. extra on the brief fee and £11 in respect of the sixth day. When the application came before me in chambers, it appeared that it might raise matters of some general interest under the Legal Aid and Advice Act, 1949, and I therefore adjourned it into open court for argument. The matter has been very fully and carefully argued by all three counsel engaged in this application, and I am much indebted to them for their help.

Two points arise here for consideration: first, can the court entertain an application of this kind when it is brought in the name of an assisted party who has no interest in it, but is in fact brought solely for the benefit of the party's legal advisers? If that question can be answered affirmatively and the court can entertain the present application, I shall have to consider whether there are grounds on which the court should vary the order of the registrar. It is conceded here that the wife can neither suffer nor benefit from any variation of the order made on taxation. The small contribution which she was ordered to make by the legal aid committee has been paid and cannot now be increased. If the present application succeeds and the fees to counsel payable under the party and party taxation are increased, they will fall on the husband who is not an assisted person. If the fees are increased on the solicitor and client taxation, the increase will fall on the legal aid fund which was not represented before me. But the wife, the nominal applicant in the present summons, has no interest in (and perhaps no knowledge of) these proceedings. Certainly she can be in no way adversely affected by any variation in the costs allowed on taxation.

There have been cases in this Division which have been decided since the Legal Aid and Advice Act, 1949, in which the remuneration of solicitors and counsel has been investigated. In *Gibbs* v. *Gibbs* (1) ([1952] 1 All E.R. 942) Havers, J., had to consider on a review of taxation the general principle distinguishing party and party and solicitor and client taxations. The power of the court to entertain an application of this kind in a legal aid case was neither doubted nor argued. In *Self* v. *Self* (2) ([1954] 2 All E.R. 550) Sachs, J., had to consider the question of counsel's fees in an undefended case tried out of London, but again the power of the court to hear the application was not considered. Questions relating to counsel's fees were decided in *Young* v. *Young & Kohler* (3) ([1955] 1 All E.R. 796), *Isaacs* v. *Isaacs* (4) ([1955] 2 All E.R. 811) and *Eaves* v. *Eaves & Powell* (5) ([1955] 3 All E.R. 849). In none of these cases was the power of the court to hear the applications discussed. It was not, I think, doubted in this Division that the court had power to hear an application to review a taxation in a legal aid case. But the decision of Devlin, J., in *Rolph* v. *Marston Valley Brick Co., Ltd.* (6) ([1956] 2 All E.R. 50) has raised the question of the court's powers. In that case the infant plaintiff's claim for personal injuries was compromised by the defendants submitting to judgment for £1,500 with costs. The infant plaintiff, suing by her father and next friend, was legally aided and her contribution was assessed at £22 10s. On taxation the taxing master disallowed counsels' fees in respect of a view, allowing instead a lesser fee for a consultation. An application was made for a review of taxation, but this was refused by Devlin, J., on the ground that the taxing master had made no error of principle. Application was then made for an order to tax the costs of the summons under reg. 18 (3) (b) of the Legal Aid (General) Regulations, 1950*, but Devlin, J., held that he had no power to order such a taxation, on the grounds that the summons was interlocutory and not a final order and also because the proceedings were not proceedings to which the assisted person was a party. No application is made in the present case to tax the costs of the summons before me, nor has the wife sought or obtained leave from the legal aid committee to bring this summons. The point therefore decided by Devlin, J., is not before me and does not here arise.

Without expressly deciding the point, Devlin, J., thought that he ought to have dismissed the summons at the outset on the grounds that the solicitor could not have had authority from the assisted person to make the application, and he pointed out that the solicitor would be seeking to obtain money from her estate partly for his own benefit. Devlin, J., added this observation ([1956] 2 All E.R. at pp. 56, 57):

> "When the court becomes aware that a solicitor is acting without authority, I think the court should act of its own motion and refuse to grant relief; see *Daimler Co., Ltd.* v. *Continental Tyre & Rubber Co. (Great Britain), Ltd.* (7) ([1916] 2 A.C. 307 at p. 337, per Lord Parker of Waddington)."

Relying on the observations of Devlin, J., counsel for the husband argued that there was no power in the court to review taxation in a legal aid case. Counsel for the wife pointed out that the observations of Devlin, J., referred to above were not part of his decision. Counsel for the wife also distinguished the present application on the facts from *Rolph* v. *Marston Valley Brick Co., Ltd.* (6), since there a variation of taxation would have affected adversely the financial interests of the plaintiff, whereas in the present application the financial interests of the wife would remain unaffected by any review of taxation.

I agree that I am not bound by the observations of Devlin, J., on the power of the court to entertain an application of the present kind, since they were not directly concerned with the issue which he had to decide. I have, however, read with care and interest his observations on the power of the court to hear an application of the present kind, and I have come to the conclusion that his

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*** As amended by S.I. 1954 No. 166.**

A reasoning is unanswerable and that I ought to follow it. I do not think that the fact that in the present case the wife's financial interests are unaffected affects the principle. I have therefore come to the conclusion that the court has no power to deal with the present application and it must therefore be dismissed. I would add that I do not regard this result as wholly satisfactory, since there may be cases in which it is desirable for a review of taxation to be held in legal
B aid cases. As I understand the present legal aid regulations, they do not provide the machinery for a review except on the application of the parties themselves (see the observations of Harman, J., in *Theocharides* v. *Joannou* (8), [1955] 1 All E.R. 615). This appears to preclude both the legal aid fund and the solicitors or counsel to the parties from questioning a taxation, but it may be in the interests of the working of the Legal Aid and Advice Act, 1949, that both the
C fund and the legal advisers to the parties should be entitled to be heard. I agree with Devlin, J., that at present the legal aid scheme treats the taxation as if it were a piece of machinery into which the bill is inserted and from which it emerges correct. This assumes a degree of infallibility on the part of those charged with the difficult task of taxing costs in legal aid cases which few taxing officers, perhaps, would care to accept.

D I think it desirable to add the following comments on the actual taxation in this case. So far as the taxation of costs is concerned, I cannot see that the taxation by the registrar can be criticised on any matter of principle. The registrar clearly took into account the nature and length of the case, and the fact that counsel who appeared for the wife has had very great experience in this class of litigation. I cannot accept that the area committee would have
E allowed leading counsel to be briefed, since no such application was made to the area committee. The issues at the trial were issues of fact only, and of a kind with which counsel for the wife was most certainly well able to deal. I am not prepared to assume even the probability of the area committee (if asked) allowing leading counsel to be briefed. Nor do I think that the fact that counsel for the wife asks for (and no doubt often gets) a larger fee in unassisted cases than that
F allowed here, binds the taxing registrar to any particular figure. I am satisfied here that the registrar took the relevant factors into account and did not err in principle in any way. The summons fails and must be dismissed.

Application dismissed.

Solicitors: *W. Timothy Donovan* (for the wife); *Coleman & Co.* (for the husband).

[*Reported by* A. T. Hoolahan, Esq., *Barrister-at-Law.*]

COLLIER *v.* STONEMAN.

[Court of Appeal (Jenkins, Romer and Sellers, L.JJ.), June 21, July 17, 1957.]

Rent Restriction—Death of tenant—"Residing with"—Grand-daughter and family having one room to themselves and sharing kitchen with tenant for weekly payment—Separate housekeeping arrangements and meals—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5 *c.* 17), *s.* 12 (1) (*g*).

For more than six months next before her death the statutory tenant of a flat, which comprised two rooms and a kitchen, had her grand-daughter, with the grand-daughter's husband and baby, living in the flat. The tenant's rent was 18s. per week and the grand-daughter paid her 13s. 3d. per week but had no rent book. The tenant had one room to herself, and the grand-daughter and her family had the other room which was furnished with the grand-daughter's furniture. There was no sub-tenancy of this room. All used the kitchen in common. The tenant had an occasional meal with the grand-daughter and her husband, but she usually ate separately and made her own separate housekeeping arrangements. On the death of the tenant the grand-daughter claimed that she had been "residing with" the tenant within the meaning of s. 12 (1) (g)* of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended, and was therefore entitled to the protection given by the Act to "the tenant".

Held: according to the ordinary popular significance of the words "residing with", the grand-daughter and her family had been residing with the tenant before her death, there being no sub-tenancy in favour of the grand-daughter, and, therefore, the grand-daughter and her family were "residing with" the tenant within the meaning of s. 12 (1) (g) of the Act of 1920; accordingly the grand-daughter became, on her grandmother's death, "tenant" of the flat within that enactment.

Edmunds v. *Jones* (see footnote, p. 23, post) explained and distinguished.

Appeal allowed.

[As to transmission of a statutory tenancy on the death of the tenant, see 20 Halsbury's Laws (2nd Edn.) 335, para. 401, text and note (r); and for cases on the subject, see 31 Digest (Repl.) 663-666, *7635-7649*.

For the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (g), as amended, see 13 Halsbury's Statutes (2nd Edn.) 999.]

Cases referred to:

(1) *Edmunds* v. *Jones* (Jan. 14, 1952, C.A., noted in L.T. Jo. Feb. 1, 1952; and see footnote, p. 23, post).

(2) *Neale* v. *Del Soto*, [1945] 1 All E.R. 191; [1945] K.B. 144; 114 L.J.K.B. 138; 172 L.T. 65; 31 Digest (Repl.) 646, *7508*.

Appeal.

The grand-daughter of the deceased statutory tenant appealed from the decision of His Honour Judge Bensley Wells, given at Marylebone County Court on Mar. 12, 1957, that she had not been "residing with" her grandmother within the meaning of s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (as amended), and so was not entitled to the protection given by the Act to "the tenant". The facts appear in the judgment of Jenkins, L.J.

J. J. Davis for the grand-daughter, the plaintiff.

J. R. Phillips for the landlord, the defendant.

Cur. adv. vult.

July 17. The following judgments were read.

JENKINS, L.J.: In this case the plaintiff grand-daughter, Mrs. Gladys Lilian Collier, claims that she is, by virtue of s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the statutory tenant in succession to her late grandmother, Mrs. Langshaw (hereinafter called " the tenant "), of a dwelling-house (which I will call " the flat ") consisting of two rooms and a kitchen on the first floor of No. 192, Portnall Road, W.9.

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* The relevant part of s. 12 (1) (g), as amended, is printed at p. 21, letter D, post.

The defendant landlord, Mr. W. F. G. Stoneman, disputes the grand-daughter's claim on the ground that the facts of the case are not such as to entitle her to the benefit of s. 12 (1) (g) and in furtherance of this contention has purported to resume possession of the front room in the flat formerly used by the tenant as her bedroom.

In these circumstances the grand-daughter brought the present action against the landlord in Marylebone County Court, claiming a declaration of her title to a statutory tenancy of the flat on the same terms as that held by the tenant at the time of her death and damages for trespass. There was a counterclaim on which nothing turns.

The learned judge held that the grand-daughter was not " residing with " the tenant at the time of her death within the meaning of s. 12 (1) (g). Accordingly he gave judgment on the grand-daughter's claim for the landlord with costs, and from that judgment (dated Mar. 12, 1957) the grand-daughter now appeals to this court.

The relevant part of s. 12 (1) (g) of the Act of 1920 is in these terms:

> ". . . and the expression ' tenant ' includes the widow of a tenant . . . who was residing with him at the time of his death, or, where a tenant . . . is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court."

I have read this provision as amended by s. 1 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1935, and should note that by s. 13 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, the claiming member of the deceased tenant's family must have been residing with the tenant for not less than six months immediately before the death.

It appears that the tenant, who had been living in the flat with her sister-in-law Mrs. Twyford since about 1941, was granted a new contractual tenancy of the flat after Mrs. Twyford's death in 1943, and later became a statutory tenant by reason of a notice of increase of rent.

For some years the back room was empty and in 1947 the tenant allowed the grand-daughter and her future husband, Mr. Collier, to whom she was then engaged, to store their furniture in it.

The grand-daughter and Mr. Collier were anxious to get married and set up house together but had to postpone their marriage because they could find nowhere to live. According to Mr. Collier it was suggested by one of the tenant's daughters (who lived in the neighbourhood) that they might go to No. 192 and have the vacant room in the flat. This they did with the permission of the tenant, getting married in March, 1950. In due course they had a son, born in July, 1951.

The arrangement between the grand-daughter and her husband and the tenant was that the grand-daughter and her family had the back room to themselves, the tenant had the front room to herself, and the whole party shared the kitchen.

The tenant was ninety-four years of age when she died on Oct. 14, 1956.

In her examination-in-chief the grand-daughter said this:

> " We went to live at No. 192 so that I could help grandmother. We had a bedroom of our own. Mrs. Langshaw [the tenant] slept in the other room. We all had our meals together in the kitchen. Mrs. Langshaw and I both did the cooking. We both did the shopping. I used to hand the rent to Mrs. Stoneman downstairs to hand to the landlord. I also handed her the rent book which my grandmother kept. Rent was 17s. 1d. when I

> went to 192. We paid Mrs. Langshaw 12s. 6d. to help her out with the rent. The rent was 18s. when Mrs. Langshaw died. At the date of her death I was paying her 13s. 3d. per week."

In cross-examination she said:

> " I carried up her coals. Her coal was kept separate from ours. Bought separately. My husband made a box for her coal. She was a very independent old lady. She had her own windows cleaned by a cleaner. We made our own arrangements for window cleaning. We had separate food cupboards. She thought it was fairest that way. We had our meals together. She usually cooked for herself. She sometimes had meals in her own room. She had an oilstove in her room and she sometimes cooked on it ",

and at the end of her cross-examination:

> " I was not on bad terms with Mrs. Langshaw during the last two years of her life. We did move some of her things out of the kitchen into her room. She never complained to me about it. It is a fact that for one reason or other she didn't go into the kitchen much as she got older."

In re-examination she said:

> " I cooked her dinner the day before she died. I cooked more for her than she cooked for us. The furniture we had in our rooms was our own. We never had a rent book."

Mr. Collier in his examination-in-chief said this:

> " We had our evening meal at 5.30 or 6 p.m. when my wife was working. Mrs. Langshaw usually cooked it for us. Mrs. Langshaw had her evening meal with us usually. Sometimes in the evenings I went to sit in the front room with Mrs. Langshaw. I made a coal box for her in about 1953. Before that our coal was kept with her coal. We only had a coal fire occasionally. I never brought her coal up—it was brought up while I was not in the house."

In cross-examination he said:

> " My working hours—8 a.m.-5.30 p.m. On Sundays Mrs. Langshaw invariably went out to her two daughters who lived in the same road. She would leave at about 12 noon and get back between 8 and 10 p.m. Sometimes she would stay for two-three days at a time with her daughters or one of them. The armchair [of Mrs. Langshaw's] which was in the kitchen was moved into her room at her request. This was four-five years before she died. I put an armchair in the kitchen to take its place out of our room. Mrs. Langshaw stored our furniture for three years before we went to live there."

The landlord's wife, Mrs. Edna Stoneman, said this in her examination-in-chief:

> " I knew Mrs. Langshaw very well. Mrs. Langshaw did most of her own work. If she wasn't well I used to go and fetch her youngest daughter who lived at No. 102. I often went up to Mrs. Langshaw's room before and after the Colliers arrived. I have several times seen Mrs. Langshaw cooking her own meals on her own oil stove in her own room. I went up to her room six days out of seven. She was invariably in her own room sitting by the window."

In the course of his judgment the learned judge said this:

> " The tenant consented to their [that is, the grand-daughter and her husband] making their matrimonial home in her back room where their furniture was still being stored. The grand-daughter and Mr. Collier were married and went to live in the tenant's back room in March, 1950, and were allowed to share the kitchen with the tenant. There they have

> A remained ever since, and a child was born to them in July, 1951. The only
> evidence of the arrangement arrived at between the grand-daughter and her
> husband and the tenant in March, 1950, was that they paid the tenant
> 12s. 6d. each week regularly when the tenant's rent was 17s. per week,
> and later 13s. 3d. when the tenant's rent was increased to 18s. per week.
> According to the grand-daughter and her husband they never had a rent
> B book. In fact, in return for their weekly payment, the grand-daughter and
> her husband had an unfurnished room, which they furnished with their
> own furniture, and the use of the kitchen in common with the tenant. On
> these facts I was of opinion that I might well draw the inference that the
> grand-daughter and her husband had been given a sub-tenancy by the
> tenant; but in the absence of any evidence as to what was said at the time,
> C I came to the conclusion that perhaps I ought not to go quite as far as that.
> I was satisfied that the tenant was an old lady of independent habits and
> way of life. She would not share anything. She insisted on her own
> housekeeping arrangements; she bought and ate her own food and had her
> own larder. She had the window of her own room cleaned by a cleaner.
> She may have had an occasional meal with the grand-daughter and her
> D husband but mostly not. She was too old to get up to breakfast with them;
> they were both working and were out most of the day; in the evenings she
> usually had something in her own room. On Sundays she invariably went
> to spend the day with her youngest daughter, Mrs. Child (or to another
> daughter), who lived in the same street, and was away from 12 noon until
> about 10 p.m. On these facts it seemed to me to be difficult to say that the
> E grand-daughter was residing with the tenant at the time of her, the tenant's,
> death; in my view she was residing with her husband and their child in their
> matrimonial home which certainly did not include the tenant's room. I was
> of opinion that, as far as was physically possible in one flat, the grand-
> daughter and her family and the tenant were living totally separate and
> independent lives, as independent households. I therefore came to the
> F conclusion, though not without some doubt, that the plaintiff grand-
> daughter had failed to make out her case."

In reaching his conclusion to the effect that the plaintiff grand-daughter had
failed to establish her claim to have been " residing with " the tenant within
the meaning of s. 12 (1) (g) the learned judge must, I think, have been consider-
ably influenced by certain observations of this court in *Edmunds* v. *Jones* (1)
G (Jan. 14, 1952), which is unreported save for a brief note in the LAW TIMES
JOURNAL of Feb. 1, 1952. We have had the advantage of seeing the full tran-
script of the judgments from the collection of Appeal Court Judgments kept in
the Bar Library (1952 No. 7).

It appears that in *Edmunds* v. *Jones* (1)* a daughter was her mother's sub-
tenant in respect of two rooms in a house of which her mother was tenant,
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* In *Edmunds* v. *Jones*, heard on Jan. 14, 1952, before SIR RAYMOND EVERSHED, M.R.,
JENKINS and HODSON, L.JJ., the daughter of the deceased statutory tenant of a house
known as No. 91a, Gadbys Road, Aberdare, appealed from an order for possession of the
house made in favour of the landlord thereof at Pontypridd County Court. The daughter
had lived at the house with the tenant, her mother, for more than six months next
before the tenant's death as sub-tenant to her mother of two rooms, of which she was
I entitled to exclusive possession, together with the joint use with her mother of the
kitchen for cooking. The Court of Appeal affirmed the decision of the county court
judge that as the daughter was a sub-tenant she was not " residing with " her mother
within the meaning of s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Re-
strictions) Act, 1920, and so was not entitled to the protection given by the Act to
" the tenant ". The daughter was not entitled to the protection given by s. 15 of the
Act to sub-tenants because she shared the kitchen with her mother (*Neale* v. *Del Soto*,
[1945] 1 All E.R. 191). The material passages from the judgments of SIR RAYMOND
EVERSHED, M.R., and JENKINS, L.J., are set out between p. 24, letters B to H, post.
HODSON, L.J., agreed with these judgments and had nothing to add. The appeal was
dismissed.

together with the use of the kitchen jointly with her mother. On the mother's death her landlords claimed possession of the premises against the daughter, who resisted their claim on the ground that she was entitled to the protection of the Rent Acts in respect of her sub-tenancy. That claim failed on the principle of *Neale* v. *Del Soto* (2) ([1945] 1 All E.R. 191) by reason of the sharing of the kitchen. The daughter then raised a contention to the effect that she was entitled to succeed to her mother's tenancy as a member of the mother's family " residing with " the mother within the meaning of s. 12 (1) (g). A B

In rejecting this contention SIR RAYMOND EVERSHED, M.R., at p. 3 of the transcript, said this:

> " I think that the words ' residing with ' must be given their ordinary popular significance. They do not, I think, involve any technical import or have some meaning only to be defined by lawyers. Giving them, then, the ordinary sense of the language it is, to my mind, necessary in order that para. (g) may be satisfied, that the person claiming to succeed to the tenancy of the particular premises must fairly and truly be said to have been residing with the predecessor in those premises in the sense that the successor lived in and shared for living purposes the whole of the premises to which he or she claims to have succeeded." C D

At p. 4 he said:

> " As I have already said, I think that what is contemplated is the case of a dependent child, or whoever it may be, being one of the household of the predecessor quoad the particular house, and that, as it seems to me, the appellant in this case [the daughter] cannot prove. She was the tenant at law of two rooms to the exclusive possession of which she was entitled. And all she can further say was that she shared the kitchen with her mother. She had no right to go into any other part of the house beyond the confines of her own tenancy. She was in no sense residing in any part of the house other than the two rooms of which she was the tenant, and the kitchen to the extent to which she used it. She, therefore, in my judgment, cannot be said to have been residing with her mother at the time of the latter's decease as regards the premises to which she now claims to have succeeded; in other words, I share the view which the learned county court judge took, and I think that for those reasons this appeal fails." E F

I myself said, at p. 5: G

> " I agree with my Lord that the words ' residing with ' in s. 12 (1) (g) mean residing with the deceased tenant quoad the whole of the premises comprised in the tenancy in question. It is with reference to that tenancy that the expression ' residing with ' is used, and I do not think that in the context the words ' residing with ' can be regarded as appropriate to a member of a tenant's family who is in the premises and lives on the premises under a sub-letting which gives that member of the family the right to possession of part of the premises to the exclusion of the tenant, and I do not think that the position is altered by the mere circumstance that in addition to the exclusive right to part of the premises under such a sub-tenancy a right of user in common with the tenant is given over some other part such as the kitchen." H I

That case differed from the present case in that the daughter claiming to have been " residing with " her mother was a sub-tenant legally entitled to exclusive possession of the two rooms comprised in her sub-tenancy. I should have thought it reasonably plain that quoad those two rooms she could not be said to be residing in them with her mother, for she was in fact residing in them to the exclusion of her mother by virtue of the sub-tenancy. I should have also thought it reasonably plain that she could not claim to have been " residing with " her mother in the rest of the house merely on account of the fact that her sub-tenancy included the right to share the kitchen with her mother.

In the present case the learned judge has held that there was nothing amounting to a sub-letting of the back room in the flat to the grand-daughter or her husband, and, notwithstanding the doubt which he expressed on this point, I think he was clearly right in so holding.

That seems to me to be a vital point of distinction between *Edmunds* v. *Jones* (1) and the present case.

Here the position was that the tenant had her own bedroom to herself, allowed the grand-daughter and her family the use to themselves of the other bedroom, and further allowed them to use the kitchen in common with herself. The flat comprised only the two rooms and the kitchen. The arrangement being of this nature, it seems to me that the grand-daughter and her family were plainly residing with the tenant according to the ordinary meaning of that expression. It is argued against that conclusion that the grand-daughter and her family had de facto the exclusive use of one of the two bedrooms while the tenant retained the exclusive use of the other. It is said that this is enough to negative residence with the tenant on the part of the grand-daughter and her family on the strength of the Master of the Rolls' observation in *Edmunds* v. *Jones* (1) (at p. 3 of the transcript) that the claimant

> " must fairly and truly be said to have been residing with the predecessor . . . in the sense that the successor lived in and shared for living purposes the whole of the premises to which he or she claims to have succeeded."

This passage does not, however, mean that it must be shown that the claimant used in common with the predecessor every room in the premises. If that were so, then a case of residence with the deceased tenant could rarely be made out. In almost every case (other than those concerning husband and wife) it would be found that the tenant and the claimant respectively occupied separate bedrooms.

In the present case quite obviously the only way in which the flat could be shared for living purposes between the tenant and the grand-daughter and her family was the arrangement in fact made by which the grand-daughter and her family had one of the two bedrooms to themselves, the tenant had the other bedroom to herself and the kitchen was shared. In the passage just quoted the Master of the Rolls is contrasting a sub-letting of part of the premises to a member of the tenant's family with a sharing of the entire premises between a tenant and a member of the tenant's family, and is saying in effect that the latter state of affairs amounts to residence with the tenant on the part of such member, while the former state of affairs does not.

As to the later passage in the Master of the Rolls' judgment (at p. 4 of the transcript)

> " what is contemplated is the case of a dependent child, or whoever it may be, being one of the household of the predecessor quoad the particular house "

I think that a member of a tenant's family living in the tenant's house otherwise than as sub-tenant answers this general description.

As the Master of the Rolls said in the first of the passages quoted above " the words ' residing with ' must be given their ordinary popular significance ". Given that significance, it seems to me that they clearly apply to the grand-daughter's position in the present case. If the tenant had been asked whether anyone resided with her in the flat I do not see how she could consistently with the facts have answered the question otherwise than by saying: " Yes, my grand-daughter, her husband and their son reside with me. They have one of the two bedrooms to themselves, I have the other, and we share the kitchen."

I cannot think that the independence of the tenant in matters such as catering, cooking, and window cleaning displaces this conclusion, any more than does the fact that as she grew older she tended to keep increasingly to her own room. Obviously her periodical visits to her daughters cannot affect the case one way or the other.

In founding himself on matters such as these and deciding the case against the grand-daughter on the ground that

> " the grand-daughter and her family and the tenant were living totally separate and independent lives as independent households "

the learned judge seems to me to have given the words " residing with " a restricted meaning which does not accord with " their ordinary and popular significance ". In so doing I think that he misdirected himself, possibly through reading more into the Master of the Rolls' reference to the household of the predecessor than that reference in its context can properly be made to bear.

It would, as I think, be in the highest degree inconvenient if the investigation of claims by members of tenants' families to have been " residing with " the tenants concerned came to involve consideration of the extent to which the parties acted jointly or independently in matters such as the purchase and cooking of food or in fact made use of rooms available for their common use.

In my opinion the correct conclusion here, and the only conclusion possible on the facts of this case, is that the plaintiff grand-daughter was " residing with " the tenant within the meaning of s. 12 (1) (g) of the Act of 1920 from 1950 until the tenant's death in 1956, and is entitled accordingly to the relief claimed in her action.

For these reasons I am of opinion that this appeal should be allowed.

ROMER, L.J.: I agree. On the assumption, which counsel for the landlord did not challenge, that two persons could be regarded as residing together in the somewhat limited accommodation of which Mrs. Langshaw was tenant, it is difficult to see what use and occupation of the premises could constitute co-residence with the tenant if that enjoyed by the grand-daughter did not. The first floor of No. 192, Portnall Road, was undoubtedly the residence of the grand-daughter and had been for upwards of six years prior to her grandmother's death; she had no contractual right to live there, but she made a home there for herself and her husband by the permission of her grandmother, the tenant. Accordingly, I should have thought that in ordinary parlance it could be said, and indeed it could not be denied, that the grand-daughter was residing with her grandmother in the accommodation of which the grandmother was tenant. Counsel for the landlord's contention to the contrary was based on the view that although the grand-daughter certainly resided at No. 192, Portnall Road, the evidence shows that she did not reside there with the tenant, and is therefore not within s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The argument is that the tenant lived such a detached and independent life of her own that the true state of affairs was that two separate homes existed on the first floor of the house, namely, the tenant's and that of the grand-daughter and her family, and that there was therefore no such sharing of the total accommodation as is envisaged by s. 12 (1) (g).

Counsel for the landlord submitted that in cases arising under that sub-section the legislature was not concerned so much with the legal relationship as with the family relationship which exists between the parties, and he said that in the present case there was no family relationship at all between the tenant and her grand-daughter. I am unable to accept this interpretation of s. 12 (1) (g) which seems to me to attribute to the word " with " in the expression " residing with " a weight and significance which it cannot properly bear. Such an interpretation would involve in many cases a detailed inquiry into the way of life of persons who were sharing accommodation, for the purpose of ascertaining what degree of personal or family association existed between them. Such an inquiry would very much complicate applications under the sub-section. Nor is there, in my judgment, anything in its language which warrants investigations of this character. The question which has to be decided, in my opinion, is whether a tenant and a member of his family were, according to ordinary notions, residing together and not how they lived their respective lives. According to those notions the grand-daughter and the tenant were, in my judgment, residing together, and none the less so because the tenant, in the various ways indicated by the evidence, isolated herself from the grand-daughter and her family.

In my opinion the conclusion which I have expressed is in no way at variance with the decision of this court in *Edmunds* v. *Jones* (1) (see footnote, p. 23, ante). The crucial element in that case which prevented the tenant's daughter from successfully relying on s. 12 (1) (g) of the Act of 1920 was that her mother had granted her a sub-tenancy of two rooms in the house in which they lived, and that the daughter was in possession of those rooms by virtue of the sub-tenancy at and previous to her mother's death. This contractual right of the daughter to the possession of a part of the house clearly negatived the view that the house was the joint residence of herself and her mother; for her own residence was a part only of the house and that part was, in law, exclusive to herself. This difficulty does not confront the grand-daughter in the present case, for the learned judge has held that there was no sub-letting to her by the tenant, and the contrary was not contended before us. The decision, therefore, in *Edmunds* v. *Jones* (1) has no application here. There may be a passage or two in the judgments in that case (and more particularly in the judgment of the Master of the Rolls) which, if taken in isolation, lend some support to the landlords' case, and it is clear that the learned judge himself thought so. The judgments have, however, to be read in the light of the particular circumstances which were before the court; and I agree with JENKINS, L.J., in thinking, for the reasons which he has stated, that there is nothing in *Edmunds* v. *Jones* (1) which really assists the landlord in the present case. In my opinion the appeal should be allowed.

SELLERS, L.J.: I agree with the judgments which have been delivered. If the grand-daughter had had a sub-tenancy of part of the tenant's premises (whether a protected one or not) it could not be said that she " resided with " her grandmother, the tenant. (*Edmunds* v. *Jones* (1), cited by JENKINS, L.J., Jan. 14, 1952, see footnote p. 23, ante.)

However, no sub-tenancy was found or established. From 1950 the grand-daughter and her husband (and eventually also their child) lived in the flat, occupying the back room, using and sharing the kitchen and making a substantial contribution towards the rent the tenant had to pay her landlord.

It seems to have been an informal arrangement such as might commonly exist within a family, and one perhaps not untypical of the case of a child or grandchild living with a parent or grandparent in very limited accommodation.

The grandmother, as tenant, had control of the premises, and I find it difficult to see how, without a tenancy of their own, the grand-daughter and her husband, making their home there, could be said not to be residing with the grandmother up to the date of her death.

If the grandmother on the one hand and the grand-daughter on the other had lived wholly separate lives without mutual meetings or domestic co-operation — which is very far from the case here—a finding of a sub-tenancy might have been justified. Short of that, however, differing habits of living or independence with regard to coal, food or cooking do not seem to me to be criterions by which to judge whether a person was residing with another. I would allow the appeal.

Appeal allowed: £2 nominal damages awarded. Declaration that the plaintiff grand-daughter was entitled to the benefit of s. 12 (1) (*g*) *of the Act of* 1920 *in respect of the premises let to the tenant, the grandmother.*

Solicitors: *D. W. Plunkett* (for the grand-daughter, the plaintiff); *Wright, Son & Pepper* (for the landlord, the defendant).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

R. *v.* DEPUTY CHAIRMAN OF THE COUNTY OF LONDON QUARTER SESSIONS APPEAL COMMITTEE, *Ex parte* BORG.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Devlin, JJ.), July 16, 19, 1957.]

Quarter Sessions—Appeal to—Appeal against conviction—Plea of guilty before metropolitan magistrate—Jurisdiction—Whether person unequivocally pleading guilty can be aggrieved by conviction—Metropolitan Police Courts Act, 1839 (2 *&* 3 *Vict. c.* 71), *s.* 50.

B., having been charged at a metropolitan magistrates' court with keeping a brothel and permitting children to be kept there, pleaded guilty to the charges and did not, in effect, dispute the facts which were read out by the prosecutor. B. was convicted and was ordered to pay a fine of £100 and was sentenced to six months' imprisonment. She then appealed against her conviction; quarter sessions, having decided that B. unequivocally pleaded guilty to the charges in the magistrates' court, held that she had no right of appeal against conviction under s. 50 of the Metropolitan Police Courts Act, 1839. On a motion for mandamus directing quarter sessions to determine the appeal against conviction on the ground that B. was a " person . . . aggrieved by the order or conviction " within s. 50 of the Act of 1839 and had a right of appeal thereunder,

Held: a person who deliberately pleaded guilty could not be aggrieved by being convicted and, accordingly, did not have a right of appeal against the conviction under s. 50, although a right of appeal against sentence was given by that section; mandamus would, therefore, be refused.

Mittelmann v. *Denman* ([1920] 1 K.B. 519) explained.

[As to the right of appeal to quarter sessions in criminal cases, see 21 HALSBURY'S LAWS (2nd Edn.) 705, 706, paras. 1226, 1227; and for cases on the subject, see 33 DIGEST 390-392, *1013-1023*.

For the Metropolitan Police Courts Act, 1839, s. 50, see 14 HALSBURY'S STATUTES (2nd Edn.) 752.]

Cases referred to:

(1) *Mittelmann* v. *Denman*, [1920] 1 K.B. 519; 89 L.J.K.B. 310; 122 L.T. 426; 84 J.P. 39; 33 Digest 391, *1023*.

(2) *R.* v. *Durham Quarter Sessions, Ex p. Virgo*, [1952] 1 All E.R. 466; [1952] 2 Q.B. 1; 116 J.P. 157; 3rd Digest Supp.

(3) *R.* v. *West Kent Quarter Sessions Appeal Committee, Ex p. Files*, [1951] 2 All E.R. 728; 115 J.P. 522; 2nd Digest Supp.

(4) *R.* v. *Bishop Wearmouth* (*Inhabitants*), (1834), 5 B. & Ad. 942; 110 E.R. 1040.

Motion for Mandamus.

Lillian Mary Borg, the applicant, moved for an order of mandamus directed to Henry Elam, Esq., Deputy Chairman of the County of London Quarter Sessions Appeal Committee, to hear and determine an appeal brought by the applicant against her conviction at Marlborough Street Magistrates' Court on June 13, 1957.

At the hearing at the magistrates' court the applicant was charged with one offence of permitting premises to be used as a brothel contrary to s. 35 of the Sexual Offences Act, 1956, and with three offences of permitting children to be kept at those premises contrary to s. 3 of the Children and Young Persons Act, 1933. She was not represented at the hearing; she pleaded guilty to the four charges. The solicitor for the prosecuting authority, Westminster City Council, A then stated the facts on which the charges were founded and referred to the premises being used by three prostitutes. The applicant said nothing further at the hearing except that when asked by the magistrate if she wished to say anything, she denied that the alleged number of prostitutes in fact used the premises. The applicant was convicted on all four charges and was ordered to pay a fine of £100 or serve two months' imprisonment on the charge of keeping B a brothel and was sentenced to six months' concurrent imprisonment on each of the three remaining charges. She appealed against her conviction and the appeal came on for hearing on June 25, 1957, before the Appeal Committee of the County of London Quarter Sessions. It was argued by the prosecuting authority before the Appeal Committee that the applicant had entered an unequivocal plea of guilty to the charges in the magistrates' court and had no C right of appeal against conviction; in particular she had no such right under s. 50* of the Metropolitan Police Courts Act, 1839, which, it was submitted, was repealed by later legislation, and her right of appeal was limited to one against sentence. The Appeal Committee accepted this argument and decided that they had no jurisdiction to hear the appeal.

The applicant now sought an order of mandamus against the Appeal Com- D mittee on the ground that they were wrong in holding that she had unequivocally pleaded guilty and that she had no right of appeal against conviction under s. 50 of the Act of 1839.

H. S. Grannum for the applicant.

Bernard Caulfield for the prosecuting authority, Westminster City Council.

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LORD GODDARD, C.J.: The applicant pleaded guilty and at the magistrates' court a representative of Westminster City Council, the prosecuting authority, stated the facts to the magistrate, and stated enough facts to show that this was a brothel; the applicant did not dispute any fact which was stated to the magistrate. She was convicted and sentenced to imprisonment, and was then advised, F apparently, to appeal to the London Sessions against her conviction as well as against her sentence. Before I turn to what happened at the sessions, I had better briefly refer to the history of the right of appeal to quarter sessions. A right of appeal in London was given against convictions by the Metropolitan Police Courts Act, 1839, the terms of which I will read in a moment. In 1879 the Summary Jurisdiction Act, 1879, which gave power to magistrates' courts G or courts of summary jurisdiction, as they were called in those days, not only to hear summary offences but also with the consent of the defence to hear certain indictable offences, gave a right of appeal to quarter sessions against the magistrates' determination†. If a person pleaded guilty the Act of 1879† gave no right of appeal, at any rate outside the metropolitan police courts, against a H conviction or against sentence. That remained the law until 1925 when, by the Criminal Justice Act of that year‡ an appeal for the first time was given to a person who had pleaded guilty but only against sentence. Of course, a person still had a right of appeal against conviction if he had not pleaded guilty, but if he had pleaded guilty he had no right of appeal against conviction.

Section 50 of the Metropolitan Police Courts Act, 1839, is in these terms:

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> "... In every case of summary order or conviction before any of the [metropolitan police] magistrates, in which the sum or penalty adjudged to be paid shall be more than £3, or in which the penalty adjudged shall be

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* For the terms of s. 50, see letter I, supra.

† See s. 19 of the Act of 1879; 14 HALSBURY'S STATUTES (2nd Edn.) 858.

‡ See s. 25 of the Act of 1925 which was repealed by the Criminal Justice Act, 1948. A right of appeal to quarter sessions from a magistrates' court is now conferred by s. 83 of the Magistrates' Courts Act, 1952; 32 HALSBURY'S STATUTES (2nd Edn.) 484.

> imprisonment for any time more than one calendar month, any person who shall think himself aggrieved by the order or conviction may appeal to the justices of the peace at the next general or quarter sessions . . ."

In *Mittelmann* v. *Denman* (1) ([1920] 1 K.B. 519), which is really the decision that we have to consider in this case, it was decided by this court that s. 50 was unaffected by the subsequent legislation which had taken place and that it did give a right of appeal to a person although he had pleaded guilty. When, however, one reads *Mittelmann* v. *Denman* (1) carefully it is quite obvious that what the court was holding there was that s. 50 of the Act of 1839 gave quarter sessions power to consider the sentence which had been passed, not the conviction, if the person had pleaded guilty. Mr. Purchase, who appeared for the appellant in that case and who was a counsel of great experience in these matters, put the matter quite clearly in his argument, in which he said ([1920] 1 K.B. at p. 521):

> " The section [s. 50] does not limit the right of appeal to a defendant who has not pleaded guilty. That section therefore, assuming that it has not been repealed, gives the defendants the right of appeal which they claim. That section, in so far as it gives a right of appeal to a person who has pleaded guilty, has never been expressly or impliedly repealed or superseded by any later Act. It has not been impliedly repealed either by s. 19 of the Summary Jurisdiction Act, 1879, or by s. 37 of the Criminal Justice Administration Act, 1914, because the right of appeal which it gives has been widened and extended by these Acts. Section 19 of the Act of 1879 in giving a right of appeal which is limited to persons ' not otherwise authorised to appeal ' expressly recognises as still existing the right of appeal given by s. 50 of the Act of 1839. At all events these later enactments have not repealed s. 50 of the Act of 1839 in so far as it gives a right of appeal to a defendant who has pleaded guilty. There are reasons why they should not have done so. These later enactments do not themselves give to a defendant who has pleaded guilty any right of appeal, and it frequently happens, as in the present case, that the Act or statutory order constituting the offence does not give him any right of appeal, and, therefore, if these later enactments repealed s. 50 entirely, it would follow that in many cases a defendant who had pleaded guilty and been sentenced with undue severity or was otherwise aggrieved would have no right of appeal at all."

When one reads the judgment of the court it is quite clear that the whole point was whether an appeal lay under s. 50 so that a person who had been sentenced after a plea of guilty could appeal against his sentence. That was all that the court was considering in *Mittelmann* v. *Denman* (1).

In the present case the sessions went into the question whether this woman deliberately and intentionally pleaded guilty and therefore understood what she was doing. This court has decided that it is open to a court of quarter sessions to consider whether a plea of guilty which has been entered is or ought or ought not to have been accepted as a plea of guilty. Sometimes a person pleads guilty when it is quite clear from the statements which he makes that the plea ought to have been one of not guilty. In *R.* v. *Durham Quarter Sessions, Ex p. Virgo* (2) ([1952] 1 All E.R. 466), a man was charged with stealing a bicycle. He pleaded guilty but made a statement to the magistrates which clearly showed that he was setting up a defence that he had reasonable grounds for believing that he had mistaken it for his own bicycle. He was convicted and sentenced and he appealed against his conviction to quarter sessions; we held that quarter sessions had a right to inquire into the matter although he had pleaded guilty and to say the plea of guilty ought never to have been taken. Quarter sessions had treated the conviction as a nullity and had decided to send the case back to the magistrates to be re-heard. On the other hand, in *R.* v. *West Kent Quarter Sessions*

Appeal Committee, Ex p. Files (3) ([1951] 2 All E.R. 728), which was considered in *R.* v. *Durham Quarter Sessions* (2), a man who had pleaded guilty to a charge of dangerous driving had been warned that if he did plead guilty he would not be able to go to quarter sessions, and had insisted on pleading guilty. He then appealed to quarter sessions and that court thought that he pleaded guilty by mistake. We thought that he had deliberately pleaded guilty and that he could not be allowed to appeal.

In *Mittelmann* v. *Denman* (1) the point which has been raised by counsel on behalf of Westminster City Council was never considered. Section 50 of the Act of 1839 provides: " any person who shall think himself aggrieved by the order or conviction ". How can a person who pleads guilty deliberately be aggrieved by a conviction? I said " deliberately ", for it has been found that this woman deliberately intended to plead guilty. Ever since the Court of Criminal Appeal has been in existence the court will not entertain appeals against convictions by prisoners who have pleaded guilty unless there ought never to have been a plea of guilty, and the man obviously pleaded guilty under some mistake. It is idle to say that a person can put himself before the court as a person who thinks himself aggrieved if he has no reasonable ground for thinking himself aggrieved. That was one of the points which the Court of King's Bench considered in *R.* v. *Inhabitants of Bishop Wearmouth* (4) ((1834), 5 B. & Ad. 942). Lord Denman, C.J., referring to a statute* which gave a right of appeal to persons who considered themselves aggrieved more in civil matters than criminal matters, said (ibid., at p. 949):

> " That clause as it seems to me ought not to be construed so as to let in anyone who, taking a capricious view of the order, may think himself aggrieved by it, when it is clear that he was not intended to be included in it, but must be confined to those who may have reasonable ground for thinking themselves aggrieved."

There is certainly no reason for this applicant who had been previously convicted of soliciting and using her premises for prostitution feeling herself aggrieved. The facts were stated at the magistrates' court and she did not raise any protest there. In my opinion, it is impossible to say that a person who has pleaded guilty deliberately, as the court of quarter sessions found in the present case, can be heard to say that she is a person aggrieved by the conviction. There is no doubt that she has a right to appeal against sentence; and the court of quarter sessions has adjourned consideration of the appeal against sentence until we have dealt with the matter in this court. Since *Mittelmann* v. *Denman* (1) and at any rate until the Criminal Justice Act, 1925, it was always considered that a person had a right to go to quarter sessions under s. 50 of the Act of 1839 to appeal against sentence. In my opinion, s. 50 properly construed does not give a person who has pleaded guilty a right to appeal against the conviction. It cannot be said, within the fair meaning of the words of s. 50, that a person who has pleaded guilty can be heard to say that she is aggrieved.

For those reasons I think that the motion fails and must be discharged.

BYRNE, J.: Prior to 1925 a person who pleaded guilty to a summary offence in any court of summary jurisdiction other than a metropolitan police court, had no right of appeal. Section 25 of the Criminal Justice Act, 1925, gave a right of appeal to a person who had pleaded guilty. That section was repealed by the Criminal Justice Act, 1948, which in turn was repealed by the Magistrates' Courts Act, 1952; and s. 83 of that Act provides a right of appeal in the case of a person who has pleaded guilty.

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* 13 & 14 Car. 2 c. 12, s. 2.

By s. 50 of the Metropolitan Police Courts Act, 1839, a right of appeal was A
given to a person who thought himself aggrieved by an order or conviction in
which the sum or penalty adjudged to be paid was more than £3 or
the imprisonment was longer than one month. It was held in 1919 in *Mittelmann* v. *Denman* (1) ([1920] 1 K.B. 519), that that section had not been impliedly
repealed by s. 19 of the Summary Jurisdiction Act, 1879, or by s. 37 of the Criminal
Justice Administration Act, 1914, by both of which statutes a right of appeal was B
given only where there had not been a plea of guilty. The Metropolitan Police
Courts Act, 1839, remains unrepealed, and it is now argued before this court that
Mittelmann v. *Denman* (1) is authority for the proposition that a person who pleaded
guilty to a summary offence before a metropolitan magistrate and was sentenced to
longer than one month's imprisonment has a right of appeal against conviction. It is
to be observed that in *Mittelmann* v. *Denman* (1) the defendants pleaded guilty, C
and the arguments and judgments were concerned and, as I read the case, only
concerned with the question whether in those circumstances there was a right
of appeal by virtue of s. 50 of the Metropolitan Police Courts Act, 1839. It was
held that there was a right of appeal. I can find nothing in that case to support
the contention that it decided that they had a right of appeal against conviction
after a plea of guilty. I fail to see how a person, to use the language of s. 50, D
can think himself aggrieved by a conviction when in fact he unequivocally
pleaded guilty. He can, of course, think himself aggrieved by the sentence of
imprisonment, and if that sentence was longer than one month he has a right
of appeal against sentence by virtue of s. 50 of the Act of 1839. He has that
right by virtue of the Act of 1839, and of course he now also has a right of appeal
against sentence by virtue of s. 83 of the Magistrates' Courts Act, 1952. E

For those reasons I agree with the observations my Lord has made, and I agree that this motion must fail.

DEVLIN, J.: I also agree.

Motion dismissed.

Solicitors: *Norman Lipman & Co.* (for the applicant); *Allen & Son* (for the prosecuting authority, Westminster City Council).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

COUNTESS OF KENMARE *v.* INLAND REVENUE COMMISSIONERS.

[HOUSE OF LORDS (Viscount Simonds, Lord Reid, Lord Cohen, Lord Keith of Avonholm and Lord Somervell of Harrow), July 1, 2, 3, 25, 1957.]

Surtax—Settlement—Power to revoke or otherwise determine settlement—Foreign settlement, settlor and trustees resident abroad, but trust funds in United Kingdom—Trusts for settlor's issue subject to her life interest—Trustees' power to declare sums held on trust for settlor absolutely—Amounts might ultimately exhaust fund—Whether terms of settlement such that trustees might have power to determine it—Finance Act, 1938 (1 *&* 2 *Geo.* 6 *c.* 46), *s.* 38 (2).

The taxpayer, who was not resident or ordinarily resident in the United Kingdom, executed a settlement in Bermuda, expressed to be governed by the law of Bermuda, under which she transferred certain stocks, shares and securities in the United Kingdom to trustees who were not resident in the United Kingdom. The trustees were in their absolute discretion to pay the income (or part thereof) of the trust fund to the taxpayer during her life, and (by cl. 3) to stand possessed of the capital and income thereof after her death on trust for her issue. The trustees had power (by cl. **5**) in their absolute discretion at any time to "declare that any part of the trust fund . . . shall thenceforth be held in trust for the" taxpayer absolutely, with a proviso that such part or parts should not exceed £60,000 in aggregate value in any period of three years (subject to a right to carry forward any deficiency in one period to the succeeding one). At the time of making the settlement the taxpayer was fifty years old and, if values remained constant, the time when the whole of the trust fund might be held in trust for the taxpayer by virtue of the exercise of the power conferred by cl. 5, would come when the taxpayer was between eighty and ninety years old. The taxpayer was assessed to surtax on the basis that income of the trust fund for the year of assessment 1947-48 was her income under s. 38 (2)* of the Finance Act, 1938.

Held: the taxpayer was properly assessed to surtax in respect of the income for the following reasons—

(i) the settlement was one to which s. 38 of the Finance Act, 1938, applied, particularly in view of the clear terms of s. 38 (7) and s. 41 (4) (b), notwithstanding the foreign character of the settlement and any difficulty that might arise in operating the machinery provisions of Sch. 3 to the Act of 1938.

Perry v. *Astor* ((1935), 19 Tax Cas. 255) distinguished.

(ii) the terms of cl. 5 of the settlement were in the circumstances such as to be within the words "a person . . . may have power . . . in the future . . . to determine the settlement" in s. 38 (2) (a) of the Finance Act, 1938, since, having regard (see particularly per LORD REID and LORD COHEN at p. 38, letters G to I, and p. 42, letters B to E, post), to the age of the taxpayer, the amounts that could be declared to be held in trust for the taxpayer absolutely and the amount of the trust fund, there was a real possibility that the trust fund would be exhausted by exercise of the power conferred by cl. 5.

Decision of the COURT OF APPEAL (sub nom. *Inland Revenue Comrs.* v. *Kenmare* (*Countess*), [1956] 3 All E.R. 69) affirmed.

[**Editorial Note.** Opinions on certain questions of construction arising on s. 38 (2) of the Finance Act, 1938, but not essential to the present decision, were reserved in view of the appeal in *Inland Revenue Comrs.* v. *Saunders*, reported at p. 43, post.

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* The provisions of this sub-section are printed at p. 35, letter C, post.

A For the Finance Act, 1938, s. 38 (2), see 12 HALSBURY'S STATUTES (2nd Edn.) 411; and for the replacing provisions of the Income Tax Act, 1952, s. 404 (2), see 31 HALSBURY'S STATUTES (2nd Edn.) 381.]

Cases referred to:

(1) *Astor* v. *Perry, Duncan* v. *Adamson*, [1935] A.C. 398; 104 L.J.K.B. 423; 153 L.T. 1; sub nom. *Perry* v. *Astor*, 19 Tax Cas. 255; Digest Supp.

B (2) *Whitney* v. *Inland Revenue Comrs.*, [1926] A.C. 37; 95 L.J.K.B. 165; 134 L.T. 98; 10 Tax Cas. 102; 28 Digest 105, *649*.

(3) *Inland Revenue Comrs.* v. *Saunders*, post, p. 43.

Appeal.

C Appeal by the taxpayer, the Countess of Kenmare, from an order of the Court of Appeal (SINGLETON, MORRIS and ROMER, L.JJ.), dated July 2, 1956, and reported sub nom. *Inland Revenue Comrs.* v. *Kenmare* (*Countess*), [1956] 3 All E.R. 69, affirming an order of DANCKWERTS, J., dated May 12, 1955, on a Case Stated by the Special Commissioners of Income Tax on an appeal by the taxpayer against an assessment to surtax made on her in the sum of £47,190 for the year 1947-48, which included £24,127 6s. 7d., being the gross income arising in that year under a settlement made by the taxpayer. The facts appear in the opinion of VISCOUNT SIMONDS. D

Heyworth Talbot, Q.C., F. N. Bucher, Q.C., and *H. H. Monroe* for the appellant taxpayer.

Geoffrey Cross, Q.C., Sir Reginald Hills and *E. Blanshard Stamp* for the Crown.

The House took time for consideration.

E July 25. The following opinions were read.

VISCOUNT SIMONDS: My Lords, on Sept. 24, 1947, the appellant, the Countess of Kenmare, being then neither resident nor ordinarily resident in the United Kingdom, made in Bermuda, in accordance with the law of that island, a settlement of certain United Kingdom stocks, shares and securities of the value of about £700,000. The trustees of the settlement were Nicholas F Bayard Dill and the bank of N. T. Butterfield & Son, Ltd., both of them resident in Bermuda. The beneficial trusts of the settlement were (a) for the trustees in their absolute discretion to pay the whole or any part of the income of the trust to the appellant during her life and to hold the balance of such income as should not be paid to her on income account and to pay the whole or any part of such balance to her from time to time during her life with the proviso that any G balance remaining at her death should be added to the trust fund and devolve accordingly, and (b) after the death of the appellant to stand possessed of the capital of the trust fund on the trusts for the benefit of the children or remoter issue of the settlor which are usually found in such a settlement. So far the settlement followed the common form, but it contained also the following cl. 5, which has given rise to the question which your Lordships have now to determine: H

> "5. (A) Notwithstanding the trusts hereinbefore declared the trustees if they in their absolute discretion think fit may at any time and from time to time during the lifetime of the settlor by writing under their hands declare that any part of the trust fund not exceeding the amount hereinafter mentioned shall thenceforth be held in trust for the settlor absolutely I and thereupon the trusts hereinbefore declared concerning the part of the trust fund or the property to which such declaration relates shall forthwith determine and the trustees shall thereupon transfer such part of the trust fund or the property to which such declaration relates to the settlor absolutely Provided always that the foregoing power shall not be exercisable by the trustees so as to vest in the settlor in any period of three years the first of which shall commence on the date hereof and end on the same date in the year 1950 the second of which shall end on the same date in the year

> 1953 and so on in every third year a part or parts of the trust fund or property of a value or aggregate value exceeding £60,000 of the currency of the Islands of Bermuda.
>
> " (B) If in any such period of three years the foregoing powers shall not be exercised to the full extent of the said sum of £60,000 the deficiency may be carried forward so as to increase the amount in respect of which the said power may be exercised in any succeeding period of three years."

The income arising from the trust fund for the period from Sept. 24, 1947, to Apr. 5, 1948, amounted, before deduction of United Kingdom tax and expenses, to £24,127 6s. 7d., and this sum was included in the assessment of the appellant to surtax for the year 1947-48 on the footing that it was caught by s. 38 (2) of the Finance Act, 1938. The net income was, in fact, paid to the appellant or placed at her disposal by the trustees. Section 38 (2) is as follows:

> " If and so long as the terms of any settlement are such that—(a) any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof; and (b) in the event of the exercise of the power, the settlor or the wife or husband of the settlor will or may become beneficially entitled to the whole or any part of the property then comprised in the settlement or of the income arising from the whole or any part of the property so comprised; any income arising under the settlement from the property comprised in the settlement in any year of assessment or from a corresponding part of that property, or a corresponding part of any such income, as the case may be, shall be treated as the income of the settlor for that year and not as the income of any other person: Provided that, where any such power as aforesaid cannot be exercised within six years from the time when any particular property first becomes comprised in the settlement, this sub-section shall not apply to income arising under the settlement from that property, or from property representing that property, so long as the power cannot be exercised."

Reference must also be made to sub-s. (5) of the same section which provides that the provisions of Part 1 of Sch. 3 to the Act shall have effect as respects the recovery by a settlor of tax with which he becomes chargeable and the recovery from a settlor of any additional relief to which he becomes entitled by virtue of that section, and to sub-s. (7) which provides that the provisions of that section shall apply for the purposes of assessment to income for the year 1937-38 and subsequent years and shall apply in relation to any settlement wherever made and whether made before or after the passing of the Act. I must also mention that, by s. 41 (4), the expression " income arising under a settlement " is defined as including any income chargeable to income tax by deduction or otherwise and any income which would have been so chargeable if it had been received in the United Kingdom by a person domiciled resident and ordinarily resident in the United Kingdom, and the expression " settlement " is defined as including any disposition, trust, covenant, agreement or arrangement, and the expression " settlor " in relation to a settlement as meaning any person by whom the settlement was made. Finally, reference must be made to Part 1 of Sch. 3 to the Act which provides, by para. 1, that where by virtue of any provision of s. 38 of the Act any income tax becomes chargeable on and is paid by a settlor he shall be entitled (a) to recover from any trustee or other person to whom income arises under the settlement the amount of the tax so paid, and (b) for that purpose to require the commissioners concerned to furnish to him a certificate specifying the amount of income in respect of which he has so paid tax and the amount of tax so paid.

The appellant, submitting to the jurisdiction, appealed against this assessment to the Special Commissioners on two grounds which, stated shortly, were (a)

that the settlement, by reason of what I may call its foreign character, was not A
a settlement to which, on its true construction, s. 38 applied, and (b) that the
power conferred by cl. 5 on the trustees was not a power to revoke or determine
the settlement or any provision thereof within the meaning of the section.
The Special Commissioners upheld her appeal on the first ground and, therefore,
thought it unnecessary to express any view on the second. On appeal by way
of Case Stated to the court, DANCKWERTS, J., reversed the decision of the B
Special Commissioners and his judgment was upheld by the Court of Appeal.
On what I have called the first ground there was no difference of opinion between
any of the learned judges and there was, in my view, little room for any difference.
The language of s. 38 and particularly of sub-s. (7) and of s. 41 makes it clear
beyond all doubt that any settlement wherever made and whatever foreign
element might be imported by the residence of settlor or trustees or the forum C
of administration is caught by its provisions if the income arises in the United
Kingdom. It is conceivable that there might be other provisions of the Act
which, read with s. 38, would enforce a narrower meaning on the word " settlement " where it occurs in s. 38. In *Perry* v. *Astor* (1) ((1935), 19 Tax Cas. 255),
this House by a majority was constrained as a matter of construction to limit
the prima facie generality of certain words appearing in s. 20 of the Finance D
Act, 1922, and the Special Commissioners were led or misled by this decision,
and particularly by the opinion of LORD MACMILLAN, into imposing a similar
limitation on s. 38. It cannot, however, be ignored that the Finance Act, 1938,
was enacted after the decision in *Perry* v. *Astor* (1), that its language appears
to be designed precisely to overcome the difficulties to which that case had
given rise, and that the definition of income " arising under the settlement " E
excludes from the operation of the section the income arising from foreign
investments to which LORD MACMILLAN had directed the very pertinent question
relied on by counsel for the appellant. Special attention was properly directed
to the so-called machinery provisions of Sch. 3. But the difficulty which may
or may not arise in applying them to the case of a settlement with foreign
trustees—an event which may happen whether the settlor himself is or is not F
resident in the United Kingdom—falls far short of such a contradiction or
inconsistency as must impel the court to limit the plain meaning of the substantive words of the section. On this part of the case I can add nothing to
what has been said by the learned judges of the Court of Appeal with whom
I am in full agreement.

I turn to the second point. Is the power given to the trustees by cl. 5 of G
the settlement a power within the meaning of s. 38 (2) of the Finance Act, 1938 ?
In the courts below, the conclusion has been unanimously reached that it is,
but not always for the same reason. For the purpose of this appeal, I think it
necessary only to consider and, having considered, to affirm the opinion of the
Court of Appeal, that, whatever may be the meaning of the word " provision ", H
the power given to the trustees may enable them by successive withdrawals
of the trust fund to exhaust it during the lifetime of the settlor and thus determine the settlement. This conclusion admittedly leaves unsolved certain
difficulties of interpretation, but I think it better to reserve them for discussion
in the following appeal of *Inland Revenue Comrs.* v. *Saunders* (3) (post, p. 43),
where their solution is inescapable. I

I have already stated in full the relevant parts of s. 38 (2). I would now
only recall attention to the words " has or may have ", " immediately or in
the future " and " revoke or otherwise determine ". Applying these words
to the present case, I do not see how it can be denied that the trustees may in
the future have power to determine the settlement. Successive withdrawals
from the trust fund on the permitted scale will, within a measurable space of
time, leave nothing on which the trusts of the settlement can operate; the

settlement will then be determined. This event may be advanced by a depreciation of the trust fund or delayed by its appreciation. It may never take place by reason of the earlier death of the settlor. But I do not see how it can be said that the day may not arrive when, the appellant being still living, the trustees will have the power to withdraw the last pound of the trust fund and place it at her disposal. For all I know that is what may have been intended or at least hoped for.

For these reasons, I am of opinion that this settlement was within s. 38 (2) of the Act and that the assessment was rightly made. I would dismiss the appeal accordingly with costs.

LORD REID: My Lords, in August, 1947, the appellant ceased to reside in the United Kingdom and she was not resident there at any relevant time so far as this case is concerned. On Sept. 24 of that year she made a settlement in Bermuda which is governed by the law of Bermuda. The property comprised in that settlement consisted of mortgages and shares of industrial companies in the United Kingdom which were then worth about £700,000. The relevant provisions of the settlement are:

> " 2. (A) The trustees shall in their absolute discretion pay the income (or such part thereof in their absolute discretion as aforesaid) of the scheduled investments and of the property for the time being representing the same (hereinafter called ' the trust fund ') to the settlor during her life.
>
> " 5. (A) Notwithstanding the trusts hereinbefore declared the trustees if they in their absolute discretion think fit may at any time and from time to time during the lifetime of the settlor by writing under their hands declare that any part of the trust fund not exceeding the amount hereinafter mentioned shall thenceforth be held in trust for the settlor absolutely and thereupon the trusts hereinbefore declared concerning the part of the trust fund or the property to which such declaration relates shall forthwith determine and the trustees shall thereupon transfer such part of the trust fund or the property to which such declaration relates to the settlor absolutely Provided always that the foregoing power shall not be exercisable by the trustees so as to vest in the settlor in any period of three years the first of which shall commence on the date hereof and end on the same date in the year 1950 the second of which shall end on the same date in the year 1953 and so on in every third year a part or parts of the trust fund or property of a value or aggregate value exceeding £60,000 of the currency of the Islands of Bermuda.
>
> " (B) If in any such period of three years the foregoing powers shall not be exercised to the full extent of the said sum of £60,000 the deficiency may be carried forward so as to increase the amount in respect of which the said power may be exercised in any succeeding period of three years.
>
> " (C) For the purposes of this clause the value of a part of the trust fund or property declared to be held in trust for the settlor absolutely shall be the value thereof at the date of such declaration and the trustees may ascertain and fix such value in any manner they may think fit and their decision shall bind all parties claiming hereunder."

Clause 3 provides that, after the death of the settlor, the trustees shall hold the capital and any balance on income account in trust for the settlor's children.

The whole of the income arising from these investments for the period from Sept. 24, 1947, to Apr. 5, 1948, was put at the disposal of the appellant by the trustees. The appellant was assessed to surtax on the income, and the question in this case is whether that assessment was rightly made. It is admitted that this income did not belong to the appellant when it accrued and that the sum which she received came to her by virtue of her rights under the settlement. Accordingly, as she resided abroad and received the money by virtue of rights under a foreign settlement, she could not be assessed unless there are statutory provisions which cover this case. The Crown rely on s. 38 (2) of the Finance Act, 1938, which is in these terms:

> " If and so long as the terms of any settlement are such that—(a) any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof; and (b) in the event of the exercise of the power, the settlor or the wife or husband of the settlor will or may become beneficially entitled to the whole or any part of the property then comprised in the settlement or of the income arising from the whole or any part of the property so comprised; any income arising under the settlement from the property comprised in the settlement in any year of assessment or from a corresponding part of that property, or a corresponding part of any such income, as the case may be, shall be treated as the income of the settlor for that year and not as the income of any other person: Provided that, where any such power as aforesaid cannot be exercised within six years from the time when any particular property first becomes comprised in the settlement, this sub-section shall not apply to income arising under the settlement from that property, or from property representing that property, so long as the power cannot be exercised."

The appellant maintains that, on their true construction, the provisions of that sub-section do not apply. Her case is put on two quite separate grounds. In the first place it was argued that the terms of this settlement are not such that the trustees " may have power . . . in the future . . . to revoke or otherwise determine the settlement or any provision thereof." If that submission is well founded then admittedly the assessment is invalid. If it is not well founded then the appellant's second argument is that the sub-section must be so construed as not to have any application to a case where the settlor is not resident in the United Kingdom and the settlement is a foreign settlement, and that the fact that the income is derived from property in the United Kingdom is immaterial.

Under cl. 5 of the settlement, the trustees were empowered in their absolute discretion to release £60,000 from the trusts of the settlement during the period of three years which ended on Sept. 24, 1950, and they have been empowered and will be empowered to release a further sum of £60,000 in each succeeding triennium so long as the settlor survives. This power is cumulative so that, even if nothing has yet in fact been released and put at the absolute disposal of the settlor, there would now be power to release £240,000. The time must come, if the settlor survives long enough, when the trustees will have power to release the whole of the trust fund. We do not know when that time may come because the value of the trust fund may alter. But, if the increase or decrease in value is not very substantial that time will come if the appellant survives to an age of between eighty and ninety years. If there is a substantial fall in the value of the trust fund the time will come before the appellant reaches the age of eighty. Can it reasonably be said in those circumstances that the trustees may have power during the lifetime of the settlor to release the whole of the trust fund so that the settlor becomes beneficially entitled to the whole of it ? I think it can. In my opinion the word " may " must be construed in accordance with the principle of de minimis. There must be a real possibility of there being power to release the whole fund before the death of the settlor. I do not think that " may " means that there must be a probability in the sense that the event is more likely to happen than not to happen, but there must be more than a negligible possibility. I do not think that the possibility of there being power to release the whole fund before the death of the settlor is in this case negligible.

It was argued that, even if that be so, this is not the kind of power aimed at by the sub-section. But I am of opinion that we must look, not at the nature or the apparent object of the power, but at its possible effect if it is exercised. Then the question arises: if the exercise of the power may release the whole of the trust fund and revest it in the settlor, is that power a power to determine the settlement ? In my opinion it is. It is not a power to revoke the settlement in the sense of cancelling or annulling it, but it appears to me that, if there is nothing left for the trusts of the settlement to operate on, then the settlement can properly be said to have been determined or brought to an end. I am, therefore, of opinion that the first argument for the appellant fails and I pass to the second.

It might have been argued before the decision of this House in *Whitney* v. *Inland Revenue Comrs.* (2) ((1925), 10 Tax Cas. 102) that, because the appellant resides abroad, there is no power to make an assessment on her. But that argument is not now open, and the appellant can only succeed by showing that, on a true construction of s. 38 (2), it does not apply to this case. Construed literally it clearly does apply, and, therefore, the appellant must point to some word or phrase in it which can be given a limited meaning so as to exclude her case.

The appellant relies on certain observations made in *Perry* v. *Astor* (1) ((1935), 19 Tax Cas. 255), but I do not think that that case helps her argument. There, a resident in the United Kingdom made a foreign settlement of property situated abroad and reserved power to revoke it. On a literal construction s. 20 of the Finance Act, 1922—the predecessor of the section with which we are now dealing—would have applied as it taxed " any income " of which a person was able to obtain for himself beneficial enjoyment by exercising a power of revocation. But it was held that the words " any income " must be given a limited meaning and must mean income already charged to tax under the ordinary provisions of the Income Tax Acts. So the section did not bring new income into charge, but it enacted with regard to income already chargeable that it should be deemed to be the income of a person other than the person entitled to receive it. That is precisely what the Crown seeks to do in the present case. The income in the present case arises in the United Kingdom and the persons entitled to receive it are the Bermudan trustees; apart from s. 38 (2) of the Finance Act, 1938, they would have to suffer payment of tax by deduction at the source. If the Crown is right, this sub-section requires this income to be treated as the appellant's income and not as income of the Bermudan trustees, with the result that, in addition to tax being payable at the standard rate, she is assessable to surtax in respect of it.

The appellant's argument is that it would be unreasonable to suppose that Parliament intended to make a foreign resident liable for tax on income from property which he has ceased to own, and that the machinery provisions of the Act show that this was not intended. An equally strong argument based on the difficulty of applying machinery provisions was rejected by the majority of their Lordships in *Whitney* v. *Inland Revenue Comrs.* (2), and I do not think that it can prevail here. What appeared to me the most substantial point made was that the Act of 1938 entitles a settlor who pays tax under s. 38 (2) to recover that tax from the trustees who receive the income in respect of which it is paid, that it may not be possible to operate that relief against foreign trustees, and that s. 38 (2) should only apply to a settlor who has available this consequential right of relief. To that argument there appear to me to be two answers. In the first place, if a settlor settles property situated in the United Kingdom by means of a foreign settlement, he takes the risk of difficulty in operating his right of relief. But, it was said, suppose that an American settlor settled American property by an American settlement and then the trustees invest trust property here; the American settlor would not have created the difficulty and he should

not be chargeable. I think that the practical answer is that, if such a case A
ever arose, the Inland Revenue would probably be unable to recover anything from the American settlor because courts do not enforce liability to pay taxes in another country.

The second answer to this argument is that, if it is correct, it would also apply to relieve a resident in this country who settled property situated in this country by means of a foreign settlement. He also could say that it might not be possible B
to operate his statutory right of relief against the foreign trustees. But, in my opinion, it is clear that s. 38 (2) is intended to apply and does apply to such a case. Section 38 (7) provides that it shall apply in relation to any settlement wherever made, and the provisions of s. 41 (4) appear to me to be designed to meet such a case. With the experience of the Act of 1922 before them, it cannot have escaped the notice of those responsible for advising Parliament in 1938 C
that failure to include within the scope of s. 38 (2) foreign settlements made by British residents would leave an easy and obvious loophole for evasion. The wording of the Act of 1938 satisfies me that this was appreciated and such evasion prevented.

Once it is determined that s. 38 (2) applies to foreign settlements made by residents in the United Kingdom, I can find no way of construing any word or D
phrase in the Act in such a manner that foreign settlements made by foreign residents can be differentiated from foreign settlements made by persons resident here. Indeed, counsel for the appellant were unable to point to any word or phrase capable of a construction which would lead to that result.

In my judgment, this appeal should be dismissed.

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LORD COHEN: My Lords, the question raised in this appeal is whether certain income (amounting to £24,127 6s. 7d.), arising during the fiscal year 1947-48 under a settlement dated Sept. 24, 1947, being a settlement made by the appellant and governed by the law of the Islands of Bermuda, should be included in the total income of the appellant for that year under the provisions of s. 38 (2) of the Finance Act, 1938, notwithstanding that the appellant was not resident F
in the United Kingdom when the income arose. The question turns on the construction and effect of certain provisions of Part 4 of the Finance Act, 1938, and of Sch. 3 thereto. The points in issue, shortly stated, are (a) whether s. 38 applies to a settlement made by a non-resident settlor having non-resident trustees and governed by the law of a country other than the United Kingdom; and (b) whether a power given to trustees under a settlement from time to time G
to vest any part of the capital of the settled fund, not exceeding a certain specified amount in value, in the settlor is a power "to revoke or otherwise determine the settlement or any provision thereof" within the meaning of s. 38 (2) in a case where the exercise of the power may ultimately exhaust the whole of the settled fund.

I find myself in such complete agreement with what your Lordships have H
said about the first point that I can state quite shortly my reasons for agreeing with the Court of Appeal that the appellant's argument thereon cannot be sustained.

Section 38 (7) provides that the foregoing provisions of the section shall apply in relation to any settlement *wherever* made (the italics are mine) and whether made before or after the passing of the Act. Section 41 (4) (b) provides I
that, for the purposes of the Part of the Act which includes s. 38, the expression "settlement" shall include any disposition, trust, covenant, agreement or arrangement, and the expression "settlor" in relation to a settlement means any person by whom the settlement was made.

Prima facie, the settlement of Sept. 24, 1947, is a settlement, and the appellant is a settlor, within the meaning of s. 38 (2). But, said counsel on her behalf, it cannot have been the intention of Parliament to tax a non-resident person on income of which she has effectually divested herself or on income which has never been her income. As an illustration of the alleged preposterousness of the opposite view he instanced a case containing the following features:—(i) a settlement made in the United States by a person resident in the United States; (ii) the settled fund consisting of United States securities; (iii) the trustees resident in the United States and having a power to revoke the settlement; (iv) the settlement containing a provision that, on such revocation, the settled fund should revert to the settlor. Counsel assumed that the trustees subsequently invested part of the settled fund in United Kingdom securities and asked rhetorically: "Can it be that the foreign settlor is liable to pay surtax on the income derived from those United Kingdom securities ?" My Lords, that case is not before us, but my provisional answer must be "Yes, because the Act in plain terms so provides."

Counsel for the appellant relied on the decision of your Lordships' House in *Perry* v. *Astor* (1) ((1935), 19 Tax Cas. 255), a decision on s. 20 of the Finance Act, 1922. In that case, the securities comprised in the settlement were American securities, and the majority of the House held that "any income" in s. 20 must be confined to income chargeable with tax under the British Finance Act of the year. The material portion of s. 20 was repealed by the Finance Act, 1938, and the language of s. 38 (2) is so different that I cannot derive assistance from the decision in *Perry* v. *Astor* (1) on the meaning of s. 20 of the Act of 1922. I do, however, derive assistance from the observation of LORD RUSSELL of KILLOWEN in his dissenting judgment, where he said (ibid., at p. 280):

> "There must . . . be the necessary limitation which is inherent in all our income tax legislation, namely, that what is taxed under or by virtue of this provision can only be either (i) income which is here, or (ii) income of a person resident here".

This observation is not inconsistent with anything in the judgments of the majority in the case cited. Applying it to counsel's hypothetical case, it is plain that no tax would have been payable under s. 38 (2) on the income from the settled fund so long as that consisted only of foreign securities because of the limitation on the meaning of the expression "income arising under a settlement" to be inferred from the concluding words of s. 41 (4) (a). In the present case, your Lordships are dealing with a claim to tax on income which is here, and the language of the Act is plainly wide enough to bring that income within the ambit of the taxing provision.

Counsel for the appellant also said that his case was supported by the provisions of Sch. 3, which contains machinery for giving effect to s. 38, enables a settlor who had been compelled to pay tax under s. 38 to recover what he has paid from the trustee or other person to whom income arises under the settlement, and contains other provisions to which it might be difficult to give effect in a case where the settlor and trustees were outside the jurisdiction. My Lords, the language of s. 41 (4) makes it clear that the legislature contemplated the possibility of the settlor being resident outside the United Kingdom, and I cannot derive from these machinery provisions any sufficient justification for cutting down the plain meaning of the language used.

I turn, therefore, to the second point. If the assessment is to stand, two conditions have to be satisfied. There is, however, no dispute as to the second condition. It is admitted that, if the power contained in cl. 5 of the settlement dated Sept. 24, 1947, is a power

> "whether immediately or in the future and whether with or without the consent of any other person to revoke or otherwise to determine the settlement or any provision thereof",

the appellant will, on the power being exercised, become entitled to the whole or some part of the property comprised in the settlement. Counsel for the appellant, however, submitted that it cannot be predicated that a time will ever come when, by an exercise of the powers given by cl. 5, the trustees will be in a position to remove all remaining capital funds from the trust. That is true, but I agree with the reasons given by Morris, L.J. ([1956] 3 All E.R. at p. 76), for thinking that this submission does not afford a reason for setting aside the assessment.

The question is whether there is power to determine the settlement. I understand the word " determine " as denoting putting an end to the settlement. I agree that there can be no certainty that an exercise of the powers given by cl. 5 will ever remove all the remaining capital funds from the trust. But I would adopt what was said by Morris, L.J., in the course of his judgment in the passage which reads as follows (ibid.):

> " There is the uncertain element of the length of life of the settlor. There is the uncertain element as to the value of the trust fund. It may increase or appreciate or it may not. The value in the currency of Bermuda may fluctuate. Furthermore, it was submitted that, even if the result of the operation of cl. 5 of the settlement may be to exhaust the funds, there is even so no revocation or determination of the settlement. But it seems to me that, if the trustees by one or more declarations brought it about that the trusts concerning the greater part of the trust fund were ' determined ', the time might come when the trustees, by declaration made by them, might be in a position to exercise their power so that it affects all the remaining part of the trust fund; if so, the trusts concerning that remaining part of the trust fund would ' forthwith determine '. Such a time ' may ' come even though it may not seem likely that it will. If the trustees were in that position they would ' have power . . . to . . . determine the settlement '. It seems to me that the trustees ' may have ' such power ' in the future '. The wording of s. 38 (2) (a) is, therefore, satisfied."

I would add that no argument appears to have been addressed to the commissioners based on the probability or improbability of the appellant, who was over fifty years of age when the settlement was executed, being alive at a date when the exercise of the powers given by cl. 5 would finally exhaust the settled fund. I, therefore, express no opinion on the question what the position would be in a case where, under a similar provision, it is impossible, or at least highly improbable, that the funds would ever be exhausted by the due exercise of the alleged power of revocation.

For the reasons I have given, I agree that the appeal should be dismissed.

LORD KEITH OF AVONHOLM: My Lords, I agree with the result reached by your Lordships on the case as presented. It may be arguable in an appropriate case that " may have power " does not bring s. 38 (2) into operation until the power is actually exercisable. In the present case, the power increases cumulatively with every three-year period, and at this moment is exercisable only over £240,000 of the trust fund calculated in the currency of the Islands of Bermuda. As I shall develop in *Inland Revenue Comrs.* v. *Saunders* (3) (post, p. 43, at p. 50), I think s. 38 covers a power of partial revocation of a provision and on this view it might be proper to look at the state of the power at any particular moment of time. But I reserve my opinion on this line of construction.

I would dismiss the appeal.

LORD SOMERVELL OF HARROW: My Lords, I agree that the appeal should be dismissed for the reasons given by my noble and learned friend on the Woolsack.

Appeal dismissed.

Solicitors: *Theodore Goddard & Co.* (for the appellant taxpayer); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* G. A. Kidner, Esq., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* SAUNDERS AND OTHERS.

[House of Lords (Viscount Simonds, Lord Reid, Lord Cohen, Lord Keith of Avonholm and Lord Somervell of Harrow), July 3, 4, 25, 1957.]

Surtax—Settlement—" Power to revoke or otherwise determine the settlement or any provision thereof "—Power to apply part of capital for benefit of class including settlor's wife—Finance Act, 1938 (1 *&* 2 *Geo.* 6 *c.* 46), *s.* 38 (1) (*a*), (2) (*a*).

By a settlement it was provided that the trustees should hold the trust funds on trust during a specified period to pay, divide or apply the income thereof to or between or for the maintenance support or benefit of the members of a class of beneficiaries as the trustees might determine and that at the end of the appointed period the trustees should hold the trust funds, or so much thereof as should then remain subject to the trusts thereof, on trust for the next of kin of the settlor. The class of beneficiaries included the settlor's wife. By cl. 4 the trustees were further authorised at any time or times during the specified period to pay or apply any part or parts of the capital of the trust funds to or for the benefit of all or any one or more of the class of beneficiaries, but it was provided that during the life of the settlor any exercise of this power should be subject to the limitation that the capital of the trust funds remaining subject to the trusts of the settlement immediately after such exercise should be of the value of not less than £100. The settlor was assessed to surtax for 1951-52 under the Finance Act, 1938, s. 38 (2)*, on the income from the trust funds.

Held (Lord Keith of Avonholm and Lord Somervell of Harrow dissenting): the settlor was not chargeable to surtax in respect of the income from the trust funds, because a power to dispose of nearly the whole of the capital subject to the settlement (which cl. 4 was) was not a power to bring it or any provision of it or made by it to an end and thus was not a power " to revoke or otherwise determine the settlement or any provision thereof " within the meaning of s. 38 (2) (a) of the Finance Act, 1938.

Observations on the meaning of the word " provision ".

Decision of the Court of Appeal (sub nom. *Saunders* v. *Inland Revenue Comrs.*, [1956] 3 All E.R. 83) affirmed.

[For the Finance Act, 1938, s. 38 (1), (2), see 12 Halsbury's Statutes (2nd Edn.) 410; and for the replacing provision of the Income Tax Act, 1952, s. 404, see 31 Halsbury's Statutes (2nd Edn.) 381.]

Cases referred to:

(1) *Inland Revenue Comrs.* v. *Wolfson*, [1949] 1 All E.R. 865; sub nom. *Wolfson* v. *Inland Revenue Comrs.*, 31 Tax Cas. 141; 2nd Digest Supp.

(2) *Berkeley* v. *Berkeley*, [1946] 2 All E.R. 154; [1946] A.C. 555; 115 L.J.Ch. 281; 175 L.T. 153; 2nd Digest Supp.

(3) *Kenmare* (*Countess*) v. *Inland Revenue Comrs.*, ante, p. 33.

Appeal.

Appeal by the Crown from an order of the Court of Appeal (Singleton, Morris and Romer, L.JJ.), dated July 2, 1956, and reported sub nom. *Saunders* v. *Inland Revenue Comrs.*, [1956] 3 All E.R. 83, reversing an order of Wynn-Parry, J., dated July 27, 1955, and reported [1955] 3 All E.R. 274, on a Case Stated by the Special Commissioners of Income Tax on an appeal by the taxpayer, Henry Arthur Waldron Saunders, against an additional assessment to surtax in the sum of £4,167, made on him for the year 1951-52. The facts appear in the opinion of Viscount Simonds, p. 44, post.

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* The relevant terms of s. 38 (2) are printed at p. 45, letter A, post.

Geoffrey Cross, Q.C., Sir Reginald Hills and *E. Blanshard Stamp* for the Crown. A
John Pennycuick, Q.C., and *R. A. Watson* for the respondent taxpayer.

The House took time for consideration.

July 25. The following opinions were read.

VISCOUNT SIMONDS: My Lords, this appeal by the Crown again B raises the question of the scope and meaning of s. 38 (2) of the Finance Act, 1938. The relevant facts are not in dispute. By a deed dated July 25, 1951, and made between the original respondent to this appeal (who has since died but will be referred to as " the respondent ") of the one part and Gordon Waldron Saunders, Ethel Grace Saunders (the respondent's wife) and Raymond Henry Pumfrey as trustees of the other part, it was recited that the respondent was C desirous of making such irrevocable provision as was thereinafter contained for the benefit of the specified class (an expression which was defined in the schedule and included the respondent's wife) and, for the purpose of effectuating such desire, had transferred to the trustees the sum of £100, and it was provided (by cl. 1) that the trustees should invest as therein directed the said sum and any further sums which the respondent might thereafter transfer to them; by cl. 2 that D the trustees should hold the said sums and the investments for the time being representing the same on the trusts thereinafter declared; by cl. 3 that they should during the period therein specified pay, divide or apply the income thereof less any portion thereof the income whereof should have been appointed under the provisions thereinafter contained to or between or for the maintenance support or benefit of the members of the specified class as the trustees might E determine; and (by cl. 5) that, at the expiration of the appointed period, the trustees should hold the trust fund or so much thereof as should remain subject to the trusts thereof on trust for the next of kin of the respondent as therein defined. The specified class was a large one, and nothing need be said about it except that it included the respondent's wife. I have so far not mentioned cl. 4, on which this case hangs. It was in the following terms: F

> " It shall be lawful for the trustees at any time or times during the appointed period but subject to the consent in writing of the settlor during his life thereafter at their absolute discretion to pay or apply any part or parts of the capital of the trust funds to or for the benefit of all or any one or more to the exclusion of the other or others of the specified class freed and released from the trusts concerning the same Provided G always that during the life of the settlor any exercise by the trustees with such consent as aforesaid of the power in this clause contained shall be subject to the limitation that the capital of the trust funds remaining subject to the trusts of this settlement immediately after such exercise shall be of a value of not less than £100."

H

The proviso to this clause which might otherwise seem inexplicable is, in fact, easily explained. Its avowed purpose is that the settlement may escape from s. 38 of the Finance Act, 1938. The question for your Lordships is whether it is successful in its purpose as the Court of Appeal, allowing an appeal from Wynn-Parry, J., have held that it is.

Before turning to the Act of Parliament, it only remains to be said that, I within a few days after the execution of the deed, the respondent transferred a sum of £25,000 (making £25,100 in all) to the trustees who invested it in 250,000 ordinary shares of 2s. each in H. A. Saunders, Ltd., and that in the year ended Apr. 5, 1952, the gross income arising under the settlement was £4,166 13s. 4d., and that an additional assessment to surtax which included this income was made on the respondent. This assessment was founded on s. 38 (2) of the Finance Act, 1938, which is, so far as is relevant, in the following terms:

> A "If and so long as the terms of any settlement are such that—(a) any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof; and (b) in the event of the exercise of the power, the settlor or the wife or husband of the settlor will or may become beneficially entitled to the whole or any B part of the property then comprised in the settlement or of the income arising from the whole or any part of the property so comprised; any income arising under the settlement from the property comprised in the settlement in any year of assessment or from a corresponding part of that property, or a corresponding part of any such income, as the case may be, shall be treated as the income of the settlor for that year and not as C the income of any other person: . . ."

It is clear that an exercise of the power contained in cl. 4 during the respondent's lifetime might result in his wife becoming beneficially entitled to a part of the property comprised in the settlement. The single question is whether the power is a power to "revoke or otherwise determine the settlement or any D provision thereof." The answer given by the respondent is that it is not, because always there must be £100 left in the settlement and, so long as it is there, neither the settlement nor any provision thereof can be properly described as revoked or otherwise determined. This, it was claimed, was the natural and literal meaning of the words and the observations which fell from myself and some of your Lordships in *Inland Revenue Comrs.* v. *Wolfson* (1) ([1949] 1 All E E.R. 865) were called in aid. I am assuredly not going to depart from the fair meaning of words in a taxing section in order that tax may be exacted. It is not so easy to say what is a fair meaning of the relevant words.

I must first clear out of the way one argument which was, I think, given undue weight in the Court of Appeal. The question being whether there is a power to revoke or determine a settlement or any provision thereof, it is not, F in my opinion, proper to attribute continuance or non-determination to the settlement or any provision thereof because the power itself still subsists. What is relevant is whether, and in what sense, the trusts declared by cl. 3 and cl. 5 have been determined; the power, though it may be regarded for some purposes, like a power of advancement, as part of the trusts of the settlement, is in this connexion to be regarded as something independent of the beneficial trusts G which it may itself determine.

It was on the meaning of the word "provision" that the decision of the majority of the Court of Appeal largely turned. Thus, SINGLETON, L.J., thought ([1956] 3 All E.R. at p. 88) that the words "of any provision of the settlement" at the end of s. 38 (1) (a) and in s. 38 (1) (b) meant a clause in the document, and that the word "provision" ought to be given the same meaning in s. 38 (2). H He, therefore, could not accept the argument of counsel for the Crown. MORRIS, L.J., too, though not ignoring other aspects of the case, concluded by saying (ibid., at p. 90):

> "The submission of the Crown further fails if the word 'provision' denotes, as in my judgment it does, a clause or part of the settlement deed or agreement."

I My Lords, the meaning of the word "provision" in an Act of Parliament was discussed in this House in *Berkeley* v. *Berkeley* (2) ([1946] 2 All E.R. 154), and it was then necessary to determine which of two possible meanings it bore in that Act, viz., a clause in a document (in that case a will) or a benefit conferred by that clause or document. But it was pointed out in that case that the two meanings very easily slid into each other, and I doubt, with great respect, whether in the present case the distinction need be preserved. It was indeed patent that learned counsel for the respondent accepted the view that, in its present context, the word meant indifferently a clause or a beneficial interest; he candidly admitted that a clause could not be " determined " without also determining the beneficial interest which it created and vice versa. Rather he was concerned to maintain that no beneficial interest (assuming that to be the meaning of " provision ") was determinable within the section.

The issue is thus brought within narrow limits. It is whether the words " revoke or otherwise determine the settlement or any provision thereof " are satisfied if the settlement is in part revoked, or (more appositely) if a beneficial interest created by the settlement is in part determined. Let me take a concrete case. The beneficial interest which is said to be liable to be determined is the life interest of A in a capital fund of £100,000; the trustees in the exercise of their power withdraw from the trust £10,000 or £50,000 or £90,000. On such withdrawal is the beneficial interest of A determined ? Is there on each withdrawal a new beneficial interest created and on the next withdrawal a new determination ? Alternatively, is each £ or other unit of the trust income to be regarded as a separate provision, so that, on the withdrawal of the relevant capital, it can be said that a provision for A has been determined ? I do not think that either of these explanations is plausible. Yet one or other of them must be adopted if a provision of the settlement or a beneficial interest created by it is to be regarded as determined by the diminution of it in greater or less degree. The problem may be stated in a slightly different way, perhaps more attractive to the Crown's case. I can well imagine that a beneficiary for whom the handsome provision of (say) £5,000 a year has been made would say, on finding it cut down to £50 a year, that he no longer enjoyed the provision he formerly had. Colloquially, he was no longer provided for. But he would, in fact, be provided for though on a less handsome scale, and it would be a provision made by the settlement. Therefore the same question would have to be asked: has the earlier provision been determined and a new one substituted ? Or would it be more accurate to say that the provision made for him had been not " determined " but diminished ? This is to put in other words the question that I asked earlier—Does the word " revoke " include partial revocation and the word " determine " include partial determination ? I do not think that it does. A purist would, I think, say that there can be no such thing as a partial determination of a single provision. An end is an end and there is no part left. At any rate, nothing could be easier than to use words appropriate to the revocation or determination of part of a provision if it were intended to cover the reduction of a provision for any person or body of persons, and I think that I should not be justified in giving a strained meaning to the words which the legislature has preferred to give. I do not ignore that the sub-section contemplates that the interest of the beneficiary may be in a part of the settled property but it appears to me that this is indecisive, for the " provision " made for him may be in whole determined but extend to part only of the settled property. Since writing this opinion I have had the advantage of reading the opinion of my noble and learned friend, LORD REID, and I agree with what he has written on this part of the case.

I have come, therefore, to the conclusion that the appeal must be dismissed. The Crown must pay the costs.

LORD REID: My Lords, in a plain and obvious attempt to evade the provisions of s. 38 (2) of the Finance Act, 1938, and avoid liability for surtax the late Mr. Saunders made a settlement on July 25, 1951, and the question in this case is whether that attempt has been successful. On that date he transferred to trustees £100 and directed them to hold that sum and any further sums which he might thereafter transfer to them for the benefit of a specified class of beneficiaries, including his wife. On Aug. 13, 1951, he transferred a further sum of £25,000 to the trustees. The settlement contained this provision:

> A "4. It shall be lawful for the trustees at any time or times during the appointed period but subject to the consent in writing of the settlor during his life thereafter at their absolute discretion to pay or apply any part or parts of the capital of the trust funds to or for the benefit of all or any one or more to the exclusion of the other or others of the specified class freed and released from the trusts concerning the same Provided always that B during the life of the settlor any exercise by the trustees with such consent as aforesaid of the power in this clause contained shall be subject to the limitation that the capital of the trust funds remaining subject to the trusts of this settlement immediately after such exercise shall be of a value of not less than £100."

C It is not disputed that, apart from this proviso, the terms of cl. 4 would bring this case directly within the scope of s. 38 (2); the trustees would have power immediately to determine the whole settlement by freeing the whole of the trust funds from the trusts of the settlement and paying them to the settlor's wife. I shall not repeat here what I have said in *Countess of Kenmare* v. *Inland Revenue Comrs.* (3) (ante, at pp. 38, 39) about the word "determine". Section D 38 (2) clearly provides that, in such a case, the whole of the income from the trust fund must be treated as the income of the settlor. But the proviso requires that, so long as the settlor survives, at least £100 must be retained by the trustees and must remain subject to the trusts of the settlement. £100 is, no doubt, a comparatively small sum, but it is capable of being invested and of yielding an income, and I do not think that it can be treated as negligible. E Accordingly, in my opinion, the presence of the proviso prevents the trustees' power from being a power to determine the settlement. The question, therefore, is whether the power, limited as it is by the proviso, can be said to be a power to revoke or otherwise determine any provision of the settlement.

It has not been argued that the word "determine" can mean anything else than "bring to an end". It cannot mean "modify" or "diminish". Accordingly, F the sub-section cannot apply unless there is power to bring something to an end. The presence of the word "revoke" does not help because the phrase used is "revoke or otherwise determine". The word "otherwise" shows that revoking is regarded as one method of determining or bringing to an end either the settlement or any provision thereof.

There has been much argument about the meaning of the word "provision". G In the first place the word "thereof" makes it clear that the sub-section is referring to something that can properly be called a provision of the settlement. And, secondly, the provision must be of such a nature that the result of determining it will or may be that the settlor or his wife becomes beneficially entitled to the whole or a part of the property comprised in the settlement or of the income arising from it. "Settlement" is defined in s. 41 as follows: "the H expression 'settlement' includes any disposition, trust, covenant, agreement or arrangement", and a provision of a settlement would normally mean some part of it. But, as was pointed out in *Berkeley* v. *Berkeley* (2) ([1946] 2 All E.R. 154), provision is often used in the sense of what is provided, and I think that if a settlement gives a beneficial right to X that right can properly be said to be a provision of the settlement. It is, therefore, necessary to examine the I beneficial rights given by this settlement and to see whether the exercise of the power could properly be said to determine any of them.

Clause 3 leaves it to the discretion of the trustees to pay the income from the trust fund to or for behoof of any one or more members of the specified class but requires them to distribute the income annually. Clause 5 makes provision for distributing the fund, or what remains of it, at the end of the appointed period. During the lifetime of the settlor there must always remain £100 the income from which must be distributed in terms of cl. 3. After his death and during the remainder of the appointed period, the trustees may pay away the whole of the trust fund; if they do not then, at the end of the appointed period, cl. 5 comes into operation. I do not think it necessary to consider cl. 5 further because, if paying away part of the trust fund under cl. 4 does not determine any provision of cl. 3, a fortiori it does not determine any provision of cl. 5. Clause 3 directs the trustees to apply the income of the trust funds "less any portion thereof the capital whereof shall have been appointed under the provisions hereinafter contained." I attach no importance to those words. Clause 3 and cl. 4 must be read together and, without these words, cl. 3 could only operate on the income of what capital remained at the time. Nor do I think that it makes any difference that no particular member of the specified class can demand any part of the income, it being for the trustees to determine to which members the income shall be paid. Perhaps, if any preference were given to one or more members, diminution of the trust fund could result in the rights of the others being determined, but that is not the case here. This case seems to me to be the same as it would be if cl. 3 had simply directed the trustees to pay the income from the trust fund to A. B.

I ask the question: What "provision" is brought to an end by reducing the amount of the trust fund from £25,100 to £100? Two suggestions were made by counsel for the Crown. The first was that the depletion of the trust fund by exercising the powers in cl. 4 would essentially alter the nature of the "provisions" so that it could properly be said that the original provisions had been determined and new and different provisions had come into existence with regard to what was left of the trust fund. Apart from the artificiality of this conception, I see one fatal objection to it. *Berkeley* v. *Berkeley* (2) is an example of a case where it is material to determine the date when a provision was made. On this view the date when provisions operating at a particular time came into being would not be 1951 but would be the last date when the trustees paid away capital under cl. 4. That, in my view, cannot be right. Moreover, who makes the new provisions with regard to the capital remaining in the settlement? They must surely flow from the settlor, and I find it very difficult to construe the settlement as authorising the trustees to make new provisions whenever they pay away capital. It might, perhaps, be said that payment of small sums would not determine the old provisions but that payment of more than ninety-nine per cent. of the trust fund does determine them. But suppose the trustees pay away the capital £1,000 at a time. At what stage are the old provisions determined and new ones substituted? I am quite unable to accept this suggested way of finding that provisions are determined or brought to an end.

The Crown's alternative suggestion was that each pound (or, I suppose, each penny) of the trust fund is a separate provision so that, if £X is released from the settlement, X provisions are determined and 25,100 – X provisions remain unaltered. This appears to me to be an even more artificial conception than the last, and I ask what happens if the value of the trust fund appreciates. Does each £1 provision become a provision of £1 1s. or does the appreciation create a number of new £1 provisions; if so, who makes these provisions? And, if the trust fund depreciates in value, does each provision become one of 19s. or do some just disappear? And, if depreciation results in each £1 provision becoming a provision of 19s., why does paying out five per cent. of the trust fund under cl. 4 not have the same result but cause a number of provisions to determine while the rest remain unaltered? I find it equally impossible to adopt this suggestion.

There is one other argument for the Crown that I must notice. The second condition for the application of the sub-section, set out in s. 38 (2) (b), is that, in the event of the exercise of the power, the settlor will or may become beneficially entitled to the whole or any part of the property; and, where the exercise of the power only entitles the settlor to a part of the property, the next part of the sub-section provides that any income arising from " a corresponding part of that property " shall be treated as the income of the settlor. It is said that this throws light on the meaning of " revoke or otherwise determine the settlement or any provisions thereof " in the first condition set out in s. 38 (2) (a). I do not think so. The sub-section requires two conditions to be satisfied—those set out in para. (a) and para. (b) of s. 38 (2), and it is not difficult to imagine cases where both conditions are clearly satisfied although only a part of the trust fund reverts to the settlor (or his wife). In the first place, the settlement may be wholly determined but only part of the trust fund may revert; the settlement may provide that, in the event of power to determine it being exercised, half the trust fund shall revert to the settlor and the rest go to his issue. Or, secondly, a provision of the settlement may be wholly determined but only part of the trust fund be affected by that; for example, a settlor might settle property on his four children in equal shares and reserve power to revoke the interest of one child but not of the others. The exercise of such a power would wholly bring to an end the provision in favour of one child but the result would be that only part of the property, one quarter, would revert to the settlor.

This argument for the Crown seems to me to be based on the view that condition (a) must be so construed that it must be held to apply whenever condition (b) is satisfied. I see no reason why that should be so. In the present case, condition (b) is satisfied because in the event of the exercise of the power part of the settled property may revert to the settlor's wife. But that seems to me to throw no light on the question whether condition (a) is also satisfied. I, therefore, adopt the simple explanation of this case that when part of the capital is paid away—or for that matter is lost by depreciation of investments—the provisions of the settlement remain the same but their value to the beneficiaries decreases. That would be so whether one takes the word " provision " to mean a part of the settlement or a right given by the settlement. If that be true, then nothing would be determined or brought to an end by paying away part of the trust fund and, therefore, there is no room for the application of s. 38 (2).

If the words of a statute are reasonably capable of two interpretations it is right to adopt that which will prevent evasion provided that this course does not lead to some other difficulty or injustice; but in this case I can find no interpretation favourable to the Crown which can survive analysis. In a case like the present one may well be tempted to strain words, but for two reasons I do not think that that would be right.

In the first place I see no way of construing the sub-section, even by straining words, which would bring this case within its scope without at the same time bringing in genuine cases which Parliament may well have desired and might now desire to exclude. For example, trustees may have power to return capital to the settlor for certain specific purposes and it may be unlikely that any substantial sum could ever be paid back to him, but, nevertheless, it may be possible that in some improbable event the power would extend to a large proportion of the trust fund. Are the words of the Act to be strained to bring in such cases ? And if they are, how is condition (b) to be applied ? Is the proportion of the trust income which is to be treated as the income of the settlor to correspond to the largest proportion of the trust fund which the exercise of the power may enable the trustee to repay to the settlor, using the word " may " in the sense which I have explained in the *Countess of Kenmare's* case (3) (ante, p. 33)? It appears to me that it ought to be for Parliament to consider how far, if at all, such cases should come within the scope of this legislation, and that it may be a difficult task to amend the sub-section so as to reach a just result.

That brings me to my second reason. It is sometimes said that we should apply the spirit and not the letter of the law so as to bring in cases which, though not within the letter of the law, are within the mischief at which the law is aimed. But it has long been recognised that our courts cannot so apply taxing

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Acts, and I venture to repeat what I said in *Inland Revenue Comrs.* v. *Wolfson* (1) ([1949] 1 All E.R. 865 at p. 870):

> " I would express my agreement with my noble and learned friend, Lord Simonds, that it is not the function of a court of law to give to words a strained and unnatural meaning because only thus will a taxing section apply to a transaction which, had the legislature thought of it, would have been covered by appropriate words."

Indeed, I am not at all sure that, if the legislature had foreseen the device used in this case, it would have been easy to find appropriate words which would cover it without also covering cases which ought to be excluded.

I am, therefore, of opinion that this appeal should be dismissed.

LORD COHEN: My Lords, I agree generally with the observations both of the noble and learned Lord on the Woolsack and of the noble and learned Lord, Lord Reid. I will, therefore, limit myself to dealing with the one point on which I am inclined to differ from them.

It relates to the meaning of the word " provision " in s. 38 (2) of the Finance Act, 1938. I agree with Lord Reid that, if a settlement gives a beneficial right to X, that right can, in common parlance, be said to be a provision of the settlement. But, where the word is used in a statute, it has to be construed in the context of the statute as a whole and, in particular, in the present case, in the context of the whole of s. 38. I agree with Singleton, L.J. ([1956] 3 All E.R. at p. 88), that the word " provision " in the phrase " of any provision of the settlement " which is to be found at the end of s. 38 (1) (a) and at the end of s. 38 (1) (b) must mean a clause in the document. Prima facie the same word should be given the same meaning throughout the section and, although the rule is not absolute, I see no sufficient reason for giving a different meaning to " provision " where that word occurs in s. 38 (2). I do not pursue the matter further since, on this construction, it is plain that it cannot be said that the operation of any clause of the settlement would be determined—i.e., put an end to—by the exercise of the power conferred by cl. 4 of the settlement. Clause 3 and cl. 5 would continue to operate on the £100 which must be left in the settlement.

For these reasons, I agree that the appeal should be dismissed.

LORD KEITH OF AVONHOLM: My Lords, it seems to me reasonably clear that when the Finance Act, 1938, by s. 38 (2) (a), refers to a power " to revoke or otherwise determine the settlement or any provision thereof ", it is referring to a settlement or provision conferring a benefit or benefits. In many cases it will matter nothing whether one construes " provision " as meaning the words in a settlement conferring a benefit or the benefit conferred by words in a settlement. If a settlement is revoked or determined the benefits conferred fall with it, and so also if the words of a clause conferring a benefit are revoked or determined. Difficulty arises only where, as here, the power to revoke or determine is limited to a power to revoke or determine part of the benefit made in favour of a particular person or persons. In speaking of part of a benefit I mean, of course, not part of a number of separate benefits but part of what may be thought to be a single benefit.

My Lords, the settlement here has been skilfully drawn. The trusts of the settlement apply only to whatever is to be found in the trust fund at any time. Allowing for the full exercise by the trustees of the powers given to them by cl. 4 of the settlement, the trust fund can never fall below £100 in value. Thus the provision, it is said, even if provision be read as meaning benefit conferred, never changes. The settlor has conferred nothing more than the income and the capital of what the trustees choose to leave in the trust fund, subject to the minimum of £100. This view found favour with Morris and Romer, L.JJ., in the Court of Appeal. This, I think, is to take too narrow a view. The Act is not concerned, in my opinion, with subtleties of conveyancing. It is directed to securing that

> "any income arising under the settlement from the property comprised in the settlement in any year of assessment or from a corresponding part of that property, or a corresponding part of any such income, as the case may be, shall be treated as the income of the settlor for that year and not as the income of any other person"

where there exists in any person the specified power of revocation or determination, with the result of taking out of the settlement the whole or part of the property or income of the settled fund for the benefit of the settlor or the settlor's wife or husband. Looking at the whole language of s. 38 (2), I am impelled to the view that removing a part of the settled fund from the trusts of the settlement for the benefit of the settlor or his wife is a determination of a provision of the settlement.

To state the position in another way, the reality of the transaction, in my opinion, was that the settlor made two provisions, one a provision of the income and capital of so much of the settled fund as should be at any time above £100 in value, which was subject to the trustees' power of determination under cl. 4 of the settlement, and the other a provision of the income and capital of £100 which was not subject to this power of determination. As the power of determination could be exercised in favour of the settlor's wife, nothing more was necessary to bring into operation the effect of s. 38 (2) of the statute.

I would allow the appeal.

LORD SOMERVELL OF HARROW: My Lords, the reference in the Finance Act, 1938, s. 38 (2) (b), to "any part of the property" shows that the sub-section was intended to cover powers by the exercise of which the beneficial interest of part only of the settled property went to the settlor or the settlor's wife or husband. The respondent in the present appeal agreed that if, in the present case, the settlement had provided for a total revocation, £25,000 going to the settlor and £100 to charity, the settlement would have been within the section. It is said not to be within the section because the £100 is left in the settlement; there is no total revocation or determination.

The words "any provision thereof" show that it was intended to cover powers the exercise of which fell short of total revocation or determination of the whole settlement, considered, of course, apart from the "term" which confers the power. If there had been in this case one clause which conferred the discretionary power on the trustees in respect of the £25,000 and another clause which conferred the discretionary power on the trustees in respect of the £100, I find difficulty in seeing how the argument for the respondent could start. It is said, however, that where, as here, the trusts of the funds are declared in one clause there is not a revocation or determination of any provision of the settlement if any funds, however small, are left subject to the trusts. No provision, it is said, has been revoked or determined. I do not think that, in its context in this clause, provision can be so construed.

I am giving, I think, a natural meaning to the word as applied to a settlement. What are the provisions of a settlement? The first matter with which the answerer would naturally deal would be the amount of the settled fund. I think a provision is revoked or determined if, as in the present case, £25,000 is taken out of the settlement. The question of construction does not, of course, turn on the amount taken out.

I would allow the appeal.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Henry Pumfrey & Son* (for the respondent taxpayer).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

Re DAVIES (*deceased*).

DAVIES AND ANOTHER *v.* MACKINTOSH AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), June 26, July 12, 1957.]

Will—Acceleration—Disclaimer by life tenant—Life interest in share of residue—Share to be equally divided between issue on death of life tenant—Whether existing issue take to the exclusion of those subsequently born.

Will—Legacy given by will—Second legacy given by codicil—Whether legacies were cumulative.

By her will a testatrix gave the residue of her estate to be divided equally between her two sons and her stepdaughter, P. She further provided: "[P.'s] portion to be hers for life and then to be divided equally between her issue." On Mar. 22, 1955, the testatrix died and by a deed dated Oct. 5, 1956, P. irrevocably renounced and disclaimed all the life or other interest in the residuary estate of the testatrix attempted or purported to have been given or conferred on her by the will. P. was a widow aged fifty-eight years. She had three children the youngest of whom was nearly twenty-one years old. None of P.'s children had had issue. On the question how P.'s portion should be dealt with,

Held: the effect of the disclaimer was to accelerate the interests of P.'s children and preclude the participation of P.'s remoter issue, and P.'s portion belonged to P.'s three children in equal shares absolutely.

Jull v. *Jacobs* ((1876), 3 Ch.D. 703) applied.

By her will the testatrix gave a legacy of £350 to D. By a codicil she bequeathed to D. £1,000 "thus increasing the sum of £350 as mentioned in my said will, in appreciation of his valuable services and advice over a period of over twenty years."

Held: there being no context to displace the rule that legacies given by different instruments to the same legatee are prima facie cumulative, D. was entitled to the legacy of £1,000 in addition to that of £350.

[**Editorial Note.** The decision in the present case should be compared with that in *Re Taylor*, post, p. 56. In the present case the exclusion of remoter issue was the necessary result of the gift taking effect at an early date in consequence of the disclaimer, but effect was given, as at that date, to the words of the gift according to their true construction. In *Re Taylor* a different result was reached, because the words of the accelerated gift were different, but again effect was given to them according to their tenor, though at the early date consequent on the disclaimer.

As to the acceleration of subsequent interests by the disclaimer of the life interest by the donee, see 34 HALSBURY'S LAWS (2nd Edn.) 132, para. 171; and for cases on the subject, see 44 DIGEST 428-432, *2575-2596*.

As to the rule of construction in the case of gifts in different instruments being presumed to be cumulative, see 34 HALSBURY'S LAWS (2nd Edn.) 360, para. 408.]

Cases referred to:

(1) *Re Johnson, Danily* v. *Johnson*, (1893), 68 L.T. 20; 44 Digest 777, *6346*.
(2) *Jull* v. *Jacobs*, (1876), 3 Ch.D. 703; 35 L.T. 153; 44 Digest 736, *5915*.
(3) *Re Townsend's Estate, Townsend* v. *Townsend*, (1886), 34 Ch.D. 357; 56 L.J.Ch. 227; 55 L.T. 674; 44 Digest 431, *2593*.
(4) *Re Vernon, Garland* v. *Shaw*, (1906), 95 L.T. 48; 44 Digest 432, *2595*.

Adjourned Summons.

This originating summons was issued by the plaintiffs, David William Davies and John Walters Davies who were two of the executors of the will and codicil of the testatrix, Mary Davies, deceased, and who together claimed to be entitled to two-thirds of the residuary estate bequeathed by her will and also to any property of hers as to which she died intestate, for the determination of the following questions (among others): (i) whether, on the true construction of the will of the testatrix and in consequence of the disclaimer (by deed dated Oct. 5, 1956) by Mrs. Primrose Mackintosh, named in the will, of all interest in the residuary estate of the testatrix, the one-third share of such residuary estate bequeathed by the will for the benefit of Mrs. Primrose Mackintosh and her issue (a) now belonged to the defendants, David Donald Mackintosh, Alastair Mackintosh, and Mary Elizabeth Arbell Mackintosh in equal shares absolutely, or (b) ought to be retained by the executors of the will until the death of Mrs. Primrose Mackintosh or for some other and what period, or (c) ought to be dealt with in some other and what manner; (ii) whether on the true construction of the will and codicil the legacy of £1,000 given to the defendant David John Williams by the codicil was (a) in addition to, or (b) in substitution for, the legacy of £350 given to him by the will.

E. I. Goulding for the plaintiffs, two of the executors of the will, and only children of the testatrix.

J. L. Knox for the first three defendants, children (including an infant) of the disclaimant stepdaughter of the testatrix.

H. E. Francis for the fourth defendant, a legatee and the third executor.

Cur. adv. vult.

July 12. **VAISEY, J.**, read the following judgment: This summons deals with two quite distinct questions. They arise on the will and codicil of a testatrix, Mary Davies, who died on Mar. 22, 1955. She was a widow and left issue two children only, the plaintiffs, David William Davies and John Walters Davies, who are accordingly entitled in equal shares to any estate of the testatrix as to which she died intestate. Her will is dated Nov. 13, 1939, and after making certain specific gifts and bequeathing a number of pecuniary legacies, including one of £350 to the defendant David John Williams, she gave and bequeathed the remainder of her estate to be divided equally between her two sons, the plaintiffs, and her stepdaughter Primrose Mackintosh. There follows a direction in the words following, namely: "Mrs. Primrose Mackintosh's portion to be hers for life and then to be divided equally between her issue". The testatrix appointed the plaintiffs and the defendant D. J. Williams to be executors of her will. By a codicil dated Dec. 10, 1954, to her said will, the testatrix bequeathed to the defendant D. J. Williams the sum of £1,000,

> "thus increasing the sum of £350 as mentioned in my said will, in appreciation of his valuable services and advice over a period of over twenty years."

On July 18, 1956, the said will and codicil were proved by the plaintiffs and the defendant D. J. Williams at Carmarthen. By a deed dated Oct. 5, 1956, the said Primrose Mackintosh absolutely and irrevocably renounced and disclaimed all the life or other interest in the residuary estate of the testatrix attempted or purported to have been given to or conferred on her by the will of the testatrix.

Mrs. Mackintosh is now about fifty-eight years of age. She has been married once only and her husband is dead. By her marriage, she had issue three children and no more, namely, the defendants David Donald Mackintosh and Alastair Mackintosh, who are of full age, and the defendant Mary Elizabeth Arbell Mackintosh, who will attain that age on Sept. 28, 1957. None of the said defendants has as yet had issue. The trust funds representing the one-third share bequeathed for the benefit of Mrs. Mackintosh and her issue are now of the approximate value of £3,500 and they produce an annual income of about £140.

The first question to be decided is how the said one-third share ought to be A dealt with in consequence of the said deed of disclaimer. The other question is quite small, viz., whether the £1,000 bequeathed to the defendant D. J. Williams by the said codicil is payable in addition to the £350 bequeathed by the said will or in substitution for that £350. I can deal with that point quite briefly. The rule is that legacies given by different instruments are prima facie cumulative. I find nothing to displace that presumption, and I will declare that the defendant B D. J. Williams is entitled to both the legacies.

Turning to the main question, which is in my judgment a difficult one, I think that the word " then " in the expression " then to be divided " is equivalent to " at her death " or " after her death " or perhaps " subject to her life interest ". Now, but for the disclaimer, the funds would at the death of Mrs. Mackintosh have been divisible in equal shares between a class of persons C comprising all her descendants of whatever degree (children and remoter issue) who had been in existence at any time between the death of the testatrix and the death of Mrs. Mackintosh. Each such person's interest would be an absolute vested interest, so that the class might include not only persons living at the death of Mrs. Mackintosh but also the legal personal representatives of persons who had predeceased her. At present the class consists only of the three children D of Mrs. Mackintosh. One view, which I will call the first view, is that the principle of acceleration now falls to be so applied as to give the fund to those three children to the total and final exclusion of all the other at present non-existent members of the class, i.e., Mrs. Mackintosh's grandchildren and remoter issue. It seems rather surprising that the purely gratuitous act (that is, the disclaimer) of one of the beneficiaries, Mrs. Mackintosh, should operate to deprive E and dispossess a number of other beneficiaries, namely, Mrs. Mackintosh's grandchildren and remoter issue, of the interest which the testatrix had given them by her will. It is clear, however, that acceleration may and does sometimes alter the constitution of a class of beneficiaries from what it would have been if the gift had not been accelerated: see *Re Johnson, Danily* v. *Johnson* (1) ((1893), 68 L.T. 20). Another view, which I will call the second view, is that as F the disclaimed life interest must be treated as struck out of the will and not to have been thereby effectively disposed of, the obvious consequence is a partial intestacy, in which case the income of the fund during the residue of the life of Mrs. Mackintosh is divisible equally between the two sons of the testatrix, leaving the capital of the fund to be divided strictly in accordance with the plain terms of the will. I have mentioned two possible views, but a third is G that the three children of Mrs. Mackintosh should be treated as possessing vested interests liable to be divested by the birth of further issue of Mrs. Mackintosh during her life. Between those three views, I am bound to say that the choice is to my mind difficult, unguided, as I think I am, by any clear authority.

On the whole, I decide this case in favour of the first view, which treats the class of Mrs. Mackintosh's issue as now finally closed, this view being, in my H judgment, supported by *Jull* v. *Jacobs* (2) ((1876), 3 Ch.D. 703). In that case there was a gift to a testator's daughter of real and personal estate during her lifetime, and after her decease the property was to be equally divided between her children on their coming of age. It was held that the gift to the daughter being void on account of her having witnessed the will, the gift to her children was accelerated and took effect immediately. The report seems to make it I clear that it was possible for the daughter to have had further children. In the course of his judgment, MALINS, V.-C., said (ibid., at p. 712):

> " . . . I am clearly of opinion that the remainder is accelerated, and the children take just as if the mother had died immediately after the testator."

To the same effect is *Re Townsend's Estate, Townsend* v. *Townsend* (3) ((1886), 34 Ch.D. 357), of which the headnote reads as follows:

> "Gifts by will of real and personal estate upon trust to convert and pay the income of the proceeds to A. for life, and after A.'s death to pay the capital and income thereof unto the child or children of A. in equal shares, with gifts over in case A. should die without leaving issue living at his death. The will had been attested by A.'s wife, so that the gift of a life interest to him was void under s. 15 of the Wills Act. There were no children of A.'s marriage. The personal estate was exhausted and the trust funds represented real estate only. Held, that until A. had a child the gifts upon the determination of A.'s life estate could not be accelerated, and that during the life of A., and so long as he had no children, the income of the trust funds was undisposed of, and belonged to the heir-at-law, and could not be accumulated for the benefit of the persons contingently entitled in remainder."

Jull v. *Jacobs* (2) was distinguished: and see also *Re Johnson* (1).

What I have called the second view, which is that there is no acceleration, and an intestacy as regards the income during Mrs. Mackintosh's life, may have some support from *Re Vernon, Garland* v. *Shaw* (4) ((1906), 95 L.T. 48); but this is far from being conclusive. For the third view, which seems logical, though it might be awkward to work out in practice, I can find no authority at all.

I will declare that the fund now belongs to the three children of Mrs. Mackintosh in equal shares absolutely. I will also declare that Mr. Williams is entitled to both his legacies. The costs and expenses of the plaintiffs, and the costs (taxed as between solicitor and client) of the defendants, must be raised and retained or paid out of the estate in due course of administration, but so that as between the beneficiaries under the will one half of such costs shall come out of the estate as a whole and the other half out of the fund which goes to the three children of Mrs. Mackintosh.

Order accordingly.

Solicitors: *Theodore Goddard & Co.*, agents for *D. W. Peter Williams & Co.*, Swansea (for the plaintiffs); *Farrer & Co.* (for all defendants other than the fourth); *Walker, Martineau & Co.* (for the fourth defendant).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

Re TAYLOR (*deceased*). A
LLOYDS BANK, LTD. *v.* JONES AND OTHERS.

[CHANCERY DIVISION (Upjohn, J.), July 18, 1957.]

*Will—Acceleration—Disclaimer by life tenant—Interests in remainder vested
subject to defeasance.* B

By her will a testatrix directed her trustee, a bank, to stand possessed
of her residuary trust estate on trust to pay the income arising therefrom
to her brother T. during his life and further declared by cl. 6 that "After
the death of my brother [T.] the bank shall stand possessed of my residuary
trust estate in trust [for G. and T.P.] or such of them as shall be living at the
death of the survivor of myself and the said [T.] absolutely Provided always C
that if either of them the said [G. or T.P.] shall die before the death of the
survivor of myself and my brother the said [T.] leaving issue him surviving
who being male attain the age of twenty-one years or being female attain
that age or marry under that age such issue shall take . . . equally between
them the share which his her or their parent would have taken of and in my
residuary trust estate if he had survived myself and my brother the said D
[T.]." On Feb. 22, 1955, the testatrix died and on Nov. 24, 1955, T.
disclaimed all his interest in the estate of the testatrix. On the question
how the residuary trust estate should be dealt with during the remainder
of the life of T.,

Held: the residuary trust estate should be held on trust for G. and T.P.
in equal shares subject to defeasance as provided in cl. 6 of the will, because E

(i) the gift to G. and T.P. was not contingent (in which case acceleration
would have been excluded), but was vested subject to divesting in the events
specified in cl. 6; and

(ii) on the disclaimer of T.'s life interest the interests subsequent thereto
took effect in accordance with the true construction of cl. 6; the trust for
". . . such of them as shall be living at the death of the survivor of myself F
and the said [T.]" in that clause could not be construed as merely a gift to
"such of them as shall be living at the termination of the foregoing
trust" and the provision for defeasance remained effective during T.'s lifetime.

Re Johnson ((1893), 68 L.T. 20) and *Jull* v. *Jacobs* ((1876), 3 Ch.D. 703)
explained.

Re Davies (p. 52, ante) distinguished. G

[**Editorial Note.** The decision in the present case should be compared with
that in *Re Davies*, p. 52, ante. The distinction is drawn at p. 59, letter F, to
p. 60, letter C, post; and it may be emphasised that in both cases the gift
immediately subsequent to the interest disclaimed took effect according to the
true construction of the will but at the point of time at which the disclaimer H
was effective.

As to acceleration of subsequent interests by the disclaimer of the life interest
by the donee, see 34 HALSBURY'S LAWS (2nd Edn.) 132, para. 171; and for cases
on the subject, see 44 DIGEST 428-432, *2575-2596*.]

Cases referred to: I

(1) *Re Townsend's Estate, Townsend* v. *Townsend*, (1886), 34 Ch.D. 357; 56 L.J.Ch. 227; 55 L.T. 674; 44 Digest 431, *2593*.

(2) *Cripps* v. *Wolcott*, (1819), 4 Madd. 11; 56 E.R. 613; 44 Digest 1187, *10,267*.

(3) *Re Flower's Settlement Trusts, Flower* v. *Inland Revenue Comrs.*, [1957] 1 All E.R. 462.

(4) *Re Davies, Davies* v. *Mackintosh*, ante, p. 52.

(5) *Re Johnson, Danily* v. *Johnson*, (1893), 68 L.T. 20; 44 Digest 777, *6346*.

(6) *Jull* v. *Jacobs*, (1876), 3 Ch.D. 703; 35 L.T. 153; 44 Digest 430, *2586*.

(7) *Re Conyngham, Conyngham* v. *Conyngham*, [1921] 1 Ch. 491; 90 L.J.Ch. 364; 125 L.T. 300; 44 Digest 431, *2591.*

(8) *Re Hatfeild, Hatfeild* v. *Hatfeild*, [1957] 2 All E.R. 261.

Adjourned Summons.

This summons was taken out by Lloyds Bank, Ltd., as sole executor of the will of Bessie Percival Taylor, deceased, for the determination of the question (among others) whether on the true construction of the will of the testatrix and by virtue of the execution by Thomas Taylor of a deed of disclaimer dated Nov. 24, 1955, of all his right, title and interest in every part of the property and estate of the testatrix and the income thereof (whether arising under or by virtue of the said will or otherwise howsoever) the interests in the residuary trust estate of the testatrix given to the first and second defendants, Geoffrey Bethell Jones and Thomas Percival, had been accelerated and had become absolute and indefeasible; and if not, whether, during the lifetime of the said Thomas Taylor, the income of the said residuary trust estate (i) was held on trust for the first and second defendants in equal shares subject to a gift over in the terms of the proviso to cl. 6 of the said will, or (ii) devolved as on a partial intestacy, or (iii) was held on any other and if so what trusts.

J. FitzHugh for the plaintiff, the executor.

E. I. Goulding and *V. G. H. Hallett* for the first and second defendants, Geoffrey Bethell Jones and Thomas Percival.

G. M. Parbury for the third, fourth and fifth defendants, issue of the first defendant and of the second defendant.

A. C. Sparrow for the sixth, seventh, eighth and ninth defendants, persons interested in any property as to which the testatrix died intestate.

Denys B. Buckley for the Treasury Solicitor, who might have been interested in property as to which the testatrix died intestate.

UPJOHN, J.: The testatrix made her will on May 3, 1950, and died on Feb. 22, 1955. She directed her executor and trustee, the plaintiff bank, to stand possessed of her residuary estate and the investments representing the same (called her " residuary trust estate "):

> " Upon trust to pay the actual income arising from my residuary trust estate as from my death to my brother the said Thomas Taylor during his life."

The will continues with cl. 6 which is as follows:

> " After the death of my brother the said Thomas Taylor the bank shall stand possessed of my residuary trust estate in trust to pay and divide the same unto and equally between the said Geoffrey Bethell Jones and Thomas Percival or such of them as shall be living at the death of the survivor of myself and the said Thomas Taylor absolutely Provided always that if either of them the said Geoffrey Bethell Jones and Thomas Percival shall die before the death of the survivor of myself and my brother the said Thomas Taylor leaving issue him surviving who being male attain the age of twenty-one years or being female attain that age or marry under that age such issue shall take per stirpes and if more than one equally between them the share which his her or their parent would have taken of and in my residuary trust estate if he had survived myself and my brother the said Thomas Taylor."

The difficulty in this case has been caused by the fact that the testatrix' brother, Thomas Taylor, disclaimed his life interest on Nov. 24, 1955. He was also her next of kin, and he disclaimed any interest as such in the estate of the testatrix. The question is what happens during the remainder of the life of the testatrix' brother, and three views have been submitted to me: the first view is that it must be treated as though the brother had died, and the first two defendants, Mr. Jones and Mr. Percival, have absolute vested interests which are now indefeasible; the second view is that there is a partial acceleration, i.e., the A property is now held on trust for Mr. Jones and Mr. Percival on the trusts declared by cl. 6 of the will; the third view is that during the remainder of the brother's life there is an intestacy as to income.

Before I deal with those arguments, there is one question of construction of the will with which I must deal. It is, I think, made clear by the observations of CHITTY, J., in *Re Townsend's Estate, Townsend* v. *Townsend* (1) ((1886), 34 B Ch.D. 357) that if at the time of the determination of the prior estate, whether it be by disclaimer, or because the person to whom the will purports to give it witnessed the will or for other reason, the gifts following on that estate are still contingent, there can be no acceleration because, the gifts being still contingent, it cannot be seen whether they will take effect. Income cannot be accumulated pending the contingency, for, by giving away the life estate, the testator has C evinced an intention against accumulation, and therefore necessarily the income must remain undisposed of, at all events until the contingency following on the life interest happens.

It is submitted that the gift after the death of the brother is a contingent gift. The general rule in such a case as this is not in doubt, and it is set out in HAWKINS ON WILLS (2nd Edn.), p. 316. The rule is: D

> "A bequest to several, or to a class, 'or' to such of them as shall be living at a given period, is construed as a vested gift to all, subject to be divested in favour of those living at that period, if there be such; and if none are then living, all are held to take. Thus if the gift be to A for life, with remainder to his children, or such of them as shall be living at his E decease, and no child is living at the death of A, all the children are entitled, as if the gift had been to A for life, with remainder to his children simpliciter. So if the gift be to A for life, and after his death to his children or the survivors:—the rule in *Cripps* v. *Wolcott* (2) ((1819), 4 Madd. 11) being applicable."

It is submitted that although the first words of the gift in cl. 6 fall apparently F within that rule, looking at the whole of the gift it is really contingent because the testatrix has added, at the end of cl. 6:

> "and if more than one equally between them the share which his her or their parent would have taken of and in my residuary trust estate if he had survived myself and my brother the said Thomas Taylor."

G

It is said that that shows that the original gift was contingent. I cannot accept that argument. In using the phraseology which she did in the concluding words of the clause, the testatrix was merely pointing out the interest which Mr. Jones or Mr. Percival would undoubtedly take if they or either of them in fact survived the testatrix and her brother. In my judgment it throws no light on the problem whether the gift is contingent or whether it is vested subject to H being divested. It is equally accurate in either event. Therefore one must construe the will by reference to the actual words of the gift at the beginning of cl. 6, and it seems to me that it is clearly covered by the rule that I have just read.

Accordingly, in my judgment, the gift to Mr. Jones and Mr. Percival is initially vested, and it is liable to be divested in certain events. To take an example, I if Mr. Jones dies in the lifetime of the brother leaving issue, it will go to his issue. If he dies without leaving issue, then it will go to Mr. Percival, provided that Mr. Percival survives the testatrix' brother. If neither of them survives the brother and neither of them leaves issue, then the gift will be divided equally between their estates.

The question then is whether it is possible to accelerate the gift, and, if so, in what manner. The principle of acceleration is well established and well known, and I need read only one authority, viz., the recent case of *Re Flower's*

A *Settlement Trusts, Flower* v. *Inland Revenue Comrs.* (3) ([1957] 1 All E.R. 462). In delivering the judgment of the court, JENKINS, L.J., said (ibid., at p. 465):

> "The principle, I think, is well settled, at all events in relation to wills, that where there is a gift to some person for life, and a vested gift in remainder expressed to take effect on the death of the first taker, the gift in B remainder is construed as a gift taking effect on the death of the first taker or on any earlier failure or determination of his interest, with the result that if the gift to the first taker fails—as, for example, because he witnessed the will—or if the gift to the first taker does not take effect because it is disclaimed, then the person entitled in remainder will take immediately on the failure or determination of the prior interest, and will not be kept C waiting until the death of the first taker."

Applying that, and, as has been said in a number of the earlier authorities, treating the words "after the death" as mere words of limitation and as equivalent to "subject to the foregoing trust", we reach this conclusion, that the gift takes effect immediately on the operation of the disclaimer. That appears to be the prima facie application of the rule, but then a difficulty arises, because D the trusts then following are not absolutely vested remainders. They are vested subject to being divested. Counsel for the first two defendants submits that the trust for Mr. Jones and Mr. Percival is only postponed in order that the life interest may be enjoyed by the brother; that the testatrix desired to ensure that only living objects would receive her bounty; therefore, that the reference to survivorship is nothing more than a reference to the prior life interest, and the E gift becomes absolutely vested when the brother disclaimed as though he had actually died. He referred to a number of authorities.

Since the matter was last before me, VAISEY, J., delivered a reserved judgment in *Re Davies, Davies* v. *Mackintosh* (4) (ante, p. 52). He has permitted me to see a transcript of his judgment, and counsel have had the like opportunity, and they have addressed me on it. The submission made by counsel for the first two F defendants is that it matters not that the class may change by reason of the disclaimer, as undoubtedly it does change, if he is correct in his submission, because the issue of Mr. Jones and Mr. Percival are cut out, although in fact the testatrix' brother is very much alive. VAISEY, J., dealt with that matter, and he said (ante, at p. 54, letter E):

> G "It is clear, however, that acceleration may and does sometimes alter the constitution of a class of beneficiaries from what it would have been if the gift had not been accelerated."

Then he refers to *Re Johnson, Danily* v. *Johnson* (5) ((1893), 68 L.T. 20). In *Re Davies* (4) there was a gift to a Mrs. Mackintosh of a share of the testatrix' estate, and the will said: "Mrs. Primrose Mackintosh's portion to be hers for H life and then to be divided equally between her issue." She, too, disclaimed. Had she not disclaimed, the class of issue would, of course, have been determined as at her death. VAISEY, J., held that as she had disclaimed, the class of issue was to be determined at the date of the death of the testatrix, thereby of course altering the class to take. I respectfully agree with the decision of VAISEY, J. He was treating the words, "then to be divided equally", merely as words of I remainder, and accordingly on the disclaimer there was a gift to Mrs. Mackintosh's issue on the death of the testatrix. A perfectly general rule of law is then applied, that where there is an immediate gift to a class, the class then closes, and that seems to me to be the explanation of this decision. No violence at all was done to the language of the testatrix. All that happened was, that by virtue of the acceleration and applying a general rule of law, the class was ascertained at a different period. That, in my judgment, is also the effect of *Re Johnson* (5). That was a curious case, but it seems to me that it depended on the finding that, on the true construction of the will in that case, the class was to be ascertained, not on the death of a survivor, but on the coming into force of a certain trust for sale. Therefore, it was another example of construing the will according to its ordinary meaning, and then applying the perfectly general rules with regard to a class. That I think is also the explanation of *Jull* v. *Jacobs* (6) ((1876), 3 Ch.D. 703).

The question is whether I can apply that reasoning to this case. It is to be observed at once that unless I am able to construe the words, " or such of them as shall be living at the death of the survivor of myself and the said Thomas Taylor ", as meaning to such of them as shall be living at the termination of the foregoing trust, I am, if I give effect to the argument of counsel for the first two defendants, misconstruing the will. I do not think that as a matter of construction I can so construe the words. The testatrix has made it perfectly clear that the gift is to be to " such of them as shall be living at the death of the survivor of myself and the said Thomas Taylor ", and she has said it again at the conclusion of cl. 6. I do not feel at liberty to depart from her precise language. It seems to me, therefore, that if I were to apply the doctrine of acceleration in the way in which counsel submits that I should apply it, I should be misconstruing the will. That has never, so far as I know, been done.

The principle of acceleration is helpful when one is considering the problem of a gap caused by revocation by codicil or by witnessing the will, or otherwise but it does not permit one to misconstrue the will in order to give effect to the doctrine. Accordingly, I cannot accept counsel's argument, because I am cutting out issue long before the event on which they may be entitled to take, that is, if Mr. Jones or Mr. Percival dies before the survivor of the testatrix and her brother. It seems to me that I am not at liberty in the name of the principle of acceleration to do that violence to the testatrix' language. I must, therefore, reject that argument.

It is said by counsel for the third, fourth and fifth defendants that there is a partial acceleration, and the property should be held on the trusts declared by cl. 6. Counsel for the Treasury Solicitor has argued that that cannot be done, because, he submits, the doctrine of acceleration applies only where there is an absolute vested remainder following on the life interest which has determined. I see no reason for such a limitation on the doctrine and it is not justified on the authorities. In the first place, in *Re Townsend's Estate* (1) it is perfectly plain that CHITTY, J., thought that there could be a gap and an intestacy as to income as the gift was then contingent but that gap could be filled, and then there would be an acceleration, because he pointed out that although the income was undisposed of, if there should be a child born to W. S. Townsend, then *Jull* v. *Jacobs* (6) would apply, and the interest of children in remainder would be accelerated. Furthermore, it seems to me that the view that there must be an absolute vesting is contrary to the decision of the Court of Appeal in *Re Conyngham, Conyngham* v. *Conyngham* (7) ([1921] 1 Ch. 491). In that case there was by a will dated in 1915 a devise of certain estates to the use of the testator's brother, the plaintiff, for life, with remainder to the use of the plaintiff's first and other sons successively, according to seniority in tail male, with remainder to the use of the nephew, the infant defendant, for life. Then there was a revocation of the plaintiff's life interest by codicil. He had at the time no issue, and therefore there was a gap. It was held that the nephew, the infant defendant, took because he had a vested remainder, but of course that could be divested, as appears from the headnote, if the plaintiff had a son, but until he had a son there was an acceleration in favour of the next remainderman.

Counsel for the Treasury Solicitor tried to escape from the consequences of that decision by saying that it was not a case of a vested remainder liable to be divested, but a mere postponement. That is too subtle. It was clearly a case of a vested remainder liable to be divested and HARMAN, J., so treated it when dealing with *Re Conyngham* (7) in *Re Hatfeild, Hatfeild* v. *Hatfeild* (8) ([1957] 2 All E.R. 261).

The next point that counsel for the Treasury Solicitor put was this: he said that in any event, and apart from his earlier argument, if the submission made by counsel for the third, fourth and fifth defendants were adopted, the first two defendants would be given interests not given to them by the will, because, he submits, the testatrix intended that one or other of them should receive on the death of the life tenant an absolute interest in possession, and she did not intend that they should have in possession, first of all, interests subject to defeasance, and then, on the death of the brother, interests if they were then living which were indefeasible. He submitted, therefore, that in that way it was very like a contingent gift, because, he said, the persons to take could not be ascertained until the brother died. I cannot myself accept that argument either. The ordinary canons of construction must be applied. The testatrix says that after the death of her brother her residuary trust estate is subject to certain trusts. Namely a trust to pay and divide the residuary estate equally between Mr. Jones and Mr. Percival, with certain clauses of defeasance. I have already held that in my judgment the interest was a vested interest on the death of the testatrix. The question is when did it vest in possession. That must be found on the true construction of the will. It seems to me that as a matter of construction it vested in possession immediately on the determination of a prior estate, and, therefore, although the first two defendants may have received some interest not entirely contemplated by the testatrix, nevertheless they are there waiting to receive a vested remainder on the determination of the prior estate. It is not an absolutely vested remainder, but it is a remainder subject to defeasance. That, as a matter of construction, seems to me to be the necessary consequence that flows from the disclaimer. The defeasance clauses and the proviso remain. It follows, therefore, that the trustees must hold the residuary estate on the trusts set out in cl. 6. I will declare that the residuary trust estate is now held on trust for the defendants Mr. Jones and Mr. Percival in equal shares, subject to defeasance as provided by cl. 6 of the will.

Declaration accordingly.

Solicitors: *Slater, Heelis & Co.*, Manchester (for the plaintiff); *Stoneham & Sons*, agents for *Grundy, Kershaw, Farrar & Co.*, Manchester (for the defendants, except the last defendant); *Treasury Solicitor*.

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re AUSTIN MOTOR CO., LTD.'S AGREEMENTS.

[CHANCERY DIVISION (Upjohn, J.), June 19, 20, 21, July 18, 1957.]

Restrictive Trade Practices—Agreements—Registration—Excepted agreements—Agreements between motor manufacturers and dealers—Bipartite agreements substituted for former multipartite agreements—Whether former agreements to be taken into consideration in interpreting new agreements—Restrictive Trade Practices Act, 1956 (4 *&* 5 *Eliz.* 2 *c.* 68), *s.* 6 (3), *s.* 7 (2), *s.* 8 (3).

Contract—Construction—Substance of transaction—New bipartite trade marketing agreements replacing old multipartite agreements—Alteration made to avoid registration—Whether continuance of multipartite arrangement inferred—Restrictive Trade Practices Act, 1956 (4 *&* 5 *Eliz.* 2 *c.* 68), *s.* 6 (1), *s.* 8 (3).

The applicants were manufacturers of motor cars. They appointed distributors for large areas of country. Within these areas dealers, who purchased cars from the distributors, were appointed for sub-areas. Retail dealers, who purchased cars from the dealers, were appointed. Each of these persons entered annually into an agreement with the applicants expiring at the end of July. Many of these agreements were multipartite, e.g., to agreements with retail dealers the dealers and the distributors were normally parties as well as the applicants. The provisions of the multipartite agreements were such as to bring them within s. 6 (1)* of the Restrictive Trade Practices Act, 1956, and to render them subject to registration under s. 9 of the Act. In February, 1957, pursuant to a clause in the annual agreement then current included therein in view of the Act of 1956, the applicants entered into bipartite agreements with a distributor and a dealer. The applicants proposed to enter into appropriate similar bipartite agreements with all distributors, dealers and retail dealers. Under the new agreements, for example, dealers agreed to buy a certain number of cars from the applicants or such source as the applicants should direct, whereas under old agreements dealers had agreed to buy the cars from the distributor. It was conceded that prima facie the new agreements were excepted from registration by s. 8 (3)† of the Act of 1956, as being bipartite agreements within that enactment, but it was contended on behalf of the respondent, the Registrar of Restrictive Trading Agreements, that substantially the applicants were continuing the same trading organisation and that multipartite "arrangements" between three or more parties should be inferred and that these were subject to registration. No further or collateral arrangements, not contained in the new agreements, were, however, alleged.

Held: the new bipartite agreements were within s. 8 (3) of the Restrictive Trade Practices Act, 1956, and were not subject to registration, since the history of the trading organisation and the surrounding circumstances of the new agreements could not be invoked successfully for the purpose of altering the interpretation of the new agreements, whose operation was clear and unambiguous.

[**Editorial Note.** Authorities on the doctrine, which was at one time thought to prevail in revenue cases, that the legal terms of a contract might be ignored in favour of the so-called substance of the transaction will be found in 20 HALSBURY'S LAWS (3rd Edn.) 13, para. 7, note (a).

For the Restrictive Trade Practices Act, 1956, s. 6, s. 7 (2), s. 8 (3), s. 9 and s. 13, see 36 HALSBURY'S STATUTES (2nd Edn.) 937, 939, 940, 942 and 946.]

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* The terms of s. 6 (1) are printed at p. 64, letter G, post.

† The terms of s. 8 (3) are printed at p. 65, letter E, post.

Cases referred to:

(1) *Dunlop Pneumatic Tyre Co., Ltd.* v. *Selfridge & Co., Ltd.*, [1915] A.C. 847; 84 L.J.K.B. 1680; 113 L.T. 386; 12 Digest (Repl.) 234, *1754*.

(2) *Inland Revenue Comrs.* v. *Westminster (Duke)*, [1936] A.C.1; 104 L.J.K.B. 383; 153 L.T. 223; 19 Tax Cas. 490; Digest Supp.

Adjourned Summons.

The applicants, Austin Motor Co., Ltd., applied by originating summons for a declaration, under s. 13 (2) of the Restrictive Trade Practices Act, 1956, that two agreements, dated Feb. 26, 1957, were not subject to registration under the Act. One of the agreements was between the applicants and Car Mart (Sales), Ltd., distributors of motor cars manufactured by the applicants, and the other agreement was between the applicants and Southend Motor & Aero Co., Ltd., subsidiary dealers in the applicants' cars. The application was opposed by the Registrar of Restrictive Trading Agreements.

The facts are stated in the judgment.

G. T. Aldous, Q.C., and *D. C. Johnson-Davies* for the applicants.

The Solicitor-General (*Sir Harry Hylton-Foster, Q.C.*) and *J. R. Cumming-Bruce* for the Registrar of Restrictive Trading Agreements.

Cur. adv. vult.

July 18. **UPJOHN, J.**, read the following judgment: The applicants, Austin Motor Co., Ltd. (whom I will call "Austins") are well-known manufacturers of motor cars and normally sell their cars to the public through dealers appointed throughout England and Wales. The term "agents", though used frequently by the public, is in fact a misnomer because, except for certain limited purposes, these appointed persons are not agents in law, but sales to the public are carried out by a series of sales and re-sales between Austins and their network of dealers. The general pattern of Austins' sales organisation until 1957 was this. Austins appoint distributors or main dealers for certain quite large areas of the country who enter into annual written agreements with Austins, whose operation begins on Aug. 1 in one year and ends on July 31 in the next. As an example, an agreement with Car Mart (Sales), Ltd., trading as Adams Garage, Colchester (whom I shall call "Car Mart"), dated Aug. 1, 1956, has been discussed in argument before me. The area in respect of which Car Mart is appointed distributor, sacrificing complete accuracy for brevity, is the county of Essex, except the thickly populated urban area in the south-west of that county. Within the distributor's area two or three subsidiary agents may be appointed. They are known as dealers. Dealers also enter into annual written agreements, also dated Aug. 1 in each year, with Austins. Normally the distributor for that area is also a party to the agreement. Again, by way of example, a dealer in the Car Mart area has been selected, namely, Southend Motor & Aero Co., Ltd. (whom I shall call "Southend Motors"), and agreements with Southend Motors have been discussed in argument before me. The sub-area in respect of which this dealer is appointed is that part of the Car Mart area in the county of Essex, again very approximately, south of the River Crouch.

By these annual agreements the distributor is bound to purchase a certain number of Austin cars, as specified in the agreement, from Austins in each year. I do not propose to give away trade secrets by saying how many, but in the case of Car Mart it amounts to a substantial figure. A certain proportion, roughly a quarter, of these cars are available for sale by the distributor to the public, but the remainder must be available for re-sale in the trade. The cars are sold to the distributor at the current retail price, less a discount of $17\frac{1}{2}$ per cent. The cars permitted to be sold to the public may be sold to any individual purchaser not buying for re-sale in the way of his trade, whether or not he lives in the distributor's area, but only at the full retail price. In addition, the distributor is bound to maintain a certain number of new and unused current vehicles for show purposes and a certain rather lesser number of demonstration models. The dealer is likewise bound to purchase a certain number of cars each year, and he is at liberty to sell them at the full retail price to any individual purchaser wherever he lives, but, as in the case of the distributor, a certain number of cars must be available for re-sale in the trade. The dealer purchases his cars for re-sale from the distributor for his area and they are invoiced to him at the full retail price, less a discount of 17½ per cent., and in that event Austins pay the distributor an additional discount of four per cent. The dealer is also bound to maintain on his premises a certain number of show and demonstration vehicles, though fewer than the distributor.

Next in order of importance comes the retail dealer. He is also bound by an annual written agreement beginning on Aug. 1 each year. Normally the distributor and dealer are also parties to the agreement. As I understand it, the retail dealer is not appointed in respect of any area, but he undertakes to purchase so many Austin motor cars every year for sale to purchasers buying retail only. He does not re-sell in the trade. He normally purchases from a dealer at a discount of 17½ per cent. off the current list price and the dealer in such circumstances gets a discount of two per cent. The retail dealer is bound to maintain one demonstration car. There are other classes of dealers, for example, registered dealers, who are probably distributors or main dealers in some other make of car, but who desire to run a small line in Austin motor cars—they receive a discount of ten per cent.—and stocking traders who, for some reason, get a discount of fourteen per cent. On the evidence, the number of appointed distributors or main dealers at present, that is for the year 1956-57, is about 141. There are 157 dealers, 1,050 retail dealers, 1,019 stocking traders and 1,589 registered traders. In addition, a number of distributors and so on are appointed for commercial vehicles only.

That is the outline of Austins' sales organisation, and the question which I have to determine is whether the agreements to give effect to it are subject to registration under the Restrictive Trade Practices Act, 1956. Before examining the agreements in greater detail, however, it will be convenient to look at the relevant provisions of that Act. Section 6 (1), (2) and (3), is in these terms:

> " (1) Subject to the provisions of the two next following sections, this Part of this Act [Part 1*] applies to any agreement between two or more persons carrying on business within the United Kingdom in the production or supply of goods, or in the application to goods of any process of manufacture, whether with or without other parties, being an agreement under which restrictions are accepted by two or more parties in respect of the following matters, that is to say:—(a) the prices to be charged, quoted or paid for goods supplied, offered or acquired, or for the application of any process of manufacture to goods; (b) the terms or conditions on or subject to which goods are to be supplied or acquired or any such process is to be applied to goods; (c) the quantities or descriptions of goods to be produced, supplied or acquired; (d) the processes of manufacture to be applied to any goods, or the quantities or descriptions of goods to which any such process is to be applied; or (e) the persons or classes of persons to, for or from whom, or the areas or places in or from which, goods are to be supplied or acquired, or any such process applied.
>
> " (2) For the purposes of the foregoing sub-section it is immaterial whether any restrictions accepted by parties to an agreement relate to the same or different matters specified in that sub-section, or have the same or different

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* Part 1 of the Act contains s. 1 to s. 23, and provides for the registration and judicial investigation of restrictive trading agreements.

> effect in relation to any matter so specified, and whether the parties accepting any restrictions carry on the same class or different classes of business.
>
> " (3) In this Part of this Act 'agreement' includes any agreement or arrangement, whether or not it is or is intended to be enforceable (apart from any provision of this Act) by legal proceedings, and references in this Part of this Act to restrictions accepted under an agreement shall be construed accordingly; and 'restriction' includes any negative obligation, whether express or implied and whether absolute or not."

Pausing there, I have already said sufficient to indicate that, had the Act stopped there, all the sub-paragraphs of s. 6 (1) would apply to these agreements, except possibly sub-para. (d), but the sub-section is expressly stated to be subject to the provisions of the two next following sections.

Section 7 (2) is in these terms:

> " In determining whether an agreement for the supply of goods or for the application of any process of manufacture to goods is an agreement to which this Part of this Act applies, no account shall be taken of any term which relates exclusively to the goods supplied, or to which the process is applied, in pursuance of the agreement . . . "

I do not read the proviso which, it is agreed, has no application to this case. Section 8 (3) is in these terms:

> " This Part of this Act does not apply to any agreement for the supply of goods between two persons, neither of whom is a trade association within the meaning of s. 6 of this Act, being an agreement to which no other person is party and under which no such restrictions as are described in s. 6 (1) of this Act are accepted other than restrictions accepted—(a) by the party supplying the goods, in respect of the supply of goods of the same description to other persons; or (b) by the party acquiring the goods, in respect of the sale, or acquisition for sale, of other goods of the same description."

Section 9 provides for registration of every agreement to which Part 1 of the Act applies, and by the operation of the Registration of Restrictive Trading Agreements Order, 1956 (S.I. 1956 No. 1869), agreements of the class which I have to consider became subject to registration on or before Feb. 28, 1957. On the day before that date Austins issued an originating summons under s. 13 (2) of the Act, asking for a declaration that the relevant agreements were not subject to registration under the Act. Accordingly, by virtue of s. 13 (3), the period for registration, if it be found that the agreements are subject to registration, is extended by a period equal to the period during which this proceeding and every appeal therefrom is pending and such further period as the court may direct.

On Aug. 1, 1956, in the usual way, Austins entered into annual agreements with their distributors, dealers, retail dealers and so on. The agreements are in printed common form for each type of agreement, except, of course, as to the number of cars to be purchased and so on, and are very long and detailed. I do not propose to read any of the clauses at length. Beyond dealing with the primary methods of sale and re-sale, which I have briefly mentioned, these agreements deal with after-sales service, supply of spare parts and other matters which I shall mention later. Following the practice in earlier years, some of the agreements were bipartite, for example, between Austins and a distributor, some tripartite, for example between Austins, a distributor and a dealer, and some even quadripartite, for example between Austins, a distributor, a dealer and a retail dealer. In the case of the last three classes of agreement the protection afforded by s. 8 (3) is, it is conceded by Austins, not available, though s. 7 (2) remains available.

Again, however, it is not disputed that s. 7 (2) does not prevent Part 1 of the Act applying to the multipartite agreements with Austins, for, while many conditions appear in these agreements which prima facie are within s. 6 (1), but which are to be left out of account as being terms which relate exclusively to the goods supplied (for example, price controls), there are many other terms which do not so relate. For example, in the first tripartite form of agreement, dated Aug. 1, 1956, to be found in exhibit E.W.P.3, cl. 6 (a) precludes the dealer from contracting for the sale of cars, light vans, and other specified types of vehicles made or dealt in by any other motor manufacturing or concessionaire without Austins' consent in writing. Clause 7 (a) precludes the dealers from selling or permitting to be sold any vehicle or second-hand, shop soiled or used vehicle of Austins' manufacture for export outside the United Kingdom without Austins' written permission. Clause 18 (a) provides that where vehicles of any make are taken in part exchange the dealer is to have regard to the prices in the current issue of the National Used Vehicle Price Book. Again, cl. 20 compels the dealer to appoint in his territory retail dealers and stocking traders either in accordance with Austins' nomination or in accordance with his own nomination, provided the same be approved by Austins.

The Act passed into law on Aug. 2, 1956, and, no doubt seeing these difficulties in their way, every agreement of Aug. 1, 1956, contained this final clause:

> " 50. In that the Restrictive Trade Practices Bill is likely to become law during the currency of this agreement and in that it is impossible at the present time to forecast those alterations and modifications of [Austins'] orderly marketing arrangements which the said Bill in its final form may require or which [Austins] may consider advisable or desirable in the light thereof, it appears reasonably certain that a number of alterations and amendments to this agreement will be necessary during its currency. It is therefore agreed that, notwithstanding anything contained in this agreement, [Austins] shall have the right at any time on giving fourteen days' notice to the signatory to alter or amend this agreement or to substitute a new agreement or agreements in so far as may be necessary or advisable to enable [Austins] to uphold [their] orderly marketing arrangements in the light of the Restrictive Trade Practices Bill when it becomes law. Provided always that this clause shall not in itself be deemed to entitle [Austins] to vary the margins, discounts, or commissions agreed to be paid or allowed to the signatory hereunder or to require him to undertake the stocking of a greater number of vehicles or parts than is otherwise provided herein."

On Nov. 16, 1956, Austins sent out to all their distributors, main dealers, retail dealers and stocking traders a remarkable letter which purported to turn every mutilateral agreement into a bilateral agreement. How it was to work counsel for Austins was quite unable to explain to me, but I am relieved of the task of considering this unintelligible letter for the reason that all such multilateral agreements will determine by effluxion of time on July 31,1957. Austins are prepared to give an undertaking to the court not to enter into any such multilateral agreements in the future, and accordingly, if I prolong the period for registration under s. 10 and s. 13 of the Act until Aug. 1, 1957, it follows that no such agreements will become subject to registration. The Solicitor-General does not oppose this course.

Conceding that at any rate the multilateral agreements would be subject to registration, apart from the arrangement which I have just mentioned, on Feb. 26, 1957, by way of providing a test case, Austins entered into new agreements with Car Mart and Southend Motors respectively which purported to regulate the relations of the parties as from Aug. 1, 1956. I will call these " the new agreements ". Similar agreements were entered into with a distributor and with a dealer both operating in the county of Somerset, but I need not refer to them further. Austins propose to enter into similar bipartite agreements with all their dealers in a form appropriate to each type of dealer on Aug. 1, 1957.

The new agreements with Car Mart and with Southend Motors respectively are both bipartite. The Solicitor-General concedes that the new agreements satisfy the conditions contained in s. 8 (3) of the Act standing by themselves, and, therefore, Part 1 does not prima facie apply to them, but for reasons which appear later he submits that they are in law subject to registration. Nearly all of the clauses in the earlier series of agreements and in the new agreements are substantially the same and in many cases identical, but differ in this essential, that, whereas the relationship between Austins and the distributor and Austins and the dealer are practically unaffected, there was no longer any legal nexus between distributor and dealer or between distributor, dealer and retail dealer. I propose to illustrate this by comparing a few clauses in one of the old tripartite agreements with the new agreements.

The first two sentences of cl. 2 of the old tripartite agreement (Austins, distributor, dealer) read as follows:

> "The dealer agrees to purchase from the distributor and the distributor agrees to purchase from [Austins] and re-sell to the dealer between Aug. 1, 1956, and July 31, 1957, both days inclusive (hereinafter called 'the current contract period') such vehicles as may be specified in the schedule attached hereto, or, if not so specified, as shall form his proportion of the distributor's allocation of vehicles for the home market during the said period as notified to him by the distributor from time to time. The dealer will use his best endeavours to dispose of at least the quantities so specified and to promote the sale of [Austins'] vehicles."

The first two sentences of cl. 2 of the new agreement between Austins and the distributor read as follows:

> "The distributor agrees to purchase from [Austins] and [Austins agree] to sell to the distributor between Aug. 1, 1956, and July 31, 1957, both days inclusive (hereinafter called 'the current contract period') such vehicles as may be specified in the schedule attached hereto, or, if any model of vehicle so specified shall cease to be produced by [Austins], such other vehicles as [Austins] may by notice in writing to the distributor substitute for such vehicles no longer produced, so that the total number of each model (including substituted models) of vehicle to be purchased hereunder shall equal the total number of each model of vehicle specified in such schedule, and such other vehicles as may be mutually agreed."

That is the same as the old bipartite agreement between Austins and the distributor.

Clause 2 of the new agreement between Austins and the dealer reads as follows:

> "The dealer agrees to purchase from [Austins] or from such source as [Austins] shall direct and [Austins agree] to sell or procure to be sold to the dealer between Aug. 1, 1956, and July 31, 1957, both days inclusive (hereinafter called 'the current contract period') such vehicles as may be specified in the schedule attached hereto, or, if any model of vehicle so specified shall cease to be produced by the company, such other vehicles as the company may by notice in writing to the dealer substitute for such vehicles no longer produced, so that the total number of each model (including substituted models) of vehicles to be purchased hereunder shall equal the total number of each model of vehicle specified in such schedule, and such other vehicles as may be mutually agreed."

By the old tripartite agreement (cl. 12) the dealer undertakes that retail dealers and stocking traders appointed under cl. 20 shall maintain a stock of demonstration vehicles in good order. By the new agreement with the dealer (cl. 10) he gives a similar undertaking as "agent" of Austins. In cl. 16 (a) of the old tripartite agreement it is provided that Austins will invoice all vehicles to the dealer through the distributor at a discount of 17½ per cent. from Austins' current retail list price. In the new agreement with the dealer (cl. 15 (a)) it is provided that Austins will invoice or cause to be invoiced all vehicles to the A dealer at a discount of 17½ per cent.

In the old agreement (cl. 20 (a), which I have already mentioned), the dealer is to appoint in his territory retail dealers and stocking traders either in accordance with Austins' nomination or in accordance with his own, provided it be approved by Austins. In the new agreement (cl. 18) the dealer is expressed to appoint retail dealers and stocking traders "as agent and on behalf of [Austins]". B In the old agreement (cl. 29) payment of vehicles contracted to be purchased under the agreement is to be paid for in cash through the distributor to Austins. In the new agreement (cl. 25) the cash is to be paid " to [Austins] or as [Austins] shall direct ".

It is further to be observed that in certain paragraphs, which do not form part of the agreement but which are printed with it under the heading " Please C note before signing ", this statement appears in both the old and new forms:

> " 6. Distributors must ensure agreement between dealers regarding the boundaries of their respective areas. It should only be necessary to refer such matters to [Austins] if agreement cannot be reached."

There are other striking similarities and significant differences between the D old and new agreements, but I have referred to sufficient to illustrate the argument of the Solicitor-General. His submission on behalf of the registrar is that the new agreements with the distributor (Car Mart) and with the dealer (Southend Motors), respectively, fall within Part 1 of the Act and are subject to registration. He draws my attention to four special features in this case.

First, he submits that until the change attempted in November, 1956, the E real basis of Austins' method of doing the business of selling their cars to the public was by a series of multipartite agreements with their various appointed dealers. That, in my judgment, is a perfectly fair comment.

Secondly, it is submitted that in substance there is no evidence of any desire on the part of Austins or any of their dealers to make any change in the way business is done, and the flow of cars sold to the public is still precisely the same, F that is to say, Austins to distributor, who takes four per cent. discount, to dealer, who takes two per cent. discount, to retail dealer, who effects the sale and receives 17½ per cent., although, of course, many sales are made direct to the public at the full retail price by distributors and dealers and, apparently, by Austins themselves. The dealers still remain bound to Austins by the same restrictions as before, for example, on price to be offered for second-hand cars, G though the formula differs slightly, in dealing with other makes of car, in prohibition on export and in many other ways. The provisions as to maintaining show and demonstration models, arrangements as to after-sales service, spare parts and other matters also remain identical or substantially the same. I agree with that as a statement of substance.

Thirdly, the Solicitor-General submits that the commercial efficiency of the H whole selling organisation depends on the existence of these parallel agreements. No one would enter into these agreements containing their many restrictions on re-sale and price control, dealing with other makes of car and second-hand prices (to mention only a few) unless all other dealers dealing in Austin motor cars were doing likewise. I dare say that is true. Fourthly, if one looks at the whole pattern of the arrangement, it is said to involve an acknowledgment on the I part of each agent of the terms of the agreement by which every other agent is bound.

Thus, the Solicitor-General submits that one finds originally a series of multipartite agreements and a desire to maintain that sales structure, but it becomes inconvenient having regard to the operation of the Act; solely to avoid its application, as is shown by the concluding clause of the series of agreements of Aug. 1, 1956, the annual agreements will no longer be multilateral agreements and now undoubtedly become, as a matter of legal form, a series of bipartite agreements; but there is no real intention to change the substance of the whole arrangement and these new agreements must be read in the light of the history and the acknowledged reason for the change. It is submitted that one then finds that the real arrangement between the parties is maintained as before, not perhaps any longer as an agreement enforceable at law, but nevertheless as an arrangement, or gentlemen's agreement or arrangement, as it is frequently called, falling within s. 6 (3) of the Act. Let me read that sub-section once again:

> " In this Part of this Act ' agreement ' includes any agreement or arrangement, whether or not it is or is intended to be enforceable (apart from any provision of this Act) by legal proceedings, and references in this Part of this Act to restrictions accepted under an agreement shall be construed accordingly; and ' restriction ' includes any negative obligation, whether express or implied and whether absolute or not."

The Solicitor-General referred me to some observations of LORD DUNEDIN in *Dunlop Pneumatic Tyre Co., Ltd.* v. *Selfridge & Co., Ltd.* (1) ([1915] A.C. 847, at p. 855), and submitted that really Austins might be regarded as the agent of the distributors and dealers to ensure that by this network of bipartite agreements the real mutual interdependence of the agreements is maintained. I cannot, however, regard that submission as justified on the facts of this case. Austins were not in any sense acting as agents for their own dealers. Austins call the tune.

Then I was referred to a number of the building scheme cases, but I do not think that they help in this case. Building schemes appear in the reports in many guises and forms, but there runs through all of them the basic fact that one must find an intention that each purchaser buys his plot of land on the footing that he is entitled to the benefit of the restrictions against all other owners and is in his turn bound to observe them for the benefit of all the others. The essence is mutual contract.

The whole question here is whether there is or is not a mutual contract or arrangement, whether enforceable at law or not. I do not propose to attempt any definition of " arrangement " in s. 6 (3). But to escape the alleviation afforded to the subject by s. 8 (3) some arrangement binding three or more parties must be spelt out of the facts, it being conceded that the conditions of the sub-section are otherwise satisfied. Whether enforceable at law or not, it seems to me that an arrangement must at least connote an arrangement whereby the parties to it accept mutual rights and obligations. Reading these new agreements alone and without reference to the earlier history of the matter, it is clear that each of them falls within the protection afforded by s. 8 (3), and the Solicitor-General does not dispute that. He seeks, however, by reference to the four especial features mentioned earlier*, to alter the proper interpretation and operation of these new agreements and, reading them together, to spell out of them a mutual agreement or arrangement between distributor and dealer. That does not seem to me permissible in law. While every agreement must be read in the light of surrounding circumstances, and the agreements may be read together in the sense that they are all part of Austins sales organisation, those circumstances cannot be invoked to alter the true interpretation of a document or of two or more documents whose operation is clear and unambiguous, so as to create an obligation where none appears on the documents.

There is, I think, a certain analogy between this case and *Inland Revenue Comrs.* v. *Duke of Westminster* (2) ([1936] A.C. 1), although there are many differences between that case and this. In that case the Duke, with the avowed object of saving tax, " in substance " paid his servants by means of seven year covenants but it was held that the documents must operate according to their tenor, they were not contracts of employment and the Duke succeeded. So here, it seems to me, that Austins, to avoid the consequences of liability to registration, have altered the legal framework of their agreements with their dealers, but those new agreements now define and regulate the transactions between the parties; multipartite agreements have gone and as a matter of law reference to history cannot resuscitate them.

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* See p. 68, letters E to I, ante.

I could well understand that in the light of the four special features the Solicitor-General might have asked me to infer as a fact that, in truth, the new agreements did not include the whole of the arrangements between the parties; that, in truth, there was a continuance of the old multipartite arrangement, an arrangement still continuing between Austins, the distributor, the dealer and retail dealer, an arrangement unenforceable at law, a gentlemen's arrangement, dark, secret and hidden, but nevertheless an arrangement which went beyond and outside the four walls of the new agreements. Such a submission, however, was never made. As I pointed out in the course of argument, had such a submission been made, I must have allowed Austins, their distributors, dealers, retail dealers and so on to bring evidence, if they so desired, to rebut such an inference; that evidence would, of course, be open to cross-examination on behalf of the registrar, but the Solicitor-General disclaimed any desire to conduct such cross-examination. In the circumstances, I can only take the new agreements as they stand. On the facts of this case they contain the whole of the arrangements between the parties, no further or collateral arrangements being alleged. On their true construction the agreements dated Feb. 26, 1957, are excepted from the operation of Part 1 of the Act and, in my judgment, are not subject to registration.

Declaration accordingly.

Solicitors: *Osmond, Bard & Westbrook* (for the applicants); *Treasury Solicitor.*

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

LAW (VALUATION OFFICER) *v.* WANDSWORTH BOROUGH COUNCIL.
PARKIN (VALUATION OFFICER) *v.* CAMBERWELL BOROUGH COUNCIL.

[COURT OF APPEAL (Lord Evershed, M.R., Morris and Pearce, L.JJ.), July 11, 1957.]

Rates—Limitation on value of hereditament—Burial ground—Land acquired under the provisions of the Burial Act, 1852*—Crematorium—Whether entitled to limitation on value as burial ground—Burial Act,* 1852 (15 *&* 16 *Vict. c.* 85), *s.* 26*—Burial Act,* 1855 (18 *&* 19 *Vict. c.* 128), *s.* 15*—Cremation Act,* 1902 (2 *Edw.* 7 *c.* 8), *s.* 4.

A metropolitan borough council, who succeeded in 1900 burial boards that had acquired land pursuant to s. 26 of the Burial Act, 1852, constructed in the years 1936 to 1938 a crematorium on the land in pursuance of the Cremation Act, 1902. By s. 4* of that Act the powers of a burial authority to provide burial grounds were deemed to extend to and include the provision of crematoria. On the question whether the crematorium was entitled to the limitation of rateable value provided by s. 15 of the Burial Act, 1855†, for " land . . . hereafter . . . acquired under the provisions of any of the Acts hereinbefore recited " (which included the Burial Act, 1852) " for the purposes of a burial ground ",

Held: the crematorium was entitled to the limitation of rateable value provided by s. 15 of the Burial Act, 1855, since—

(i) the land used for a crematorium was deemed, by virtue of s. 4 of the Cremation Act, 1902, to have been acquired pursuant to the statutory power conferred by s. 15 of the Burial Act, 1855, and

(ii) being land used as a crematorium it was also deemed by virtue of s. 4 of the Act of 1902 to be used for purposes within s. 15 of the Act of 1855.

Appeal dismissed.

[For the assessment of burial grounds under the Burial Act, 1855, s. 15, see 4 HALSBURY'S LAWS (3rd Edn.) 57, para. 156; and 27 HALSBURY'S LAWS (2nd Edn.) 380, para. 813.

For the Burial Act, 1852, s. 26, the Burial Act, 1855, s. 15, and the Cremation Act, 1902, s. 4, see 2 HALSBURY'S STATUTES (2nd Edn.) 707, 734, 796.]

Case Stated.

The valuation officers appealed by way of Case Stated against decisions of the Lands Tribunal given on Apr. 16, 1956, dismissing their appeals against decisions of the South West London Local Valuation Panel and the South East London Local Valuation Panel respectively. The local valuation courts had decided that the descriptions of two hereditaments owned and occupied by the Council of the Metropolitan Borough of Wandsworth and the Council of the Metropolitan Borough of Camberwell respectively in the valuation lists for their rating areas should, in the first case, be altered from " Cemetery and two lodges " to " Cemetery, lodges and crematorium " and should, in the second case, remain unaltered as " New cemetery and lodge (excluding crematorium) " and that the assessments should be altered as follows. The assessment of the hereditament belonging

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* The relevant terms of s. 4 are printed at p. 73, letter E, post.

† Section 15 of the Burial Act, 1855, provides:

" No land already or to be hereafter purchased or acquired, under the provisions of any of the Acts hereinbefore recited, for the purpose of a burial ground (with or without any building erected or to be erected thereon), shall while used for such purposes be assessed to any county, parochial, or other local rates at a higher value or more improved rent than the value or rent at which the same was assessed at the time of such purchase or acquisition."

A to the Wandsworth Metropolitan Borough Council should be increased from £68 gross value and £50 rateable value to £756 gross value and £255 rateable value (the valuation officer had proposed £4,125 gross value and £2,750 rateable value). The assessment of the hereditament belonging to the Camberwell Borough Council should not be altered and should remain at £50 gross value and £47 rateable value (the valuation officer had proposed two assessments: new cemetery and lodge £20 gross value and £19 rateable value and crematorium £1,700 B gross value, £1,413 rateable value).

Wandsworth Metropolitan Borough Council (hereinafter called "the Council") were the successors to the Wandsworth, Streatham and Putney Burial Boards respectively, by virtue of a Scheme under s. 4 of the London Building Act, 1899, confirmed by Her Majesty in Council on Aug. 7, 1900*, and were the burial authority for the Metropolitan Borough of Wandsworth. The Council owned C five cemeteries of which one, the Putney Vale Cemetery and Crematorium was the subject of the present proceedings. That comprised land acquired on five separate occasions, viz., (i) land acquired in 1887 under s. 26 of the Burial Act, 1852, (ii) land acquired in 1907 under s. 150 of the Metropolis Management Act, 1855, for the purpose of a refuse-chute, but used after 1926 for burial purposes pursuant to a clause in the conveyance of the land and pursuant to the sanction D of the Minister of Health under s. 9 and s. 29 of the Burial Act, 1852, and (iii), (iv) and (v) lands acquired under s. 26 of the Burial Act, 1852, in 1909, 1912, and 1940 respectively. The land acquired in 1940 had been let since 1952 as a sports ground. Between May 5, 1936, and May 25, 1938, the Council, acting under the Cremation Act, 1902, constructed a crematorium on the land described at (i) above and allocated the land described at (ii) above as a garden of remembrance. E The crematorium was used for the cremation and pulverisation of human remains. It was agreed that if it were decided that all the land except that acquired under the Metropolis Management Act, 1855, were within s. 15 of the Burial Act, 1855, the value of the hereditament should be £756 gross value and £255 rateable value.

The facts relating to Camberwell Metropolitan Borough Council's heredita- F ment were similar as regards the crematorium, but the land comprising the garden of remembrance was also acquired under the Burial Acts.

The valuation officer contended in the case of the Council that the parts of the hereditament used for or in connexion with the purposes of cremation only were not land used for the purposes of a burial ground within s. 15 of the Burial Act, 1855, and were therefore not to be assessed in accordance with that section. G The valuation officer in the case of the Camberwell Metropolitan Borough Council's hereditament contended that the crematorium and garden of remembrance should be rated as a separate hereditament and was not land used for the purpose of a burial ground within s. 15 of the Burial Act, 1855. The Council and Camberwell Metropolitan Borough Council contended that the land used as a crematorium (with, in the case of Camberwell Metropolitan Borough Council, the H garden of remembrance) was entitled to be assessed in accordance with the provisions of s. 15 of the Burial Act, 1855, by virtue of s. 4 of the Cremation Act, 1902. The Lands Tribunal upheld the contention of the Council and Camberwell Metropolitan Borough Council ((1956), 1 R.R.C. 24). The valuation officers appealed.

Maurice Lyell, Q.C., and *P. R. E. Browne* for the valuation officers. I

Michael Rowe, Q.C., and *D. G. Widdicombe* for the Council and the Camberwell Metropolitan Borough Council.

LORD EVERSHED, M.R.: This appeal raises an extremely short point which has nevertheless caused me no little difficulty. At various dates, one of which was in 1887, the Council of the Metropolitan Borough of Wandsworth acquired certain land now used by them for the purpose of a crematorium and ancillary purposes.

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* I.e., the Order in Council Approving the London (Adoptive Acts) Scheme, 1900 (S.R. & O. 1900 No. 601), summarised in 12 HALSBURY'S STATUTORY INSTRUMENTS 206.

The problem is whether the joint effect of s. 15 of the Burial Act, 1855, and s. 4 of the Cremation Act, 1902, gives to the Council certain rating relief in respect of the land so acquired. Section 15 of the Act of 1855 provides:

> "No land already or to be hereafter purchased or acquired, under the provisions of any of the Acts hereinbefore recited, for the purpose of a burial ground (with or without any building erected or to be erected thereon), shall while used for such purposes be assessed . . ."

as therein mentioned.

One of the Acts thereinbefore recited was the Burial Act, 1852, by s. 26 of which power was given to a burial authority to acquire land for the purpose of a burial ground. The section provides:

> "For the providing such burial ground it shall be lawful for the burial board . . . to purchase from any company or persons entitled thereto any cemetery or cemeteries . . ."

The burial board are now the local authority. It follows, therefore, that, if a local authority were shown to have acquired land for the purpose of a burial ground under s. 26 of the Burial Act, 1852, and if the land were being so used (and I think that the plural "purposes" may relate to purposes ancillary to the actual cemetery or burial ground) then the authority would be entitled to the rating concession.

Section 4 of the Act of 1902 provides:

> "The powers of a burial authority to provide and maintain burial grounds or cemeteries, or anything essential, ancillary or incidental thereto, shall be deemed to extend to and include the provision and maintenance of crematoria."

It is not, therefore, in doubt that the power to obtain land for burial purposes which s. 26 of the Act of 1852 must now be taken to have conferred on a local authority extends to enable them to acquire land for crematoria; but does it follow that land acquired under that extended power for crematoria purposes is entitled to the rating concession?

As appears to be not uncommon in rating problems, there is in this matter a certain scope for anomaly. The powers of acquiring land for burial grounds are not exclusively derived from Acts mentioned in s. 15 of the Burial Act, 1855. One cannot therefore get assistance by trying to obtain a result which would in any case be uniform; but, as counsel for the Council pointed out, such anomalies existed before the Act of 1855 and therefore do not really assist in the solution of the present case.

The point of view of the appellant valuation officer can be stated thus:— It is true that the Act of 1902 gave to the local authority a power to acquire land for a crematorium in addition to its pre-existing power to acquire land for burial grounds, but there is nothing sufficient to justify the conclusion that by a side-wind, so to speak, the rating concession of s. 15 of the Burial Act, 1855, is thereby extended to apply to land acquired for crematoria purposes. When Mr. Lyell put the argument to us I confess that I found it impressive; but, on the whole, I have reached the conclusion that the answer put to us by counsel for the Council is that which we should accept, and I am comforted by this consideration, that the view which counsel for the Council has put forward has commended itself both to the local valuation court and to the Lands Tribunal.

My reasons are based on the language of s. 4 of the Act of 1902, when I examine it closely:

> "The powers of a burial authority to provide . . . burial grounds . . . shall be deemed to extend to . . . the provision . . . of crematoria."

There is no express addition to the powers. The section does not say that in addition to the powers to provide burial grounds powers to provide crematoria shall be conferred. It does not even say in terms that the powers to provide burial grounds should be deemed to include powers to provide crematoria. What it says is that powers to provide burial grounds shall be deemed to include provision of crematoria; in other words, as I read it, it is saying that the justification for the purchase of land for crematoria shall be the invocation of the pre-existing power (which remains) to provide burial grounds. The power, which is exercised, is the same power. Parliament has said that that power shall be deemed to be applicable to the case of provision of crematoria. If that is so, then I come back to s. 15 of the Act of 1855 and ask: Under what power was the land here in question provided? The answer is, it was provided pursuant to the burial ground providing power.

> " No land . . . acquired, under the provisions of any of the Acts hereinbefore recited, for the purpose of a burial ground . . .",

etc. The provisions of the Act invoked were those very provisions of s. 26 of the Act of 1852. The power used was the power to provide land for a burial ground. But as a result of the Act of 1902 that power was available for the acquisition of this land although it was for use as a crematorium and not as a burial ground.

There remains the point made by counsel for the valuation officer, that two conditions are requisite for the rating concession: not only must the land have been acquired under what I call the burial ground providing Act, but the land must be used for (and I am quoting) " such purposes ". I think the plural, " such purposes " introduces what might be called ancillary or comparable purposes; but, however that may be, I think that if by reason of my reading of s. 4 of the Act of 1902 I am justified in inserting into s. 15 of the Act of 1855 after the words " burial grounds " by way of expanding periphrasis the words " which shall be deemed to include a crematorium ", then that provides at the same time the answer to the question: Is the second condition also satisfied?

That is, after all, the way in which the President of the Lands Tribunal formulated his conclusion. In para. 14 he quoted the argument of the Council which he accepted, as follows: Counsel for the Council

> " submitted that when you read s. 4 of the Cremation Act back into s. 15 of the Burial Act, you can read it as meaning, ' No land already or to be hereafter purchased or acquired, under the provisions of the Burial Acts for the purpose of a burial ground, a phrase which shall be deemed to include the provision and maintenance of a crematorium with or without any building [etc.], may be assessed to any rate; and so on."

The only divergence which I think I would make from that exposition is this. I am not so much reading s. 4 into s. 15, but, in the light of s. 4, I am asking the question as regards the land here: Under s. 15 of the Act of 1855 has this land been acquired pursuant to what I have called the burial ground providing provisions of the Act of 1852? And I answer that question: It has. Having so answered it, I think the way in which the matter is then formulated by the President was justified. I should not wish to adopt for the purposes of my judgment the later paragraphs of the decision which do not to my mind add anything to the main point.

For the reasons I have given and which the President of the Lands Tribunal gave in the first paragraph of para. 14 of his decision, I think that this appeal should be dismissed.

MORRIS, L.J.: I entirely agree.

PEARCE, L.J.: I agree with what my Lord has said.

Appeals dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor of Inland Revenue* (for the valuation officers); *Town clerk*, Wandsworth (for Wandsworth Metropolitan Borough Council); *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Camberwell (for Camberwell Metropolitan Borough Council).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

GRIFFITH *v.* PELTON.

[COURT OF APPEAL (Jenkins, Romer and Sellers, L.JJ.), July 3, 4, 5, 23, 1957.]

Landlord and Tenant—Option to purchase—Assignment of lease—Subsequent assignment of option to assignee of lease—Whether benefit of option transferred by either assignment.

Sale of Land—Option in lease to purchase freehold reversion expectant on term of years granted by lease—Assignment of lease—Subsequent assignment of option to assignee of lease—Whether option enforceable by assignee.

Option—Option to purchase freehold—Option conferred by lease—Assignment of lease—Subsequent assignment of option to assignee of lease—Whether option enforceable by assignee.

A lease, demising land for a term of twenty-one years expiring on Mar. 25, 1956, included a proviso that " if the lessee shall . . . give to the lessor . . . six months' notice in writing of the desire of the lessee to purchase the fee simple of the demised premises . . . then the lessor shall . . . upon payment of the [purchase price with interest until completion] . . . assure the said premises unto the lessee for an estate in fee simple." It was further provided that the option should not be exercised during the life of the lessor but within one year after the lessor's death. By an assignment dated Aug. 3, 1948, the lessee (having first obtained a licence so to do from the lessor, as required by the lease) assigned to the assignee " all that the property comprised in and demised by the lease." This assignment contained no reference to the option. On Mar. 2, 1956, the lessor died. By a deed dated Mar. 22, 1956, the lessee assigned to the assignee the benefit, if and so far as it was not already vested in the assignee, of the option contained in the lease. On Mar. 22, 1956, the assignee gave notice in writing of this assignment to the executrix of the deceased lessor, and also gave the executrix notice in writing exercising the option. In the lease the parties thereto were respectively described as " ' the lessor ', which expression shall include the estate owner or estate owners for the time being of the reversion of the premises hereby demised expectant on the term hereby granted, where the context so admits ", and " ' the lessee ' which expression shall include her executors, administrators and assigns where the context so admits ".

Held: the benefit of the option had been effectively vested in the assignee for the following reasons—

(i) the lessee was entitled to assign the benefit of the option to an assignee of the lease, who thus would become entitled to the option and to exercise it against the executrix of the lessor after his death (see particularly p. 84, letter B, post).

Re Adams & Kensington Vestry ((1884), 27 Ch.D. 394), and *Friary Holroyd & Healey's Breweries, Ltd.* v. *Singleton* ([1899] 1 Ch. 86) applied.

Woodall v. *Clifton* ([1905] 2 Ch. 257) explained.

(ii) the assignment of Aug. 3, 1948, transferred the benefit of the option to the assignee, since, on the true construction of the proviso, including the definition to be read into it of the term lessee as including the lessee's assigns, a mere assignment of the term operated as an assignment of the benefit of the option. A

Dicta in *Re Adams & Kensington Vestry* ((1883), 24 Ch.D. at p. 206) ((1884), 27 Ch.D. at pp. 402, 404), and in *Batchelor* v. *Murphy* ([1925] Ch. at pp. 226, 228, 231) ([1926] A.C. at pp. 67, 68) applied.

(iii) if, however, the assignment of Aug. 3, 1948, did not vest the benefit of the option in the assignee, that benefit remained vested thereafter in the lessee and was effectively assigned to the assignee by the deed of Mar. 22, 1956. B

Observations as to the nature of options to purchase land (see p. 83, letter F, to p. 84, letter A, post).

Appeal dismissed. C

[As to the persons by whom an option to purchase contained in a lease is exercisable, see 20 HALSBURY'S LAWS (2nd Edn.) 67, para. 71; and for a case on the subject, see 30 DIGEST (Repl.) 500, *1428*.]

Cases referred to:

(1) *Spencer's Case*, (1583), 5 Co. Rep. 16a; 77 E.R. 72; 21 Digest 573, *1495*. D

(2) *Dewar* v. *Goodman*, [1907] 1 K.B. 612; *affd.* C.A., [1908] 1 K.B. 94; *affd.* H.L., [1909] A.C. 72; 78 L.J.K.B. 209; 100 L.T. 2; 31 Digest (Repl.) 154, *2915*.

(3) *Thomas* v. *Hayward*, (1869), L.R. 4 Exch. 311; 38 L.J.Ex. 175; 20 L.T. 814; 31 Digest (Repl.) 165, *3007*.

(4) *Woodall* v. *Clifton*, [1905] 2 Ch. 257; 74 L.J.Ch. 555; 93 L.T. 257; 30 Digest (Repl.) 495, *1395*. E

(5) *Re Adams & Kensington Vestry*, (1883), 24 Ch.D. 199; 48 L.T. 958; *affd.* C.A., (1884), 27 Ch.D. 394; 54 L.J.Ch. 87; 51 L.T. 382; 20 Digest 357, *961*.

(6) *Friary Holroyd & Healey's Breweries, Ltd.*, v. *Singleton*, [1899] 1 Ch. 86; 68 L.J.Ch. 13; 79 L.T. 465; *revsd.* C.A., [1899] 2 Ch. 261; 68 L.J.Ch. 622; 81 L.T. 101; 30 Digest (Repl.) 500, *1428*. F

(7) *Batchelor* v. *Murphy*, [1924] 2 Ch. 252; *revsd.* C.A., [1925] Ch. 220; 94 L.J.Ch. 177; 132 L.T. 449; *affd.* H.L., [1926] A.C. 63; 95 L.J.Ch. 89; 134 L.T. 161; 30 Digest (Repl.) 523, *1616*.

(8) *Re Johnston's Application*, [1950] 1 All E.R. 613; [1950] Ch. 524; 2nd Digest Supp. G

(9) *Hutton* v. *Watling*, [1947] 2 All E.R. 641; *affd.* C.A., [1948] 1 All E.R. 803; [1948] Ch. 398; 2nd Digest Supp.

Interlocutory Appeal.

In an action for a declaration that an option, contained in a lease, to purchase the freehold reversion expectant on the lease had been effectually exercised by the assignee of the lease, for specific performance of the agreement contained in the lease to sell the freehold on exercise of the option, and for damages for breach of this agreement, an order was made, under R.S.C., Ord. 34, r. 2, that the questions of law (i) whether the benefit of the option was validly and effectually vested in the assignee by an assignment dated Aug. 3, 1948, made between the lessee and the assignee, or, if not, then (ii) whether a deed dated Mar. 22, 1956, and made between the lessee and the assignee (a) operated to vest in the assignee the full benefit of the option, including in particular the right to enforce any agreement resulting from the exercise thereof by specific performance, or, if not, then (b) operated in some other manner, or (c) was wholly ineffectual, be argued before the court. After the case had been argued VAISEY, J., made a declaration, dated Mar. 18, 1957, answering the first of these questions in the affirmative. The freeholder appealed. The facts, and the relevant parts of the lease, assignment and deed, are set out in the judgment of the court. H I

George Newsom, Q.C., and *K. J. T. Elphinstone* for the freeholder, the defendant.

E. I. Goulding for the assignee, the plaintiff.

Cur. adv. vult.

July 23. **JENKINS, L.J.:** The judgment that I am about to read is the judgment of the court.

In this case the plaintiff, Herbert Charles Griffith (who is the respondent to this appeal and is called herein " the assignee "), claimed against the defendant, Ethel Elizabeth Pelton (who is the appellant on this appeal and is herein called " the freeholder "), as executrix of Aubrey John Pelton, deceased, a declaration to the effect that the assignee had by a notice in writing dated Mar. 22, 1956, effectually exercised an option contained in a lease dated May 17, 1935, and made between the deceased of the one part and Winifred Martha Blaker of the other part, to purchase the property comprised therein, and consisting of No. 1, The Broadway, Mount Pleasant, Tunbridge Wells, together with a leasehold interest in a certain right of way, with consequential claims for specific performance of the agreement constituted by his exercise of the option, and further or other relief.

On an application by the assignee for summary judgment under R.S.C., Ord. 14A, an order was made by consent for the setting down of certain questions of law for argument under R.S.C., Ord. 34, r. 2.

The questions of law thus raised, so far as immediately material, were (shortly) whether the benefit of the option was effectually vested in the assignee, either (1) by an assignment dated Aug. 3, 1948 (being an assignment of the lease by Miss Blaker to the assignee), or alternatively (2) by a deed dated Mar. 22, 1956 (being an assignment, or purported assignment, of the benefit of the option by Miss Blaker to the assignee).

VAISEY, J., by his order dated Mar. 18, 1957, made a declaration answering the first of these questions in the assignee's favour, and from that order the freeholder now appeals to this court.

The lease of May 17, 1935, was, as we have said, made between the deceased of the one part and Miss Blaker of the other part. The parties were thereinafter respectively described as

> " ' the lessor ', which expression shall include the estate owner or estate owners for the time being of the reversion of the premises hereby demised expectant on the term hereby granted, where the context so admits ",

and

> " ' the lessee ' which expression shall include her executors, administrators and assigns where the context so admits."

The lease was for twenty-one years from Mar. 25, 1935 (determinable as thereinafter mentioned) at the yearly rent of £450. There was a proviso that

> " if the lessor survives the term hereby granted [which event did not happen] he will grant to the lessee a further term of fourteen years subject to the rent terms and conditions of this lease."

There was also a proviso enabling the lessee to determine the lease at the expiration of the first fourteen years of the term.

Finally, there was this proviso conferring the option which has given rise to the present litigation:

> " Provided always and it is hereby agreed that if the lessee shall within the period hereinafter prescribed give to the lessor or leave at his last known place of abode in England six months' notice in writing of the desire of the lessee to purchase the fee simple of the demised premises and his leasehold interest in the right of way over the passageway coloured yellow on the said plan then the lessor shall on the expiration of such notice and upon payment of the sum of £7,000 together with interest thereon at the rate of

> £5 per centum per annum from the expiration of such notice till the completion of the purchase and of all rent hereby reserved up to such expiration assure the said premises unto the lessee for an estate in fee simple in possession free from incumbrances except as already disclosed to the lessee and assign his interest in the said right of way to the lessee Provided nevertheless that this option to purchase the fee simple of the demised premises shall not be exercised during the lifetime of the present lessor the said Aubrey John Pelton but shall be exercised within one year next after his death if he shall die during the term hereby granted and nothing herein contained shall be construed as giving to the lessee any option to purchase the fee simple of the demised premises at any time after the expiration or sooner determination of the term hereby granted unless the aforesaid notice shall have been given by her before such expiration or determination."

By the assignment of Aug. 3, 1948, to which we have already referred, Miss Blaker (having first duly obtained a licence so to do from the deceased as required by the lease) assigned to the assignee at the price of £3,200 " all that the property comprised in and demised by the lease " for the residue of the term thereby granted, subject to the rent thereby reserved and the lessee's covenants and conditions therein contained. This document contained no reference to the option. It included, in addition to the lease, an assignment of the goodwill of a business carried on at the premises to which the purchase consideration was no doubt to some extent attributable.

The deceased died on Mar. 2, 1956, and probate of his will was granted to the freeholder on Apr. 13, 1956. By the deed dated Mar. 22, 1956*, to which we have already referred, Miss Blaker gratuitously assigned (or purported gratuitously to assign) the benefit of the option to the assignee if and so far as not already vested in him. On the same day the assignee by his solicitors gave notice in writing of this assignment to " the personal representative or personal representatives " of the deceased. Also on the same day the assignee by his solicitors gave to " the personal representative or personal representatives " of the deceased notice in writing exercising the option†. The term granted by the lease expired on Mar. 25, 1956. On these facts counsel for the freeholder contends that both the questions shortly stated above should be answered in the negative.

As to the first question, counsel for the freeholder submits that the benefit of the option cannot have been effectually vested in the assignee by the assignment of Aug. 3, 1948, because the benefit of the provision in the lease whereby the option was conferred did not run with the land. He invokes the second and sixth resolutions in *Spencer's Case* (1) ((1583), 5 Co. Rep. 16a), the effect of which is conveniently stated by JELF, J., in *Dewar* v. *Goodman* (2) ([1907] 1 K.B. 612 at p. 620) as establishing the proposition that neither the benefit nor the burden (as the case may be) of a lessor's covenant runs with the land unless it touches or concerns the thing demised, or, as s. 142 (1) of the Law of Property Act, 1925, now has it, is entered into " with reference to the subject-matter of the lease." As illustrations of the application of the general principle he referred to *Thomas* v. *Hayward* (3) ((1869), L.R. 4 Exch. 311), where a lessor's covenant in a lease of a public house not to keep any house for the sale of spirits or beer was held not to be enforceable by an assignee of the lease against the lessor because it did not touch or concern the thing demised and therefore the benefit of it did not run with the land; and to *Dewar* v. *Goodman* (2), where an under-lessor's covenant to perform the covenants in the superior lease as regards land not included in the sub-demise was on like grounds held not to be enforceable by an assignee of the underlease against an assignee of the under-lessor. The general principle on which counsel for the freeholder relies is, of course, well settled, and he submits that its application to the case in point of an option contained in a lease to purchase the freehold is established by authority binding on us in the shape of the case in this court of *Woodall* v. *Clifton* (4) ([1905] 2 Ch. 257), where it was held that such an option did not touch or concern the thing demised, and therefore did not run with the land so as to be enforceable against the assigns of the lessor. Counsel for the freeholder's submissions, if well founded, would produce the surprising result that although the intention of the parties to the present lease as expressed in the document plainly was that either Miss Blaker herself as the original lessee, or her executors, administrators and assigns, who were included in the term " lessee " by virtue of the definition to which I have referred, should be entitled to exercise the option by giving the prescribed notice and otherwise complying with the conditions laid down for its exercise, the option was nevertheless not assignable by Miss Blaker even by an assignment of the term which expressly included the benefit of the option. This, says counsel for the freeholder, necessarily follows from the principle established by *Spencer's Case* (1), that where a provision does not run with the land (as in his submission the present option does not), the parties cannot make it run, even where they show by express words their intention that the burden and benefit of it, as the case may be, should pass to the respective assignees.

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* The material terms of the deed were that the assignor thereby assigned "All and Singular the benefit (if and so far as it is not already vested in the [assignee]) of the agreement or option contained in [the lease] providing for the purchase by the lessee under the lease of the fee simple of the premises demised by the lease and the leasehold interest in a certain right of way therein mentioned to hold the same unto [the assignee] absolutely ".

† This notice, which was signed by the solicitors for the assignee, stated that in exercise of the option in that behalf given by the lessee the solicitors gave notice to the personal representative or personal representatives of the lessor that the assignee " desires and hereby agrees to purchase the fee simple of the premises demised by the . . . lease and the lessor's leasehold interest in the right of way over the passage coloured . . . on the plan in the lease . . . on the terms and conditions contained in the lease ".

Counsel for the assignee traverses the argument of counsel for the freeholder and submits that the benefit of an option such as this, expressly made exercisable not only by the original lessee but also by her executors, administrators and assigns, is an assignable interest which will pass to any assignee of the lease under a mere assignment of the term even though such assignment (like the assignment of Aug. 3, 1948, in the present case) contains no express reference to the option. Support for this view is to be found in the following authorities.

In *Re Adams & Kensington Vestry* (5) ((1883), 24 Ch.D. 199; *affd.* C.A. (1884), 27 Ch.D. 394), there was a lease containing a covenant by the lessor with the lessee, his executors, administrators and assigns, conferring on the latter an option to purchase the freehold. This option was in fact exercised by the heir of the lessee, who was also his administrator, against the devisee of the lessor. No objection concerning the right of the heir and administrator of the lessee to exercise the option against him was taken by the devisee of the lessor and a conveyance was executed accordingly. The heir and administrator of the lessee afterwards contracted to sell part of the land conveyed to him, and the question for the decision of the court was whether he could make a good title. As the law then stood the position was that he could make a good title if the land had passed to him in his capacity as heir as part of the lessee's real estate, but not if it had passed to him in his capacity as administrator as part of the lessee's personal estate. The court held that the land had passed to him in the latter capacity and consequently that he could only make a good title with the concurrence of the next of kin of the lessee. The case was heard at first instance by PEARSON, J. Amongst other arguments, it was contended for the purchasers (24 Ch.D. at p. 202) that the option was void as infringing the rule against perpetuities and for the vendor that " such a covenant as this cannot be attached to a lease so as to run with it ". PEARSON, J., assumed (ibid., at p. 206) without deciding, that the option was valid, i.e. (as we understand him), that it was not invalidated by the rule against perpetuities, and said this (ibid.):

> " The case was very well argued by Mr. Pownall [for the vendor], and he

> put it in this way. He said, it is perfectly true that the lease regarded as a chattel was part of the personal estate of Ralph Adams, and was, therefore, on his death intestate divisible amongst all his children, but the covenant in question was a separate thing altogether. The covenant giving the option to purchase created an equitable interest in real estate, which was vested in Ralph Adams as a separate interest from the leasehold interest. It therefore descended to his eldest son as his heir at law, and on the death of the eldest son it descended from him to the second son, who was therefore entitled to it absolutely for his own use. I cannot accede to that view. I think the option to purchase was an integral part of the lease and went with the lease. If the lease had been simply assigned, without any more words, the option would have passed with it, and, as on the death of Ralph Adams the lease passed to his administrator, the administrator took the lease, together with the right to enforce the option of purchase if he should think it beneficial."

A B C

On appeal to this court by the vendor, the decision of PEARSON, J., was affirmed. BAGGALLAY, L.J., said this (27 Ch.D. at p. 401):

> " In that view of the case it appears to me, first of all, that the right of option, as one of the provisions contained in the lease, passed with the leasehold estate to the administrator upon his taking out administration to the deceased intestate, and that he alone was capable of exercising that option."

D

COTTON, L.J., said this (ibid., at p. 402):

> " The contract is one entered into with the lessee, his executors, administrators, and assigns, and before I go further I agree that this covenant would be one the benefit of which would pass with the assignment of the lease, because it is a covenant with the lessee, if he, his executors, administrators, or assigns shall give a certain notice, that the lessor would convey. The ' assigns ' there must mean the assigns of the lease . . ."

E

LINDLEY, L.J., said this (ibid., at p. 404):

F

> " I am of the same opinion. It appears to me that we must deal with the question in this case with reference to the peculiar language of the covenant which is before us. Everything turns upon the language of the covenant, and I do not see how our decision in this case would be of the slightest use to anybody else any more than the decisions in the previous cases are of the slightest use to us in construing this covenant. The covenant is made by Smith, the lessor, with Adams, his executors, administrators, and assigns, and so on. Now I apprehend ' assigns ' there must mean the assigns of the lease; the context, I think, shows that. In the event which has happened there have been no assigns, and we may leave that out. If he did not exercise the option, his administrator could . . . *The right is given to the lessee, his executors, administrators, and assigns, and it is given to them in language which is very peculiar. It is ' if they be minded and desirous of buying the fee simple ', not ' if the heir-at-law is '. I cannot possibly construe this as meaning that the heir is to set them in motion, and that the heir is to be minded and desirous of buying; I cannot construe the covenant in that way at all."

G H I

Of the observations which we have quoted, those of PEARSON, J., BAGGALLAY, L.J., and COTTON, L.J., appear to us to be directly in point and to afford clear support for the assignee's argument in the present case. Those of LINDLEY, L.J., are less to the purpose, but indicate no dissent from the views of his brethren, which as part of their ratio decidendi cannot in our opinion be dismissed as merely obiter.

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* The passage after this asterisk is in 27 Ch.D. at p. 405.

We would next refer to *Friary Holroyd & Healey's Breweries, Ltd.* v. *Singleton* (6) ([1899] 1 Ch. 86: *revsd.* C.A., [1899] 2 Ch. 261). In that case an equitable assignee of a lease containing an option to purchase the freehold given to the lessee " his executors, administrators, and assigns ", who had not perfected his title by a legal assignment, was held by ROMER, J., not to be an assign within the meaning of the option and accordingly not to be entitled to exercise the option. ROMER, J., said this ([1899] 1 Ch. at p. 89):

> " The plaintiffs contend that the letter of Dec. 14, 1896, was a good notice under the lease to purchase the freehold at the end of the term. But, apart from any question arising on the wording of that letter, it appeared on the evidence, when the plaintiffs came to prove their title, that at the time the letter was written and up to the commencement of this action they were not the legal assignees of the lease, but only the equitable assignees of the legal owners. They were not, therefore, in my opinion the persons entitled under the lease, as against the lessor, to give the notice, and the lessor did not become bound under the lease on receipt of that letter to sell or assure the freehold to the plaintiffs. The word ' assigns ' in the option to purchase in the lease given to the lessee, his executors, administrators, or assigns, had in my opinion the same meaning as the word ' assigns ' added to the lessee's name in the covenants entered into by and with him in the lease. In other words, it meant the persons entitled to the term as between them and the lessor and bound by and entitled to the benefit of the covenants entered into by the lessee and lessor respectively which ran with the land demised."

It seems to us plain that in ROMER, J.'s view the equitable assignee would have been entitled to exercise the option if he had converted himself into a legal assign by taking a legal assignment of the lease. The case could, of course, have been shortly disposed of if ROMER, J.'s view had been that the option could not be exercised by any assign, whether legal or equitable. It is perhaps worth noticing that the defendant against whom the option was sought to be exercised was in fact the assignee of the reversion, and not the original lessor. ROMER, J.'s decision was reversed in the Court of Appeal on the facts, but the judgment of the court accepted his view as to the meaning of " assigns ", and expressed no dissent from his statement of the law.

We should also make some reference to *Batchelor* v. *Murphy* (7) ([1925] Ch. 220, *affd.* H.L., [1926] A.C. 63). In that case it was agreed between the original lessor, the executor of the lessee, and two proposed new tenants, that an existing lease should be surrendered and that a new lease of the premises should be granted to the proposed new tenants for the residue of the term " on the same terms and conditions in all respects " as the original lease. That lease had contained an option for the original lessor, his executors, administrators and assigns, to purchase the freehold, and the question was whether the two new tenants were entitled to a similar option. TOMLIN, J., held ([1924] 2 Ch. 252) that they were not so entitled, but in the Court of Appeal his decision was reversed by a majority (WARRINGTON and SARGANT, L.JJ., POLLOCK, M.R., dissenting), and that judgment was upheld in the House of Lords. In the course of his dissenting judgment, POLLOCK, M.R., said this ([1925] Ch. at p. 226):

> " It [that is the option provision] is a provision which is outside the terms which regulate the relations between landlord as landlord and tenant as tenant. It is in truth and in fact a collateral bargain. It is not one of the terms of the demise. It is incidental but collateral to the demise. In the present case—and this I think is the only outside matter which has any weight upon my mind—there is this. It is quite clear that if the Murphys had taken by assignment of the original lease of Oct. 17, 1913, they would have acquired this option. It would have passed to them under an assignment. But it appears to me that one ought to take into account the fact

> that assignment was not adopted to give the Murphys the interest which they were to take in these premises."

WARRINGTON, L.J., said this ([1925] Ch. at p. 228):

> " Having regard to the interpretation of the word ' lessee ' in the option, the word ' lessee ' means Clarkson, his executors, administrators and assigns. It is therefore quite clear, and it is admitted, that the benefit of the option, which although it is something collateral to the mere relation of landlord and tenant, still is one of the terms of the document which created that relation, would pass to the assignee by a mere assignment of the land for the term, at the rent, and under and subject to the conditions and so forth reserved by and contained in the lease of Oct. 17, 1913."

SARGANT, L.J., said this (ibid., at p. 231):

> " Now it is to be noticed that if there had been a mere assignment by Clarkson to the Murphys, the necessary result would have been that the Murphys would have been entitled to the option of purchase given to Clarkson by the lease to him, and I should have thought that prima facie if it had been intended in any way to affect that option or prevent it being transferred in the ordinary course to the purchasers or the assignees, the persons intending to take the transfer from Clarkson, there would have been some definite bargaining to that effect. I do not want to lay too much stress on that, but it seems to me that would have been the ordinary business way of looking at the matter."

In the House of Lords VISCOUNT HALDANE said this ([1926] A.C. at p. 67):

> " Now, my Lords, as I said, the original lease contains an option to Clarkson to purchase, and to purchase for £3,000, and be it noted that by a provision in that document, wherever Clarkson is named the document provides that Clarkson, his executors, administrators and assigns, are to be included by the word ' Clarkson '; so that when the option to purchase is given to Clarkson it prima facie at all events means to include Clarkson's assigns. That being so, my Lords, the question is what is meant in the document of November, 1915, by ' the terms and conditions ' in the lease of Oct. 17, 1913? They are to be ' the same terms and conditions in all respects ' as in the lease. My Lords, we are not dealing with a mere technical demise, we are dealing with a deed, the lease itself—a deed containing terms—and when you look at the substance of this transaction I quite agree that the option to purchase is a collateral right—it is not part of the term of the demise, it is a collateral right—but it is a collateral right which is included in the document, which in substance is transferred. I say in substance is transferred, because if you look at the document, Clarkson could have done what he did by an assignment of his lease or in the way he did—namely, by surrender and a new lease to be granted. There is no difference in substance between the two methods or the rights under them; it is only a different way of carrying out the same transaction, and I am of opinion that Clarkson, in substance, transferred his rights to the respondents."

LORD ATKINSON said this (ibid., at p. 68):

> " It is quite true that when there is a collateral agreement, it is not necessarily transferred by a transfer of the lease, but it is perfectly competent to the contracting parties if they are so inclined to use language which will carry in a collateral agreement just as well as any stipulation springing from the relation of landlord and tenant. In my opinion when the parties used the words that the new lease is to contain all the terms and conditions in all respects as the lease of Oct. 17, 1913, which, of course, means contained in the lease of Oct. 17, 1913, they could use no words that are more expressive

> A to convey the idea that the new lease is to be a replica of the old lease save and except in the two points of duration of the time and rent."

LORD CARSON concurred without adding any reasons of his own, while LORDS WRENBURY and BLANESBURGH founded themselves on the construction of the agreement, without, we think, expressing any view regarding the effect which an B assignment of the original lease would or might have had in relation to the option if the parties had chosen to proceed in that way. Reference was also made in the course of the argument to *Re Johnston's Application* (8) ([1950] 1 All E.R. 613), a case concerning the apportionment of war damage in which HARMAN, J., held that an option to purchase the freehold contained in a lease was for this purpose an "incident" of the lessees' proprietary interest.

C In this state of the authorities, counsel for the freeholder urges us to follow *Woodall* v. *Clifton* (4), which he says concludes the present case in his favour, and to reject all observations to the contrary in the other authorities to which we have referred as made obiter or alio intuitu or on the strength of admissions. In particular, he adopts this comment by ROMER, L.J., towards the end of the judgment of the court in *Woodall* v. *Clifton* (4) ([1905] 2 Ch. at p. 279), as disposing of what is perhaps the most difficult case from his point of view: D

> "There are cases where the option has been exercised by the tenant and accepted by the landlord, and subsidiary questions have had to be decided which naturally would be dealt with on the footing that what had already been done could not or need not be questioned by the court; as, for example, *Re Adams & Kensington Vestry* (5). But such cases are really of no assistance for the decision of the present case." E

On the other hand, counsel for the assignee submits that the cases above referred to relating to options to purchase, other than *Woodall* v. *Clifton* (4), taken together afford a strong body of judicial opinion in favour of the assignee's contention by which, in preference to *Woodall* v. *Clifton* (4), the court should be guided in deciding the present case.

F In order to resolve this conflict it will be necessary to examine with some care *Woodall* v. *Clifton* (4), to see what was actually decided by that authority. However, before doing so, we may perhaps be permitted some general observations of an elementary kind as to the nature of options to purchase land. It is by no means uncommon for leases to contain (as did the present lease) provisions conferring on the lessee an option to purchase the freehold. Options to purchase G land are also, however, not uncommonly granted in cases where the grantor and the grantee of the option do not stand in the relationship of landlord and tenant. Options of the latter class may conveniently be referred to as "options in gross". An option in gross for the purchase of land is a conditional contract for such purchase by the grantee of the option from the grantor, which the grantee is entitled to convert into a concluded contract of purchase, and to have carried H to completion by the grantor, on giving the prescribed notice and otherwise complying with the conditions on which the option is made exercisable in any particular case. The conditional contract constituted by the grant of the option is a chose in action the benefit of which can (if the terms of the contract are such as to show that it is not merely personal to the grantor) be assigned by the grantee to anyone he chooses, subject to any restriction imposed by the contract as to I the persons in whose favour assignment is permissible. The burden of the contract qua contract does not, in the absence of novation, pass to a third party acquiring the land; but inasmuch as the option creates in favour of the grantee of the option a contingent interest in the land, it may, provided that its exercise is limited to a period permissible under the rule against perpetuities, and provided that the appropriate precautions as to registration are taken, be exercised and enforced against the land in the hands of such third party—see as to the rule against perpetuities in relation to options the judgment of WARRINGTON, J., in *Woodall* v. *Clifton* (4) ([1905] 2 Ch. 257), and of JENKINS, J., in *Hutton* v.

A *Watling* (9) ([1947] 2 All E.R. 641 at pp. 643 et seq., *affd.*, [1948] 1 All E.R. 803) in which two cases the authorities on this matter are discussed. An option contained in a lease for the lessee to purchase the freehold differs from an option in gross only in the respects that the grantor and the grantee stand in the relationship of landlord and tenant, and that the contract creating it is made part of the terms on which the lease is granted. However, albeit collateral to the lease, it is in itself a distinct contract possessing all the essential characteristics B of an option in gross. These general observations lead us to the conclusion that under the option provisions in the present case Miss Blaker was entitled as a matter of contract to assign the benefit of the option contained in the lease to the assignee as her assignee of the term, so as to entitle the assignee to enforce it against the freeholder, who, be it observed, was not an assignee of the reversion but the executrix of the original lessor, and as such bound by her testator's C contract.

Returning to *Woodall* v. *Clifton* (4), we would observe that the plaintiff there seeking to enforce the option was an assignee of the original lessee to whom and whose heirs and assigns the option to purchase had been granted, while the defendants were assignees of the original lessor: and that the term during which the option was expressed to be exercisable was ninety-nine years from June 24, D 1866. The assignment of the reversion prevented the plaintiff from enforcing the option against the defendants as a matter of contract, and the plaintiff could only rely on the contingent or conditional interest in the land created by the option, because the period during which it was exercisable exceeded the limit of time imposed by the rule against perpetuities. WARRINGTON, J., held in those circumstances that the option to purchase was void on the ground of remoteness. The Court of E Appeal apparently accepted this view so far as the plaintiff's claim involved the assertion that the option created an interest in the land which had devolved on him by assignment, but went on to consider an alternative contention to the effect that the burden of the proviso creating the option ran with the land so as to bind the assignees for the time being of the reversion at any distance of time. That was the contention which ROMER, L.J., in delivering the judgment of the F court, was concerned to repel, and he did so by holding that the burden of the proviso did not run with the land so as to make the option enforceable against the assignees of the reversion. He did not hold that if there had been no assignment of the reversion the plaintiff as assignee of the term could not as a matter of contract have enforced the option against the original lessor or his personal representative. We think that it is reasonably plain that he was deciding nothing G of the sort. This sufficiently appears from the opening passage of his judgment, where he said ([1905] 2 Ch. at p. 278):

> "A contract in a lease giving an option of purchase might be good, without regard to the provisions of the statute of Henry VIII*, as binding the land in the hands of the heirs or assigns, provided it did not infringe the law as to perpetuities. It would not be the less a binding contract because it was H contained in a lease. But in the present case it is clear that the plaintiff cannot succeed on such a ground. Unless the covenant or proviso giving the option of purchase can be said to run with the land by virtue of the provisions of the statute, then the plaintiff must fail."

If it had been his view (as counsel for the freeholder now would have us hold) I that the plaintiff could not enforce the option because he was an assignee of the term, but not the original lessee, that would have been a short answer to the whole case, and his discussion of the question whether the assignees of the reversion were bound would have been wholly otiose. The same may be said of WARRINGTON, J.'s full and careful discussion of the rule against perpetuities in its application to options to purchase land. We would add that *Friary Holroyd &*

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* I.e., 32 Hen. 8 (1540) c. 34.

Healey's Breweries, Ltd. v. *Singleton* (6) was referred to in argument in *Woodall* v. *Clifton* (4) ([1905] 2 Ch. at p. 269), when ROMER, L.J., said of it:

> "In that case the question was, assuming the validity of the covenant, who was the person entitled to give notice to exercise the option."

That comment does not appear to us to cast any doubt on the correctness of the view that he had expressed in the former case on the point now in hand.

In our view, therefore, there is nothing in *Woodall* v. *Clifton* (4) to prevent us from holding that it was competent to Miss Blaker to assign the benefit of the option to the assignee so as to make it exercisable and enforceable by him against the freeholder as executrix of the deceased original lessor. We agree with VAISEY, J. (as indeed was held in *Re Adams & Kensington Vestry* (5) (27 Ch.D. 394, per COTTON, L.J., at p. 402, and per LINDLEY, L.J., at p. 404), and in *Re Friary Holroyd & Healey's Breweries, Ltd.* v. *Singleton* (6)) that the reference to the assignees of the lessee, imported by definition into the option provision, must be construed as referring to assigns of the term, and consequently as limiting the assignability of the benefit of the option to assigns of that description. So far as assigns of that description are concerned, however, the language of the proviso conferring the option expressly entitles them to exercise it.

The first of the two questions stated above therefore seems to us to come down to the narrow issue whether the assignment of Aug. 3, 1948, being on the face of it a mere assignment of the term, without any reference to the benefit of the option, operated, in view of the terms of the proviso, or, in other words, the contract creating the option, as an assignment of the benefit of the option; or whether an express reference to the benefit of the option in the assignment of the term was necessary to produce that result. We think that, on the true construction of the proviso, including the definition to be read into it of the term lessee as including the lessee's assigns, the original parties to the lease must be taken to have agreed that the option should be exercisable by Miss Blaker herself or by any assignee of the term to whom she might assign the benefit of the option, and that a mere assignment of the term should operate as an assignment of the benefit of the option to the assignee of the term. On this point we find ourselves in complete agreement with the following passage from the judgment of VAISEY, J.:

> "I now come to what seems to me to be the main point of the case, which is whether the benefit of the option passed by the assignment of 1948, or, if not, then by the assignment of 1956. Taking the assignment of 1948 first, it seems to me that the benefit of the option did pass by it to the [assignee] notwithstanding the omission of any reference to it. Admittedly it was a collateral contract, independent in some respects of the main contract between the parties as lessor and lessee. I think that the point is covered by *Re Adams & Kensington Vestry* (5) ((1883), 24 Ch.D. 199); see per PEARSON, J., at p. 206"—.

Then VAISEY, J., reads part of what I have already quoted from the judgment of PEARSON, J., including

> "If the lease had been simply assigned, without any more words, the option would have passed with it . . ."

Then the learned judge continues:

> "In the same case in the Court of Appeal ((1884), 27 Ch.D. 394), the decision of PEARSON, J., was affirmed."

Then VAISEY, J., quotes COTTON, L.J.'s observations (27 Ch.D. at p. 402), and goes on: "To the same effect is *Batchelor* v. *Murphy* (7) ([1925] Ch. 220)." VAISEY, J., then, after briefly stating the nature of that case and quoting a passage from the judgment of WARRINGTON, L.J. (ibid., at p. 228), to which we have already referred, continues:

> "And the authority of that decision is enhanced and certainly in no way diminished by the report of the same case in the House of Lords ([1926] A.C. 63) and support is given to the same view by *Re Johnston's Application* (8) ([1950] 1 All E.R. 613)."

For these reasons we are of opinion that the first of the two questions raised should be answered in the affirmative, that is to say, in the sense that the assignment of Aug. 3, 1948, did, as Vaisey, J., held, effectually vest the benefit of the option in the assignee.

That conclusion makes it strictly unnecessary to answer the second question, concerning the efficacy of the deed of Mar. 22, 1956, which purported to assign the benefit of the option to the assignee, if and so far as not already vested in him by the assignment of Aug. 3, 1948, and Vaisey, J., did not deal with it. However, in case we are wrong in holding the assignment of Aug. 3, 1948, to have included the benefit of the option, we should perhaps briefly indicate our view on this second question also.

If the assignment of Aug. 3, 1948, did not pass the benefit of the option to the assignee, then in our view the benefit of the option remained vested in Miss Blaker. True it is that by the terms of the option provision Miss Blaker could only assign it to an assignee of the term, but we fail to see why it should not have been competent to her to assign it to the assignee who was in fact the assignee of the term.

Counsel for the freeholder contended that the benefit of the option if, contrary to his submission on the first question, it was assignable at all, was only assignable along with and by the same instrument as the term; and accordingly that by assigning the term without including the option, Miss Blaker destroyed the option, which thus became incapable of assignment to the assignee or anyone else. We find it impossible to accede to this argument and are clearly of opinion that the deed of Mar. 22, 1956, must have constituted an effective assignment of the benefit of the option to the assignee if the assignment of Aug. 3, 1948, did not.

Counsel for the freeholder raised a subsidiary contention to the effect that the notice of Mar. 22, 1956*, purporting to exercise the option was bad because on the true construction of the option provision the six months' notice required for its exercise must, in order to be effective, expire with or before the expiration of the term. He relied on the condition requiring payment of all rent up to the expiration of the notice as showing that the provision contemplates that rent should be accruing down to the date of such expiration, which could only be so if the lease was still on foot. We can attach no weight to this point. There is nothing in this condition as to rent which can, as a matter of language, be regarded as inconsistent with a notice expiring after the end of the term, as in that case the condition would be literally complied with by payment of all rent due down to the end of the term. It is true that there would then be a hiatus in the shape of the period from the expiration of the lease down to the expiration of the notice during which no rent would be in terms reserved. But the parties appear, very sensibly, to have acted on the footing of an implied obligation on the lessee to continue to pay rent during this period, as it seems that rent since Mar. 25, 1956, has in fact been paid and accepted. Moreover, we think counsel's contention is quite plainly negatived by the latter part of the provision which is that:

> " . . . nothing herein contained shall be construed as giving to the lessee any option to purchase the fee simple of the demised premises at any time after the expiration or sooner determination of the term hereby granted unless the aforesaid notice shall have been given by her before such expiration or determination."

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* The terms of the notice are stated in the footnote at p. 78, ante.

That language expressly allows for a notice given before but not expiring till after the end of the term. Various other arguments and authorities were touched on in the course of a long and highly technical discussion, but we have, we think, dealt sufficiently with the essential points.

For the reasons which we have endeavoured to state we think that VAISEY, J., came to a right conclusion in this case, and we would dismiss this appeal.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Risdon, Weston, Witham & Hancock*, Minehead (for the freeholder, the defendant); *Slaughter & May* (for the assignee, the plaintiff).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

CADE *v.* BRITISH TRANSPORT COMMISSION AND ANOTHER.

[COURT OF APPEAL (Hodson, Parker and Ormerod, L.JJ.), July 11, 12, 15, 1957.]

Railway—Look-out—Statutory duty of railway to appoint look-out—Work "for the purpose of . . . repairing the permanent way"—Sub-ganger lengthman engaged on tightening loose fish plates on goods line—Trains going at only fifteen miles an hour—Whether "danger . . . likely to arise"—Prevention of Accidents Rules, 1902 (*S.R. & O.* 1902 *No.* 616), *r.* 9.

A sub-ganger lengthman employed on the defendants' railway undertaking was instructed to inspect a section of a goods line to see if anything were wrong. He was an experienced man and had worked on the section for a number of years. His duties included knocking in loose keys in the chairs of the line and tightening loose fish plates. After fetching a long spanner from a lengthmen's hut he returned to the line to tighten a fish plate. There were two lines on this section of railway, which at this point curved slightly, the visibility in each direction being about a quarter of a mile. When standing between the two lines the lengthman was fatally injured by one of two passing trains. The section of line was a "permissive block", that is to say, a specified number of trains (seven in this case) could be admitted on each line of the block at the same time. The number of trains passing in both directions was about six in an hour. The trains travelled at about fifteen miles an hour, the engines going tender first. The work of tightening a nut, whether the lengthman used his fingers or the long-handled spanner, took only a minute or a minute and a half, and there was nothing in the operation which would have prevented him, except for a brief moment, from keeping a look-out for trains. No look-out man was provided by the defendants. The widow of the deceased man brought an action against the defendants under the Fatal Accidents Acts, 1846 to 1908, for breach of statutory duty under the Prevention of Accidents Rules, 1902, r. 9, on the ground that the deceased man was "working . . . for the purpose of . . . repairing the permanent way" within that rule and that the defendants had failed to provide the look-out man whom the rule required them to provide in "cases where any danger is likely to arise".

Held: (i) the work on which the deceased man was engaged at the time of the accident was work of repair within r. 9 of the Rules of 1902 (*Reilly* v. *British Transport Commission*, [1956] 3 All E.R. 857, approved), but

(ii) the defendants would not be in breach of duty under r. 9 unless danger were "likely to arise", the mere possibility of danger arising not being enough, and

(iii) on the facts the work was not of such a kind that there was a likelihood (within r. 9) of danger arising (*Hutchinson* v. *London & North Eastern*

Ry. Co., [1942] 1 All E.R. 330, distinguished), and therefore the defendants were not in breach of r. 9 in not having provided a look-out man. A

Appeal dismissed.

[As to the making of rules for the prevention of accidents on railways, see 27 HALSBURY'S LAWS (2nd Edn.) 281-283, paras. 606, 607, and SUPPLEMENT.

For a summary of the Prevention of Accidents Rules, 1902, see 22 HALSBURY'S STATUTORY INSTRUMENTS 239.] B

Cases referred to:

(1) *London & North Eastern Ry. Co.* v. *Berriman*, [1946] 1 All E.R. 255; [1946] A.C. 278; 115 L.J.K.B. 124; 174 L.T. 151; 38 B.W.C.C. 109; 2nd Digest Supp.

(2) *Reilly* v. *British Transport Commission, Woods* v. *British Transport Commission*, [1956] 3 All E.R. 857; 3rd Digest Supp. C

(3) *Hutchinson* v. *London & North Eastern Ry. Co.*, [1942] 1 All E.R. 330; [1942] 1 K.B. 481; 111 L.J.K.B. 369; 166 L.T. 228; 36 Digest (Repl.) 114, *564*.

(4) *Vincent* v. *Southern Ry. Co.*, [1927] A.C. 430; 96 L.J.K.B. 597; 136 L.T. 513; Digest Supp. D

(5) *Smithwick* v. *National Coal Board*, [1950] 2 K.B. 335; 2nd Digest Supp.

(6) *Walker* v. *Bletchley Flettons, Ltd.*, [1937] 1 All E.R. 170; Digest Supp.

Appeal.

The plaintiff, Phyllis Maude Cade, appealed from an order made by BARRY, J., at Leeds Assizes on Jan. 17, 1957, whereby he dismissed the plaintiff's claim under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, for damages in respect of the death of her husband, Laurence Cade. E

The deceased man was employed as a sub-ganger lengthman by the first defendants, British Transport Commission. On Nov. 12, 1953, when the deceased man had tightened, or was about to tighten, a loose fish plate on a railway line controlled and operated by the first defendants, he was seriously injured, being struck by one of two passing trains, and he died on the same day. He had worked on the same section of line in which the accident happened for four years previously. The second defendant, Richard Winfield, was the foreman ganger under whose orders the deceased man was working at the time of the accident. F

By her statement of claim the plaintiff alleged (a) that the first defendants were in breach of r. 9 of the Prevention of Accidents Rules, 1902, in that they had failed to provide a look-out man; (b) that the first defendants had failed to provide a safe system of work; (c) negligence on the part of the first defendants, their servants or agents; and (d) negligence on the part of the second defendant. The learned judge held that the plaintiff had not established that the accident was due to the negligence of any individual employed by the first defendants, or to negligence on the part of the second defendant, or to any negligence on the part of the first defendants themselves. On the issue of breach of statutory duty on the part of the first defendants, the learned judge held that at the time of the accident the deceased man was " repairing the permanent way ", within r. 9 of the Rules of 1902, but that the circumstances were not such that " any danger [was] likely to arise ", within the rule and that, therefore, the first defendants were not under a statutory duty to provide a look-out man. G H I

F. W. Beney, Q.C., and *F. C. Denny* for the plaintiff.

G. S. Waller, Q.C., and *A. G. Sharp* for the defendants.

Cur. adv. vult.

July 15. **HODSON, L.J.:** This is an appeal from a judgment of BARRY, J., given on Jan. 17, 1957. The claim was a claim under the Fatal Accidents Acts, 1846 to 1908, by the widow of Mr. Laurence Cade, who was killed on Nov. 12, 1953, near Settings Dyke Bridge on a railway near Kingston-upon-Hull. He was killed in the course of his employment by the British Transport Commission, when he was either tightening up or about to tighten up loose fish plates on the railway and he was struck by one or other of two trains.

The facts, so far as it is necessary for me to state them, are that on the morning in question the deceased man, who was a sub-ganger with some four years' experience, was under the orders of the foreman ganger, Mr. Winfield [the second defendant], whose length of line included a length running between Ella Street and a lengthmen's hut in the Willerby-Hull direction. The line in question is called a main line, and there are two lines on a curve, but it is not a main line in the popular sense of the word "main". It is used by goods' trains, and is what is called a "permissive block"; that is to say, a number of trains up to seven may enter the block at the same time. The trains travel slowly; the trains in question were travelling at about fifteen miles per hour, tender first. The gang started at Ella Street, and the deceased man was instructed to walk the line. The main body of the gang had work to do and went to do it while the deceased man was walking the line. He had to walk a piece of branch line first, and so he was behind the main gang, who proceeded along the down main, walking towards the traffic. He proceeded after them and was subsequently seen by the foreman ganger near the lengthmen's hut at the Willerby end of the length, emerging from the hut with a long spanner in his hand. He told the foreman that he had found a fish plate nut loose and was going to tighten it.

The duties of a lengthman walking the line are to inspect the line to see if anything is wrong; and, by regulations, he carries with him a key hammer with which he knocks in any keys in the chairs which may be found to be loose. If he notices a fish plate nut requiring adjustment, he has to go to the nearest lengthmen's hut, as the deceased man was doing, to get the long spanner to tighten the nut. If only one nut is loose, he carries on and does not attend to it at once, coming back to it when convenient; but, if two nuts are found to be loose, he goes back at once and does the job.

On the day in question there were two trains, one on the down line and one on the up line, and the deceased man must have been aware of the approach of one train and was standing in the six-foot way between the two lines when he was struck by the other train and killed. This situation is envisaged by the regulations. Rule 234 (a) of the British Railway Rules reads:

> "When a train is approaching, men working on or near to the line must not remain on any running lines, nor between them if the space is less than eight feet, but must at once move clear of all lines unless they can distinctly see that they are in a position of safety, and in no danger from another train approaching them unobserved . . ."

Various questions were raised and various allegations of negligence were made against the British Transport Commission and their servants, including the foreman ganger and the drivers of the respective trains. The only question which now survives arises under r. 9 of the Prevention of Accidents Rules, 1902, made by the Board of Trade pursuant to s. 1 (1) of the Railway Employment (Prevention of Accidents) Act, 1900. Rule 9 reads:

> "With the object of protecting men working singly or in gangs on or near lines of railway in use for traffic for the purpose of relaying or repairing the permanent way of such lines, the railway companies shall, after the coming into operation of these rules, in all cases where any danger is likely to arise, provide persons or apparatus for the purpose of maintaining a good look-out or for giving warning against any train or engine approaching such men so working, and the persons employed for such purpose shall be expressly instructed to act for such purpose, and shall be provided with all appliances necessary to give effect to such look-out."

The deceased man was alone and no look-out was provided.

Two questions arise on this appeal. The first is whether the deceased man was doing work of repair, and the second is whether he should have been provided with a look-out to warn him of the approach of any trains, because his work was one in which danger was likely to arise. As to the first point, on first impression it might be thought that the work of a lengthman inspecting the track, knocking in keys with a hammer where they had worked loose, and tightening up nuts where necessary with a spanner in the fish plates, was work of maintenance not coming under the head of " repair ". The particular work on which the deceased man was engaged was, of course, the latter; and, in my judgment, the learned judge was right in coming to the conclusion that the work involved was work of repair. The material words are " relaying or repairing ", and the word " repair " has to be construed in its natural and not in any special railway sense.

The conclusion which the learned judge reached follows from the speeches given in the House of Lords in *London & North Eastern Ry. Co.* v. *Berriman* (1) ([1946] 1 All E.R. 255), where, by a majority of three to two, their Lordships held that the routine work of oiling signal apparatus was not a work of repair. I think that the obvious inference from the speeches, particularly the speeches of the majority, is that the House would have held that the work on which the deceased man was engaged in the present case was work of repair, and that we should follow the guidance of that majority. LORD PORTER said (ibid., at p. 267):

> " The exact meaning of repair is perhaps not easy to define, but it contains, I think, some suggestion of putting right that which has gone wrong."

LORD SIMONDS (ibid., at p. 271), accepted the dictionary definition of " repair ":

> " to restore to good condition by renewal or replacement of decayed or damaged parts or by refixing what has given way; to mend."

The case which we are now considering was, indeed, mentioned by LORD JOWITT, L.C., who was one of the minority. He said (ibid., at p. 258):

> " It would, I suppose, be conceded that if a nut had worked loose and required to be tightened the work involved would be a work of ' repair ' even although the actual work occupied only a few seconds of time."

In *Reilly* v. *British Transport Commission*, *Woods* v. *British Transport Commission* (2) ([1956] 3 All E.R. 857), the tightening of nuts, in that case the crossing bolt nuts, was held by DONOVAN, J., to be work of repair. He said (ibid., at p. 860):

> " The function of crossing bolts and nose bolts is to hold tightly together the component parts of the points at that spot. If by working loose they do not do this, then the bolts cease to perform their full duty even though they have worked loose only a little; for their function is not to work loose at all. Accordingly, when the bolts are tightened up again the result is that something which has not been doing its full duty before is now restored to full duty: and I see no difficulty in describing an operation which has that effect as a repair. Looked at in another way, a crossing bolt or nose bolt which is loose is a defective unit—even though it is only a little loose, for it should be tight, and if the defect is not made good it may get more pronounced, and serious results, for example, a derailment of a train, might ensue. To put right such a defect is, I think, reasonably and properly called a repair."

I think that this analysis of the operation of tightening bolts applies to the operation in question in this case, and I respectfully agree with the way in which the learned judge dealt with the matter. Indeed, I think that the conclusion is reinforced by the point which counsel for the plaintiff made that, as I have stated earlier, the instructions are that a lengthman, finding two nuts loose, must as a matter of urgency attend to the matter at once. That deals with the first question which arises, on which I entirely agree with the view reached by the learned judge.

On the second matter, the learned judge held that this was not a case in which "any danger [was] likely to arise" and, therefore, the claim failed. It was contended that his decision was wrong because of what had been said in this court in *Hutchinson* v. *London & North Eastern Ry. Co.* (3) ([1942] 1 All E.R. 330). The court was there at pains to point out the fallacy of the argument presented to it that the words in question did not cover the ordinary case of men working on railway lines which are in use, because in such cases there must always be some danger. I will read part of the judgment of Lord Greene, M.R., which deals with this. He said (ibid., at p. 332):

> "It seems to me that the phrase 'in all cases where any danger is likely to arise' means what it says, and I do not see how it can be disputed that danger is likely to arise to any men who are working on a main railway line, quite apart from any special circumstances, and that the rule is directed to making provision to guard against that danger. It is said by counsel on behalf of the railway company that some limitation must be put upon the words 'in all cases where any danger is likely to arise'. He says that, if they are held to cover the ordinary, normal case of work on a line of railway which is in ordinary use, there would be no need for those words at all, because in every case of a line of railway in use for traffic there must be some danger. I do not agree. It is manifest, to my mind, that in many cases where work is being done on a railway in use for traffic, which means a railway that is not closed or abandoned, it may be possible to say that there can be no danger at all to men working on the line."

Lord Greene, M.R., then gave this instance (ibid., at p. 333):

> ". . . if there were a branch line with only two or three trains a day, at long intervals, during those intervals it is clear that there would be no danger likely to arise, and, if those words had not been inserted, it would have been obligatory on the railway company to provide a look-out even on such a line during such intervals, which really would, of course, have been absurd."

Lord Greene, M.R., then went on to deal with the situation where work was being done not on the lines but near the lines.

Goddard, L.J., was also dealing with the same argument when he said (ibid., at p. 335):

> "With regard to the construction of the Prevention of Accidents Rules, 1902, r. 9, if it were not that the judge took another view, I am bound to say that I should have thought the question was simply unarguable. The rule is unambiguous. It is made in pursuance of a statute which contemplates rules being made for reducing or preventing the dangers and risks incidental to railway service, and one of the purposes for which rules may be made is the protection of permanent way men relaying or repairing the permanent way. The danger which is an incident of their service is being run down by a train. Therefore, when you find a rule, made in pursuance of a statute, which says that the railway company shall provide a look-out in all cases where any danger is likely to arise, I can see no ground whatever for saying that that rule is to be construed as meaning any unlikely danger. With regard to the words 'where any danger is likely to arise', an abnormal or unusual danger is one not likely to arise . . ."

I do not, however, read the judgments as laying down that there are no other instances than those mentioned by Lord Greene, M.R., where danger is not likely to arise. To do so would, indeed, be to read into the judgments more than they say; and that they so intended to hold is exceedingly unlikely, in view of the fact that the court had been referred to *Vincent* v. *Southern Ry. Co.* (4)

([1927] A.C. 430), in which Lord Sumner, in his speech, dealt with the construction of these very words. He said (ibid., at p. 440):

> ". . . the words ' in all cases ' (i.e., of relaying or repairing the permanent way in use for traffic) ' when any danger is likely " to arise " ' (i.e., from that traffic) are essentially relative to the condition of the permanent way and of that traffic from time to time, and, unless the rule requires the provision of a look-out man not from time to time but throughout the day, which it neither says nor implies, the only person who can judge such danger is the man who is on the spot, authorised to detail and instruct the look-out man, and that person is almost inevitably the foreman of the gang. True, the words are ' in all cases where ' not ' whenever ', but also the words are in all ' cases ' not in all ' places '. I think ' case ' includes the place, the time, and the method of carrying out the repair . . ."

It appears to me to be clear that the court is, accordingly, entitled to look at the circumstances of the case and also to make up its mind whether danger is likely to arise. This involves considering the method and the nature of the work which is being done. I again agree entirely with the approach of Donovan, J., to this question in *Reilly* v. *British Transport Commission* (2). He said ([1956] 3 All E.R. at p. 861):

> " It [the danger] is constituted, or ' arises ', only when trains and workmen are brought into close proximity one to the other, and the surrounding circumstances are such as to constitute a real risk of accident. I use the expression ' real risk ' in contradistinction to a remote risk, for the words in r. 9 are ' danger is *likely* to arise '; and the word ' likely ' is important in this context. Thus, if a linesman is sent off by himself to inspect a length of line and tighten up, for example, fish plates, this is work which he can do with a long spanner provided for the purpose, and at the same time keep his eyes and ears open. If no special danger like fog is present, there is really no reason to expect that he will be struck by some passing train, the approach of which he could both see and hear, and which he would have ample time and space to avoid. I think that danger would not be likely to arise in such a case."

Counsel for the plaintiff, however, contended that this approach was wrong and that the words " where any danger is likely to arise " in the rule were equivalent to the word " dangerous " where it appeared, for example, in Part 2 of the Factories Act, 1937. He relied for his contention on the observations of du Parcq, J.*, which were quoted by Tucker, L.J., in *Smithwick* v. *National Coal Board* (5) ([1950] 2 K.B. 335 at p. 347). The words of du Parcq, J., are taken from his judgment in *Walker* v. *Bletchley Flettons, Ltd.* (6) ([1937] 1 All E.R. 170 at p. 175), where he said:

> ". . . a part of machinery is dangerous if it is a possible cause of injury to anybody acting in a way in which a human being may be reasonably expected to act in circumstances which may be reasonably expected to occur."

I draw attention to the use of the word " possible ".

In *Smithwick* v. *National Coal Board* (5) Denning, L.J., dealing with the word " dangerous " in the Factories Act, 1937, said ([1950] 2 K.B. at pp. 350, 351):

> " It is ' dangerous ' if it is such that it may reasonably be foreseen to be a source of injury to people who may be in the vicinity, taking them with all the ordinary infirmities to which human nature is prone. The occupier must realise that not everybody is careful: many are hasty, careless or

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* In *Walker* v. *Bletchley Flettons, Ltd.*, before du Parcq, J., the action was for breach of statutory duty under s. 10 of the Factory and Workshop Act, 1901, which was repealed by the Factories Act, 1937. The relevant part of s. 10 was replaced by s. 14 of the Act of 1937.

> inadvertent; some are unreasonable, or even disobedient. It may be unlikely that they will act in such a way, but it is not only the likely but also the unlikely accident against which the occupier must guard. He must guard against all conduct which he can reasonably foresee. The limit of his responsibility is only reached when the machinery is safe for all except the incalculable individual against whom no reasonable foresight can provide—the individual who does not merely do what is unlikely, but also what is unforeseeable, or, at least, not to be foreseen by any ordinary man."

Denning, L.J., then referred to the passage in the judgment of du Parcq, J., to which Tucker, L.J., had previously referred.

I think that that passage which I have read from the judgment of Denning, L.J., provides the answer to the argument here presented, drawing, as it does, the distinction between things dangerous in the sense that danger can possibly arise and cases in which danger is likely to arise.

The remaining question, therefore, is whether on the facts of this case the learned judge was right in holding that the circumstances were not such that it could be said that danger was " likely to arise ". It is true that the position in which the deceased stood was on a curve, but he could see a quarter of a mile each way. The trains were travelling at the slow speed of about fifteen miles per hour, and the number of trains going each way was probably about four in the hour. It is true that the moment of arrival of any particular train could not be anticipated, because they were not timed in any way; the permissive block system enabled several trains to be in the same section at the same time. It is also true that the engines were travelling tender first and, therefore, the driver's view was more obscured than if the boiler had been in front; but in any event the possibility of the driver of the train being able to avoid running down any one on the track must necessarily be very remote.

The salient feature of the case is, however, that the work which the deceased man was doing with a long spanner provided for the purpose was work which can be done quickly and without relaxing one's look-out for more than a moment or two at a time. That appears quite plainly from the evidence in this case. As a matter of practice, if a nut appears to be loose, the man will stoop down and, if it can be tightened with the fingers, he will tighten it with his hand as far as it will go, and then he will stand up and use the long-handled spanner. There is nothing in that operation, which is the operation with which we are concerned in this case, which will prevent him, except for a very brief moment, from keeping a look-out ahead and looking after himself. I think that that is the matter which is of salient importance and decisive in this case. The conclusion of Barry, J., on this matter was, in my judgment, right, and the appeal, therefore, should be dismissed.

PARKER, L.J.: I have come to the same conclusion. The first question is whether the deceased man was working " for the purpose of . . . repairing the permanent way ", within the Prevention of Accidents Rules, 1902, r. 9. It is true that he was merely about to tighten up two nuts, so that it might well be said that he was doing a job of maintenance or adjustment, as opposed to a job of mending or replacement which everyone, I imagine, would concede to be " repair ". In the context, however, I do not think that any such distinction can be drawn. " Repair " is, I think, used in its ordinary sense as the putting right of something which has gone wrong. Mr. Winfield, the deceased man's foreman, was asked what the deceased man's job of track walking involved, and he replied:

> " It involves examining the track. Q.—For what purpose? A.—For any defects or putting in keys, tightening up bolts or anything that has gone wrong."

Add to that the fact that the working instructions were that, if two nuts were found loose, the ganger had to fetch a spanner and tighten up the nuts at once, and I think it becomes clear that the work was a work of repair in the ordinary sense. I think that this follows largely from the speeches of the majority of the House of Lords in *London & North Eastern Ry. Co.* v. *Berriman* (1) ([1946] 1 All E.R. 255), and I can find no grounds for saying that a job of repair in the ordinary sense is not within the rule if the length of time involved is short. I entirely agree with the reasoning of Donovan, J., on this point in his very careful judgment in *Reilly* v. *British Transport Commission* (2) ([1956] 3 All E.R. 857), to which my Lord has referred.

It was, however, submitted by counsel for the commission that the court should look at the deceased man's job as a whole and not merely at that part of it which entailed the tightening up of the nuts. For my part I doubt whether this is the correct approach, since, from the moment when he broke off from his track walking and fetched the spanner, he was engaged on work of repair; but, in any event, I should have thought that his job as a whole, including the knocking in of loose keys, was itself work of repair.

The next question is whether this was a case where any danger was " likely to arise ". Undoubtedly the rule was made to protect men, in part at any rate, against their own carelessness or inadvertence: see *Hutchinson* v. *London & North Eastern Ry. Co.* (3) ([1942] 1 All E.R. 330), per Lord Greene, M.R., and per Goddard, L.J. (ibid., at pp. 334, 335, and p. 337). Accordingly, it is said that the test is the same as in considering, for instance, whether a part of machinery is dangerous for the purposes of s. 14 of the Factories Act, 1937. Applying the test laid down by du Parcq, J., in *Walker* v. *Bletchley Flettons, Ltd.* (6) ([1937] 1 All E.R. 170), it is said, and I think correctly, that the operation on which the deceased was engaged was a dangerous operation: but the question is whether that is the correct test. I think that it is not. It gives no effect to the word " likely ", but merely assimilates it to " possible ". My Lord has referred to the passage in the judgment of Denning, L.J., in *Smithwick* v. *National Coal Board* (5) ([1950] 2 K.B. 335 at p. 351) where, to quote merely a sentence, he said:

> " It may be unlikely that they will act in such a way, but it is not only the likely but also the unlikely accident against which the occupier must guard."

In r. 9 of the Rules of 1902, however, the word " likely " appears and likelihood is made the test, and that, as I think, must depend on the exact circumstances.

Support for this is to be gained from a passage in Lord Sumner's speech in *Vincent* v. *Southern Ry. Co.* (4) ([1927] A.C. 430). I need only read a very short passage. Lord Sumner said (ibid., at p. 441):

> " True, the words are ' in all cases where ' not ' whenever ', but also the words are in all ' cases ' not in all ' places '. I think ' case ' includes the place, the time, and the method of carrying out the repair . . ."

It is, however, said that *Hutchinson* v. *London & North Eastern Ry. Co.* (3) is authority to the contrary and that, wherever a man is working on a railway line on which trains are running, danger is likely to result, regardless of the exact circumstances. While there are passages in the judgment which at first sight appear to bear this out, I am satisfied that this is not their true effect. It must be borne in mind that in that case men were engaged in adjusting the level of the rails, jacking them up and putting in new ballast, a job which required all their attention. It was the main line between York and Newcastle, with express trains passing every eight to ten minutes, and there was no look-out. In those circumstances, although danger was clearly likely to arise, it was argued that the rule was not intended to apply to normal working, and it applied only in the case of abnormal danger. The judgments, as I read them, do no more than controvert that argument. Finally, the dictum of Lord Sumner in *Vincent* v. *Southern Ry. Co.* (4) was before the court and no dissent was expressed from it.

Turning to the facts of the present case, the salient facts are as follows. The line on which the deceased man was working was used only for goods traffic. True, trains passed comparatively frequently, but they were slow-moving. Visibility was good, some quarter of a mile in each direction. The tightening up of the nuts was a matter of one to one and a half minutes and, whether he used his fingers or the long-handled spanner, the deceased man could keep a look-out all the time he was working. Finally, he was a very experienced man who had worked on this section for a number of years. In all those circumstances, I agree with the learned judge that it cannot be said that danger was " likely to arise ". Accordingly, I would dismiss this appeal.

ORMEROD, L.J.: I agree. The learned judge found that the deceased man, at the time when he met with his accident, was engaged in " repairing the permanent way ", but held that the case was not one where danger was "likely to arise ". With regard to the first point, whether the deceased was engaged in " repairing the permanent way ", I agree with what has been said, and there is nothing that I wish to add to the remarks which have already been made.

With regard to the second question, whether this was a case where danger was " likely to arise ", the facts which the learned judge took into account in coming to his decision were that the operation on which the deceased man was engaged, or about to engage, whichever is the fact, was of the simplest character. In order to tighten the nut on the fish plate, he would first turn it as far as possible with his hand, and then make a final turn with the long spanner provided for the purpose. To place the spanner on the nut required only a momentary glance; and, as the learned judge put it, he was in the very same position to keep a look-out as any man sent there to act specifically as a look-out man. It was proved that there was good visibility for a quarter of a mile either side of the place where the work was being performed, that a number of trains up to about six in the hour passed the spot at a speed of about fifteen miles per hour, and that the whole of the traffic on this line was slow goods traffic.

The main criticism of the judgment by counsel for the plaintiff was that the learned judge applied the wrong test in asking himself whether the deceased man could with reasonable care have seen the train coming. Counsel submitted that the words of r. 9 of the Prevention of Accidents Rules, 1902, should be equated with the words of s. 14 of the Factories Act, 1937, and referred to the classic passage, to which there has already been reference, in the judgment of DU PARCQ, J., in *Walker* v. *Bletchley Flettons, Ltd.* (6) ([1937] 1 All E.R. 170 at p. 175). In considering this question, however, attention must be paid to the difference in the wording of the rule and the section, respectively. Rule 9 refers to " all cases where any danger is likely to arise ", and s. 14 (1) of the Act of 1937* provides that " Every dangerous part of any machinery . . . shall be securely fenced . . ." The passage from the judgment of DENNING, L.J., in *Smithwick* v. *National Coal Board* (5) ([1950] 2 K.B. 335 at p. 351) has already been read. That case was not, of course, dealing with s. 14 of the Factories Act, 1937, but was dealing with s. 55 of the Coal Mines Act, 1911, but the words " dangerous parts of the machinery " were similar to the operative words in s. 14 of the Factories Act, 1937. It is not necessary for me to read those words again, except to point out that DENNING, L.J., said that the limit of the employer's responsibility was

> ". . . only reached when the machinery is safe for all except the incalculable individual against whom no reasonable foresight can provide . . ."

The wording of r. 9, however, in my judgment, calls for a different test. It is not the unlikely, albeit foreseeable, act against which the British Transport Commission has to provide protection; they must provide protection against the danger which is " likely to arise ". The test here is not that of foreseeability;

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* Superseding, for the present purpose, s. 10 of the Factories and Workshop Act, 1901.

it is likelihood; and to apply this test requires consideration of the whole of the circumstances of the case. This is borne out by the dictum of Lord Sumner in *Vincent* v. *Southern Ry. Co.* (4) ([1927] A.C. 430 at p. 441), which has already been read.

Counsel for the plaintiff placed a good deal of reliance on the judgments of Lord Greene, M.R., and Goddard, L.J., in *Hutchinson* v. *London & North Eastern Ry. Co.* (3) ([1942] 1 All E.R. 330), but it must be remembered that the facts in that case were very different from the facts in the present case. There the men were engaged in the work of putting new ballast under the rails, a task which, no doubt, required all their concentration and made it difficult, if not impossible, for them to keep any kind of look-out for approaching trains. The work, too, was being carried out on a main line, where fast trains were passing with considerable frequency and regularity. The distinction between work of the kind that was being done in *Hutchinson* v. *London & North Eastern Ry. Co.* (3) and the sort of task on which the deceased man was engaged is pointed out by Lord Porter in *London & North Eastern Ry. Co.* v. *Berriman* (1) ([1946] 1 All E.R. 255). Lord Porter said (ibid., at p. 267):

> "If reason for the limitation of protection to men relaying or repairing the permanent way be required, it is, I think, to be found in the consideration that such men will for extended periods be concentrated on their work and unable to watch for oncoming trains whilst so engaged, whereas men cleaning, oiling or changing points by hand are only momentarily engaged and can insure their own safety by looking to see the state of the line or lines before they undertake their job."

It is true that in that case the question was being considered whether oiling came within the word "repair", but it does show the approach which Lord Porter made to the question. The evidence in the present case is that the work which was being done—the operation of tightening a fish plate nut—was even a simpler matter, requiring probably less time and less concentration than that of oiling; and, in those circumstances, it seems reasonable to say that this was not work which of itself constituted a case in which danger was likely to arise within the meaning of r. 9. In my judgment, the learned judge in coming to his decision applied the right test and gave proper consideration to the work which the deceased was required to do and the circumstances in which he was required to do it. I think that the learned judge was right, and I agree that this appeal should be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Smith & Hudson*, agents for *Williamson, Stephenson & Hepton*, Hull (for the plaintiff); *M. H. B. Gilmour* (for the defendants).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

Re HIBERNIAN MERCHANTS, LTD.

[CHANCERY DIVISION (Roxburgh, J.), July 22, 1957.]

Company—Winding-up—Unregistered company—Foreign company—Liquidation already commenced abroad—Compulsory order—Form of order—Whether order should limit liquidator's powers.

A creditor petitioned under s. 399 (1) of the Companies Act, 1948, for the compulsory winding-up of a company incorporated in the Republic of Ireland but having an established place of business and assets in Great Britain. The company (an unregistered company within the Companies Act, 1948) was the subject of proceedings for compulsory winding-up in Ireland. The petition in England was unopposed, and it was suggested that a special limitation be inserted in the winding-up order that the liquidator should not act in pursuance of the order except for the purpose of getting in the English assets and settling a list of the English creditors without applying to the court for directions.

Held: such a limitation would not be inserted in the order, since it was undesirable to fetter the discretion of the official receiver in the liquidation as the court had little knowledge of the circumstances and he could apply to the court if it appeared desirable to do so; but a limitation whose effect would be merely to reserve specially to the court matters in respect of which the liquidator was by law at liberty to apply to the court was not ultra vires.

Re Commercial Bank of South Australia ((1886), 33 Ch.D. 174) considered.

Dictum of VAUGHAN WILLIAMS, J., in *Re Federal Bank of Australia, Ltd.* ((1893), 62 L.J.Ch. at p. 563) criticised.

[As to the winding-up of a company when liquidation has already commenced abroad, see 6 HALSBURY'S LAWS (3rd Edn.) 845, para. 1731; and for cases on the subject, see 10 DIGEST (Repl.) 1302-1307, *9172-9202*.

For the Companies Act, 1948, s. 399, see 3 HALSBURY'S STATUTES (2nd Edn.) 754.]

Cases referred to:

(1) *Re Federal Bank of Australia, Ltd.*, (1893), 62 L.J.Ch. 561; 68 L.T. 728; 10 Digest (Repl.) 1302, *9173*.

(2) *Re Commercial Bank of South Australia*, (1886), 33 Ch.D. 174; 55 L.J.Ch. 670; 55 L.T. 609; 10 Digest (Repl.) 1305, *9185*.

Petition for compulsory winding-up order.

Hibernian Merchants, Ltd. (hereinafter called " the company ") was in June, 1953, incorporated in the Republic of Ireland under the Companies Acts, 1908 to 1924. The company established a place of business within Great Britain and the documents required by s. 407 of the Companies Act, 1948, to be delivered to the registrar of companies for registration were delivered in December, 1953. The registered office of the company was in Dublin. The nominal capital of the company was £1,000 divided into one thousand shares of £1 each, all of which were paid up or credited as paid up. At an extraordinary general meeting of the company held on May 20, 1954, the nominal capital was increased by extraordinary resolution by the creation of twenty thousand new ordinary shares of £1 each, none of which had been allotted. Objects (among others) for which the company was established were " to buy, sell, export, import and deal in goods, articles, materials, manufactures and products of all descriptions ".

The company had been in voluntary liquidation in the Republic of Ireland since August, 1956, and proceedings were now before the courts in that country at the suit of certain creditors who were seeking to wind up the company compulsorily. The statement of affairs of the company on Aug. 30, 1956, filed in the voluntary liquidation disclosed a deficiency of assets over liabilities of £39,144 19s. 3d.

On May 28, 1957, the petitioners commenced an action against the company in the High Court for the recovery of £901 10s. 2d. for purchase tax pursuant to the Finance (No. 2) Act, 1940, and amending Acts. The company failed to enter an appearance in the action and on June 11, 1957, the petitioners signed and recovered judgment for £901 10s. 2d. and £10 costs.

The company having failed to pay the judgment debt, the petitioners now alleged that the company was unable to pay its debts and asked that the company be wound up by the court.

Counsel for the petitioners submitted that the following words should be inserted in the winding-up order

> " that the liquidator shall not act in pursuance of the order except for the purpose of getting in the English assets and settling a list of English creditors without applying to the court for directions."

It is on the question whether these words should appear in the order that this case is reported.

Denys B. Buckley for the petitioners, the Customs and Excise Commissioners, judgment creditors.

I. Edwards-Jones for the Inland Revenue Commissioners, supporting creditors.

ROXBURGH, J.: This is a petition by the Commissioners of Customs and Excise, who are judgment creditors of Hibernian Merchants, Ltd. and have the support of the Commissioners of Inland Revenue, who are creditors for £864. The special feature of the case is that the company was incorporated in the Republic of Ireland. I am satisfied that this petition was duly served.

The matter is of some importance. To the winding-up of this company (which is an unregistered company within the meaning of the Companies Act, 1948) s. 399 (1) of that Act applies. Section 399 (1), which is indistinguishable from s. 199 of the Companies Act, 1862, for the present purpose, provides as follows:

> " Subject to the provisions of this Part of this Act, any unregistered company may be wound up under this Act . . ."

Up to that point, the court clearly has some kind of discretion. It is not material for the present purpose precisely what are the boundaries of that discretion, but the word " may " must import some discretion. The sub-section continues:

> ". . . and all the provisions of this Act with respect to winding-up shall apply to an unregistered company, with the exceptions and additions mentioned in the following provisions of this section."

Try hard as I will, I cannot see that those words can be treated as otherwise than mandatory. They are, in my view, as imperative as language can make them. If that be so, then the court has no power to attach to the winding-up order any provisions which would have an effect contrary to the provisions contained in the Act unless such exceptions and additions could be found in the following provisions of s. 399, and nobody suggests that with which I am concerned today is to be found there.

The point before me is in fact not quite that point, because I think counsel for the petitioners is prepared to concede that what VAUGHAN WILLIAMS, J., is reported to have said in *Re Federal Bank of Australia, Ltd.* (1) ((1893), 62 L.J.Ch. 561) goes too far, and I am certainly of that opinion; there the court was dealing with a winding-up petition in relation to which VAUGHAN WILLIAMS, J., said (ibid., at p. 563):

> " I think that the right order for me to make is an order for compulsory winding up, with the limitation introduced in the order in *Re Commercial*

> *Bank of South Australia* (2) ((1886), 33 Ch.D. 174) . . . I think that the best thing I can do in the interest of everybody concerned is to make a compulsory order, a consequence of which will be that the official receiver will be the liquidator. I shall limit his authority in the way in which I have already stated . . ."

The order was directed not to be drawn up for a fortnight, in order to give the bank an opportunity to appeal. I think that something in the nature of what North, J., did in *Re Commercial Bank of South Australia* (2) ((1886), 33 Ch.D. 174) could be done, if desirable, in a winding-up order. It is important to read carefully what he said. The case was the adjourned hearing of a winding-up petition, and North, J., said (ibid., at p. 178):

> "I do not think it would be right to insert any special directions in the order; this is not the proper time for giving such directions. But I will say this, that I think the winding-up here will be ancillary to a winding-up in Australia, and, if I have the control of the proceedings here, I will take care that there shall be no conflict between the two courts . . ."

That indicates so far that he is not going to put anything at all about this in the order, but is merely giving an indication of how in his judgment the winding-up ought to be conducted by the liquidator. He goes on later, quite categorically (ibid.)

> "I do not think that I ought to insert any special directions in the order."

He continues, and this no doubt is the foundation for the suggestion that some special direction was put in the order in spite of the judge having twice said that he was not going to put any such direction in the order:

> "But I think that the liquidator ought not to act without the special directions of the judge in chambers, except for the purpose of getting in the English assets and settling a list of the English creditors."

If he put that in the order, he obviously violated what he had himself twice said. For my own part, I believe that that refers to what he had said that he would do if he had control of the proceedings. If, however, he did put anything in the order, I do not think that the order would necessarily be ultra vires, provided that it is construed as not in any way limiting the effect of the winding-up order but as reserving specially to the court matters in respect of which a liquidator is always at liberty to apply to the court under the general law if he desires to do so. If the order be so construed, it cannot in my judgment offend the statute; and I, for my part, would regard the order of North, J., which I have not seen, as probably having no more effect than that. There were some quite special circumstances in *Re Commercial Bank of South Australia* (2), as will appear from a perusal of the judgment. I have no idea whether any similar circumstances exist in the present case. For my own part, I think that it is better to trust the official receiver to make an application to the court as he can always do if and when he thinks it is desirable, than to fetter him in advance in circumstances about which the court knows very little. I can well imagine that in many cases, even if there were a question of a principal and an ancillary jurisdiction, the official receiver would not find it difficult to carry out his duties under the Companies Act, 1948, without any application to the court; and in such a case the reservation in the order will merely waste money. In other cases no doubt it may be extremely difficult, but then surely it is better to decide what is to be done with the facts in evidence than to decide what is to be done in advance of knowledge of the facts.

Therefore, while I am satisfied that an order which does no more than the order in *Re Commercial Bank of South Australia* (2) appears to have done, is within the powers of the court, for my part I do not think it desirable in the present case to put any special provision in the winding-up order; but I would

A like to add that I am most indebted to counsel who have given me much assistance on a point which I wished to explore in the circumstances to which I have already alluded. The order will be the ordinary order.

Order accordingly.

Solicitors: *Solicitor of Customs and Excise* (for the petitioners); *Solicitor of Inland Revenue* (for the supporting creditors). B

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

GOULANDRIS BROTHERS, LTD. *v.* B. GOLDMAN & SONS, LTD.

C

[QUEEN'S BENCH DIVISION (Pearson, J.), July 9, 10, 11, 12, 26, 1957.]

Shipping—General average expenditure—Expenditure incurred through shipowners' fault—Ship unseaworthy and failure to exercise due diligence—Whether right to claim contribution from cargo owner—Remedies open to cargo owner—Whether remedies barred—York-Antwerp Rules, 1950, *Rule D—Carriage of Goods by Sea Act,* 1924 (14 *&* 15 *Geo.* 5 *c.* 22), *Schedule, art.* III, *r.* 6, *third para.* D

The international rules governing the law of general average, known as the York-Antwerp Rules, are not a complete code of law and may require to be supplemented by the provisions of the general law applicable to the contract (see p. 106, letter B, post). In Rule D of those rules, which E provides that " Rights to contribution . . . shall not be affected, though the event which gave rise to the . . . expenditure may have been due to the fault of one of the parties . . . but this shall not prejudice any remedies which may be open against that party for such fault ", the word " fault " means a legal wrong which is actionable between the parties at the time when the general average expenditure was incurred (see p. 114, letter H, post); and the F word " remedies " includes not only a cross-claim for breach of the contract of carriage but also the " equitable " defence that a claimant may not recover for the consequence of his own wrong (see p. 111, letter I, to p. 112, letter A, post).

The Carron Park ((1890), 15 P.D. 203) and dictum of LORD ATKIN in *Louis Dreyfus & Co.* v. *Tempus Shipping Co.* ([1931] A.C. at p. 748) applied as regards the meaning of " fault ". G

Schloss v. *Herriot* ((1863), 14 C.B.N.S. 59); *The Ettrick* ((1881), 6 P.D. 127) and *Strang, Steel & Co.* v. *Scott (A.) & Co.* ((1889), 14 App. Cas. 601) considered as regards the " equitable " defence.

At Sapele, a port in West Africa, river water was used to fill the boilers of the Granhill, then on a time charterparty. The vessel proceeded to Lagos H where goods were loaded for delivery in London to the respondents under a bill of lading issued on behalf of the shipowners. The bill of lading provided for general average being payable according to the York-Antwerp Rules, 1950, and applied art. III, r. 6, of the Hague Rules by which the carrier and the ship would be discharged from liability unless suit were brought within one year after delivery of the goods or the date when the goods should be I delivered. On the voyage to London the vessel suffered serious boiler trouble, had to be towed and was damaged while on tow and, though the respondents' goods were not damaged and were subsequently delivered to the respondents, a general average expenditure was incurred of which, after general average adjustment, the respondents' proportion was claimed from them by the shipowners. The respondents denied liability on the ground that the loss was caused by the shipowners' fault and that (as was found to be the fact) the ship was unseaworthy and due diligence had not been

A exercised to make her seaworthy before and at the beginning of the voyage from Lagos; the respondents also claimed from the shipowners for breach of contract damages of an amount equal to the respondents' general average contribution. No suit was brought within the year allowed by art. III, r. 6, of the Hague Rules.

Held: the shipowners were not entitled to recover general average contribution B from the respondents for the following reasons—

(i) neither the respondents' defence (viz., the "equitable" defence that the shipowners could not recover in respect of the consequences of their own fault) nor the respondents' cross-claim for breach of the contract of carriage by reason of the unseaworthiness of the vessel and the shipowners' lack of diligence to make her seaworthy was within art. III, r. 6, C of the Hague Rules, since (a) art. III, r. 6, did not bar defences (see p. 114, letter I, post), and (b) the liability to general average contribution in the present case was too remote from the respondents' goods (see p. 115, letter H, post); therefore, neither the "equitable" defence nor the cross-claim was barred by lapse of time.

(ii) the general average expenditure was caused by the shipowners' fault D within Rule D of the York-Antwerp Rules and not only the respondents' cross-claim for damages but also their "equitable" defence was, by virtue of the proviso to Rule D, an effective answer to the shipowners' claim.

[As to the defence of unseaworthiness to a claim for general average contribution, see 18 HALSBURY'S LAWS (2nd Edn.) 326, para. 454, text and notes (p) (q), E and see also 30 HALSBURY'S LAWS (2nd Edn.) 593, 594, para. 751; and for cases on the subject, see 41 DIGEST 604, *4312*, *4313*.

For the Hague Rules, art. III, r. 6, see the Carriage of Goods by Sea Act, 1924, Schedule, art. III, r. 6, 23 HALSBURY'S STATUTES (2nd Edn.) 888, 889.]

Cases referred to:

(1) *Hordern-Richmond, Ltd.* v. *Duncan*, [1947] 1 All E.R. 427; [1947] K.B. F 545; [1947] L.J.R. 1024; 176 L.T. 332; 2nd Digest Supp.

(2) *Bank of England* v. *Vagliano Bros.*, [1891] A.C. 107; 60 L.J.Q.B. 145; 64 L.T. 353; 3 Digest 170, *281*.

(3) *Schloss* v. *Heriot*, (1863), 14 C.B.N.S. 59; 32 L.J.C.P. 211; 8 L.T. 246; 143 E.R. 366; 41 Digest 604, *4313*.

(4) *Prehn* v. *Bailey, The Ettrick*, (1881), 6 P.D. 127; 45 L.T. 399; 41 Digest G 601, *4280*.

(5) *Burton* v. *English*, (1883), 12 Q.B.D. 218; 53 L.J.Q.B. 133; 49 L.T. 768; 41 Digest 596, *4218*.

(6) *Strang, Steel & Co.* v. *Scott (A.) & Co.*, (1889), 14 App. Cas. 601; sub nom. *Steel & Co.* v. *Scott (A.) & Co.*, 59 L.J.P.C. 1; 61 L.T. 597; 41 Digest 592, *4165*.

H (7) *Louis Dreyfus & Co.* v. *Tempus Shipping Co.*, [1931] A.C. 726; 100 L.J. K.B. 673; 145 L.T. 490; *affg.*, S.C. sub nom. *Tempus Shipping Co., Ltd.* v. *Louis Dreyfus & Co., Ltd.*, [1931] 1 K.B. 195; Digest Supp.

(8) *Hain S.S. Co., Ltd.* v. *Tate & Lyle, Ltd.*, [1936] 2 All E.R. 597; 155 L.T. 177; Digest Supp.

(9) *Vincent* v. *Southern Ry. Co.*, [1927] A.C. 430; 96 L.J.K.B. 597; 136 L.T. I 513; Digest Supp.

(10) *Smith* v. *Baveystock & Co., Ltd.*, [1945] 1 All E.R. 531; *affg.*, [1945] 1 All E.R. 278; 2nd Digest Supp.

(11) *Charles* v. *Altin*, (1854), 15 C.B. 46; 139 E.R. 335.

(12) *The Glenfruin*, (1885), 10 P.D. 103; 54 L.J.P. 49; 52 L.T. 769; 41 Digest 423, *2655*.

(13) *Akt. Ocean* v. *Harding (B.) & Sons, Ltd.*, [1928] 2 K.B. 371; 97 L.J.K.B. 684; 139 L.T. 217; Digest Supp.

(14) *Susan V. Luckenbach S.S. (Owners)* v. *Admiralty Comrs., The Susan V. Luckenbach,* [1951] 1 All E.R. 753; [1951] P. 197; 2nd Digest Supp. A

(15) *The Carron Park,* (1890), 15 P.D. 203; 59 L.J.P. 74; 63 L.T. 356; 41 Digest 426, *2680.*

(16) *Milburn & Co.* v. *Jamaica Fruit Importing & Trading Co. of London,* [1900] 2 Q.B. 540; 69 L.J.Q.B. 860; 83 L.T. 321; 41 Digest 404, *2508.*

(17) *Renton (G. H.) & Co., Ltd.* v. *Palmyra Trading Corpn. of Panama,* [1956] 3 All E.R. 957; [1957] A.C. 149; 3rd Digest Supp. B

(18) *Anglo-Saxon Petroleum Co., Ltd.* v. *Adamastos Shipping Co., Ltd.,* [1957] 1 All E.R. 673; [1957] 1 Lloyd's Rep. 79.

(19) *Schmidt* v. *Royal Mail SS.. Co.,* (1876), 45 L.J.Q.B. 646; 41 Digest 597, *4221.*

(20) *Greenshields, Cowie & Co.* v. *Stephens & Sons,* [1908] A.C. 431; 77 L.J. K.B. 985; 99 L.T. 597; 41 Digest 597, *4225.* C

Special Case.

This was an award in the form of a Special Case stated by an arbitrator, Mr. Eustace Wentworth Roskill, Q.C., under the Arbitration Act, 1950, s. 21 (1) (b). The hearing of the arbitration took place in London on Feb. 5, 6, 7, 1957. D

The claimants, Goulandris Brothers, Ltd., were at all material times the owners of the vessel Granhill which was chartered to Palm Line, Ltd., for one West African round voyage under a time charterparty dated Sept. 19, 1950, the terms of which were not in dispute. The vessel sailed from Liverpool on Oct. 26, 1950. From Nov. 11 to Nov. 23, 1950, she was at Sapele where she loaded a part cargo. On Nov. 25, 1950, she arrived at Lagos, where she remained until E Dec. 4, 1950. At Lagos goods were loaded among which were goods for delivery to the respondents, in respect of which a bill of lading, dated at Lagos Dec. 3, 1950, was issued on behalf of the claimants. The bill of lading provided:

> " Application of public law. In respect of shipments coming within the compulsory provisions of any law in force at the place of shipment giving legal force with or without modifications to the . . . Hague Rules . . . this bill of lading is to have effect subject to those provisions as if those provisions were inserted herein verbatim . . . F
>
> " 9. General average payable according to the York-Antwerp Rules, 1950 . . ."

The Nigerian Carriage of Goods by Sea Ordinance, No. 1 of 1926, which gave G effect to the Hague Rules, was at all material times in force at Lagos. The respondents, B. Goldman & Sons, Ltd., were the indorsees of the bill of lading to whom the property in the goods had passed, and who ultimately took delivery of them at London. The vessel sailed from Lagos on Dec. 4, 1950, bound for certain ports including Las Palmas and London. On Jan. 3, 1951, after leaving Las Palmas, the vessel developed trouble in her starboard boiler in which a tube H blew out. She proceeded on her port and centre boilers. On Jan. 7, while in the Bay of Biscay, the furnaces of the port boiler collapsed. The vessel was towed to Falmouth by a French tug and thence was towed by another tug to London, where her cargo was discharged between Jan. 15 and Jan. 31, 1951. The goods were physically undamaged. The claimants, however, claimed contribution in general average as a result of the expenditure that they had incurred in the I circumstances. A general average adjustment was duly prepared which showed the respondents' proportion of the general average expenditure to be £22 10s. 4d. The respondents denied liability and contended that the vessel was unseaworthy before and at the time of sailing from Lagos and that due diligence had not been exercised to make her seaworthy. The respondents further claimed that, if they were liable to pay the general average contribution, they were entitled to set off against it or to recover from the claimants an identical sum and thus to defeat the claimants' claim.

On the issues of unseaworthiness and due diligence the arbitrator found the following facts: (1) the port boiler was filled at Sapele with river water which contained a very large quantity of mud, and the starboard and centre boilers were " topped up " at Sapele with similar river water; (2) all such river water so used at Sapele was fed directly into all the boilers instead of into the feed tanks and thence into the boilers through filters; (3) the vessel's engine room staff were negligent in so feeding river water direct to all the boilers; (4) the sludge found in London in the port boiler was caused by the vessel's engine room staff having negligently fed river water at Sapele direct into the port boiler; (5) the traces of sludge found in London in the starboard and centre boilers were caused by the vessel's engine room staff having negligently fed river water at Sapele direct to the starboard and centre boilers to top them up; (6) the cause of the collapse of the port boiler furnaces on Jan. 7, 1951, was the presence of sludge in the port boiler resulting from the direct feeding of river water at Sapele into the port boiler; (7) the vessel accordingly was unseaworthy before and at the beginning of the voyage from Lagos and the claimants, their servants and agents before and at the beginning of that voyage failed to exercise due diligence to make her seaworthy; (8) if the claimants, their servants or agents had not so failed to exercise due diligence to make the vessel seaworthy, the furnaces of the port boiler would not have collapsed and if they had not collapsed the general average expenditure, contribution towards which was claimed by the claimants, would not have been incurred. The failure to exercise due diligence to make the vessel seaworthy was therefore the cause of the general average expenditure in question being incurred.

On these findings the respondents contended that the claimants' claim for contribution must fail in its entirety, but the claimants contended that in law, notwithstanding the unseaworthiness and failure to exercise due diligence, they were still entitled to maintain their claim by virtue of Rule D of the York-Antwerp Rules, 1950, and art. III, r. 6, of the Hague Rules. Three main questions of law arose for determination: (A) what was the true construction of Rule D of the York-Antwerp Rules, 1950* ? (B) if Rule D bore the construction for which the claimants contended, could they rely on it in the present case in view of the juxtaposition in cl. 9 of the bill of lading of the first paragraph† (which referred to the York-Antwerp Rules, 1950) and of the second paragraph (which reproduced the clause generally known as " the New Jason Clause ") ? (C) if Rule D bore the construction for which the claimants contended and if the claimants could, notwithstanding the juxtaposition of the first and second paragraphs of cl. 9, rely on it, what was the effect of art. III, r. 6, on the present case ? The arbitrator held that the claimants' contention as to the true construction of Rule D failed, and therefore it was unnecessary for him to decide the second and third questions previously stated. He intimated that, if it had been necessary to decide question (B) he would have decided it in favour of the claimants and that, if it had been necessary to decide question (C), he would have decided it in favour of the respondents. He awarded, therefore, that the claim failed.

The question of law stated for the decision of the court was whether on the facts found and the true construction of the contract the claimants were entitled to recover the sum of £22 10s. from the respondents in respect of contribution in general average.

J. F. Donaldson for the claimants.

John Megaw, Q.C., and *J. S. Wordie* for the respondents.

Cur. adv. vult.

July 26. **PEARSON, J.**, read the following judgment in which after referring briefly to the facts and stating the arbitrator's findings on the issues

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* The terms of Rule D are set out at the beginning of the headnote, p. 100, ante.

† The paragraph is printed in the footnote at p. 116, post.

A of unseaworthiness and diligence, he continued: The respondents' contention is that on the arbitrator's findings of unseaworthiness and failure to exercise due diligence the claimants' claim for contribution in general average must be rejected. The claimants, however, contend that they are still entitled to maintain their claim by virtue of the operation of Rule D of the York-Antwerp Rules, 1950, and the third paragraph of art. III, r. 6, of the Hague Rules.

B The first paragraph of cl. 9 of the bill of lading provides: "General average payable according to the York-Antwerp Rules, 1950, and any amendment thereof". Rule D of the York-Antwerp Rules, 1950, provides:

> "Rights to contribution in general average shall not be affected, though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure; but this shall not prejudice any remedies which may be open against that party for such fault." C

By virtue of a clause in the bill of lading and the Nigerian Carriage of Goods by Sea Ordinance, No. 1 of 1926, the bill of lading was subject to the Hague Rules. The third para. of art. III, r. 6, of the Hague Rules, provides:

> "In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered." D

The argument put forward by counsel for the claimants was to this effect: (1) Under the first part of Rule D of the York-Antwerp Rules, 1950, the claimants have a right to contribution in general average which is not affected E by the fact that the event which gave rise to the general average expenditure was due to the fault of the claimants. (2) The remedy, which was originally open to the respondents for the fault of the claimants and was preserved by the second part of Rule D, was to sue the claimants for damages for breach of the contract of carriage, claiming as damages the amount of the general average contribution payable by the respondents to the claimants. (3) So long as the respondents' F claim for damages for breach of contract remained enforceable, an action by the claimants against the respondents for the general average contribution could be met and defeated by the respondents setting up their claim for damages equal to the amount of the contribution, and the court in such a case would give judgment for the respondents on the claimants' claim in order to avoid circuity of action. (4) But the respondents' claim for damages for breach of contract G has become unenforceable because it was a claim "in respect of loss or damage" within the meaning of the third para. of r. 6 of art. III of the Hague Rules, and, as no suit was brought within the year after the delivery of the goods, or the date when the goods should have been delivered, the claimants have been discharged from all liability in respect of the loss or damage. (5) Therefore, now the position is that the claimants still have their right to general average H contribution and the respondents no longer have anything to set against it, so that no question of circuity arises and the claimants are entitled to recover from the respondents the amount of the contribution, which is £22 10s. 4d.

It was suggested to counsel for the claimants that his argument, if correct, would produce unreasonable results, in that the cargo owner has originally a good defence to the shipowners' claim on the ground that the general average I expenditure was caused by the fault of the shipowners but the shipowner, by merely deferring the issue of his writ for a year, can deprive the cargo owner of that defence. Counsel for the claimants' answer was that the cargo owner could protect his interest by bringing an action within the year against the shipowner, even though the shipowner had not yet brought any action or made any claim against the cargo owner. As to the nature of such action by the cargo owner, counsel for the claimants had two suggestions. First, he suggested that the cargo owner's action should be for a declaration of non-liability and he contended

A that it would be analogous to the declaration which was made in *Hordern-Richmond, Ltd.* v. *Duncan* (1) ([1947] 1 All E.R. 427). In that case the action was brought against a person who had been driving a lorry as servant of a public authority and was, therefore, entitled to the one year period of limitation under the Limitation Act, 1939*, and the declaration asked for and granted (ibid., at p. 428) was that

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> " . . . in the event of any proceedings for damages being instituted against these plaintiffs their servants or agents in respect of the accident mentioned in the pleadings in this action they shall be entitled to claim indemnity or contribution against the present defendant pursuant to the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, in respect of any damages C or costs that may be awarded against them."

That case does not go so far as the suggested action of the cargo owner in this case, for a possible future defendant would be suing a possible future plaintiff for a declaration that the possible future claim, if it were ever made, would be invalid. The court would be at least very reluctant to grant any such declaration. One difficulty is that if counsel for the claimants' other contentions are D right, the possible future claim, though invalid at an early date, would become valid at a later date after the lapse of time had destroyed the defence to it.

The second suggestion was that the cargo owner should bring against the shipowner an action for damages for breach of the charterparty and should include in the damages the amount of the cargo owner's liability to the shipowner for general average contribution. That is a more promising method and E safer on the legal side, because if a breach of contract could be proved, the plaintiff would be entitled to at least nominal damages. However, this method is not free from difficulties because the plaintiff would be unable to quantify his claim until after the compilation of the average adjustment, and normally he should not start an action unless he intended to proceed with it, and proceeding with it would involve the expense of proving that there was a fault F on the part of the ship and that that fault caused the casualty. Moreover, in some cases, where there was both damage to the ship and damage to the cargo, it might be impossible to know, until after the average adjustment had been compiled, which party would on balance be owing a contribution to the other. Also a cargo owner, if he did not happen to take legal advice at the earliest stage, would not be expected to realise that he had to bring an action forthwith, G not for the purpose of gaining any positive relief or because he had any complaint as to the existing situation, but for the purpose of maintaining unimpaired the validity of his just defence against a possible future claim not yet made or threatened. In my view, there are elements of not only inconvenience but even of absurdity in the results which would follow if the claimants' contentions were accepted. That is not in itself a sufficient reason for rejecting the contentions H but does prompt a careful scrutiny of them.

Questions were raised in the Special Case and in the argument as to the relationship between the York-Antwerp Rules and the English common law. Counsel for the claimants contended that the York-Antwerp Rules are in the nature of a code, and he cited the passage in the speech of LORD HERSCHELL in *Bank of England* v. *Vagliano Bros.* (2) ([1891] A.C. 107 at pp. 144, 145). I LORD HERSCHELL had been referring to such a statute as the Bills of Exchange Act, 1882, which was intended to be a code of the law relating to negotiable instruments. He said:

> " I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start

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* Section 21 of the Limitation Act, 1939, which conferred this privilege was repealed by the Law Reform (Limitation of Actions, etc.) Act, 1954, s. 1.

> with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view." A

It was further argued that the York-Antwerp Rules, being an international set of rules drawn up by an international convention, are for that reason also not to be presumed to have the same effect as the English common law and should not be artificially construed in an endeavour to make them conform to B the English common law. In my view, those contentions are right in principle. I also agree with counsel for the respondents, when he says that, on examining the provisions of the York-Antwerp Rules, one finds that they do not constitute a complete or self-contained code and need to be supplemented by bringing into the gaps provisions of the general law which are applicable to the contract. I will give examples of that later. The York-Antwerp Rules have not in themselves any C legal force. The parties to a contract can, if they so choose, agree that general average shall be payable according to the York-Antwerp Rules; but the parties have freedom of contract—they can agree not to adopt the York-Antwerp Rules or can agree to adopt them with express modifications or can agree to adopt them with implied modifications. In this case there is no express modification and I do not think that there is any implied modification. D

The first of the York-Antwerp Rules is the rule of interpretation which provides:

> " In the adjustment of general average the following lettered and numbered Rules shall apply to the exclusion of any law and practice inconsistent therewith. Except as provided by the numbered Rules, general average shall be adjusted according to the lettered Rules." E

Rule D of the York-Antwerp Rules has already been read but for convenience I will read it again:

> " Rights to contribution in general average shall not be affected, though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure; but this shall not prejudice any remedies which may be open against that party for such fault." F

There is not in these rules any definition of the word " fault ", and, therefore, the meaning which the word " fault " is to bear in these rules as applying to the present contract must be determined by the general law covering the present G contract. If different general laws give different meanings to the word " fault " that is an unavoidable lack of uniformity. Similarly the rules do not give any definition or list or indication of the remedies which may be open against a party whose fault has caused the event which gave rise to the general average sacrifice or expenditure. To ascertain what the remedies are you must go to the general law covering the contract, which in the present case is English law. H

Another question is as to the relationship between the first part of Rule D and the second part of it. In my view the manifest objects of Rule D are to keep all questions of alleged fault outside the average adjustment and to preserve unimpaired the legal position at the stage of enforcement. The effect of the first part of the rule is that the average adjustment is compiled on the assumption that the casualty has not been caused by anybody's fault. The convenience of I this arrangement appears when regard is had to the size and complexity that an average adjustment may attain. The average adjustment in the present case covers 183 pages and the compilation would involve much collection of information and many calculations. I understand that the task of compiling an average adjustment in a complicated case may take years. It is highly convenient and desirable, almost necessary, that the task should not be further enlarged and complicated by questions whether the casualty was caused by some fault or faults of one or more of the parties. Moreover, such questions

A would naturally be settled by litigation or arbitration, as they go beyond the sphere of general average and may affect other matters. The average adjusters ought to be able to produce figures which, so far as they are concerned, are final figures. When they have produced their final figures, the question of enforcement arises, and it is at this stage that the second part of Rule D comes into play. The average adjustment shows X owing to Y £100, but that showing is without B prejudice to any remedies which may be open to Y for X's fault having caused the casualty. In my view that is clearly the intended mode of operation of the two parts of Rule D, and it affords the clue to the interpretation of the rule. The first part refers to the rights to contribution in general average as they will be set out in the average adjustment, and these are properly and naturally called " rights ", because normally the holder of such rights is entitled to receive C payment. The second part of the rule provides that the first part is not to prejudice remedies for faults. That implies that in some cases the remedies referred to in the second part of the rule will override the rights referred to in the first part; in other words, the second part operates as a proviso, qualifying, overriding, cutting down or derogating from the first part. The rights may be nullified or defeated or diminished or otherwise affected by the remedies. In D that sense the rights referred to in the first part of the rule are prima facie rights because they are subject to the remedies.

The position, therefore, is that the claimants have their prima facie right to recover from the respondents contribution in general average, but the respondents may be able to defeat that right by using their " remedies " for the claimants' " fault ". As I have said, the York-Antwerp Rules are silent as to E what are the remedies and what is a fault, and for elucidation of those matters it is necessary to have resort to the English law.

In *Schloss* v. *Heriot* (3) ((1863), 14 C.B.N.S. 59), the headnote, so far as material, states:

> " To an action by a shipowner against a shipper of goods to recover his F proportion of average loss, the defendant pleaded . . . that the ship was unseaworthy at the commencement of the voyage, and that the average loss was occasioned and arose from and in consequence of such unseaworthiness. Held, a good plea, inasmuch as it showed that the plaintiff's actionable negligence and misconduct produced the very damage for which he sought to recover contribution from the defendant; and (probably) also on the ground of avoidance of circuity of action." G

There is an interesting citation in the argument (ibid., at p. 62), from KENT'S COMMENTARIES, Vol. 3, at p. 232, where it says:

> "By the Rhodian law, as cited in the Pandects, if goods were thrown overboard, in a case of extreme peril, to lighten and save the ship, the loss, H being incurred for the common benefit, was to be made good by the contribution of all. The goods must not be swept away by the violence of the waves, for then the loss falls entirely upon the merchant or his insurer, but they must be intentionally sacrificed by the mind and agency of man, for the safety of the ship and the residue of the cargo. The jettison must be made for sufficient cause, and not from groundless timidity. It must I be made in a case of extremity, when the ship is in danger of perishing by the fury of a storm, or in labouring upon rocks or shallows, or is closely pursued by pirates or enemies; and then, if the ship and the residue of the cargo be saved by means of the sacrifice, nothing can be more reasonable than that the property saved should bear its proportion of the loss. The doctrine of general average is one of those rules of the marine law which is built upon the plainest principles of justice; and it has, accordingly, recommended itself to the notice and adoption of all the commercial nations of the world."

Then Erle, C.J. (14 C.B.N.S. at p. 64), gave judgment as follows:

> "The fourth plea I think is a good one. It shows that the plaintiff was himself the cause of the loss,—that his actionable negligence and misconduct produced the very damage for which he seeks to recover contribution from the defendants. Further, I am of opinion that, if necessary, the plea is sustainable on the ground that the defendants would be entitled in a cross-action to recover back the whole sum claimed by the plaintiff in this action."

Willes and Keating, JJ., concurred.

The next case is *Prehn* v. *Bailey, The Ettrick* (4) ((1881), 6 P.D. 127). The headnote there states:

> "The payment into court of £8 a ton under 25 & 26 Vict. c. 63, s. **54,** does not place the shipowner in the position of a person who has not done wrong. The owner of a ship sunk by a collision in the Thames admitted it to be his fault, and paid into court £8 a ton in a suit to limit his liability. The Thames Conservators, having powers under the Removal of Wrecks Act, 1877, and the Thames Conservancy Acts, raised the ship and delivered the ship and cargo to the owner, he undertaking to pay the expenses of raising. Part of the cargo was some wool, which was damaged by being sunk:—Held, that the shipowner was bound to deliver the wool to the owner of the wool without claiming from him, by way of contribution to salvage, any part of the expenses of raising the ship and cargo."

Brett, L.J., said (ibid., at p. 135):

> "A general average contribution is a contribution in money paid to a person who has been obliged to pay for a general average loss. If the plaintiff had not been in any fault, I am inclined at present to think that he would have been entitled to claim from the defendant if it was a general average contribution. But he has been in fault, and the authorities are decisive that if the general average contribution which he claims is a general average contribution, which arose by reason of a default of his, he cannot claim anything. Therefore, taking it to be a claim for a general average contribution, he is ousted by the authorities, because the loss was a loss occasioned by his own default."

Cotton, L.J. (6 P.D. at p. 137), said:

> "Then, independently of the contract, what are the rights of the parties? I take it, first of all, without reference to the Thames Conservancy Act, but treating this as in the nature of a general average contribution, that the claim is one founded on equity, namely, that where a person has incurred expense for the general benefit of the whole adventure he shall claim contribution from all those who are interested. But it would be against equity to say that the person who himself has done the wrongful act which caused the expenditure shall claim thereupon from anybody else, and the cases have decided accordingly that where the expense has been incurred in consequence of the wrongful act of the person who incurred it, he cannot claim contribution in the way of general average."

In that case there would not have been circuity of action because the shipowner had limited his liability. Therefore, the decision rested on the ground that a person shall not recover from any other person in respect of the consequences of his own wrong. That may be called for convenience the equitable defence, although it has no special connexion with the Court of Chancery. Clearly it is a matter of defence and not of cross-claim.

Then there is *Burton* v. *English* (5) ((1883), 12 Q.B.D. 218), the headnote in which reads:

> "It was stipulated in a charterparty that the 'ship should be provided with a deck cargo if required at full freight, but at merchant's risk':—Held, reversing the decision of the Queen's Bench Division, that the words 'at merchant's risk' did not exclude the right of the charterers to general average contribution from the shipowners in respect of deck cargo, shipped by the charterers, and necessarily jettisoned to save the ship and the rest of the cargo."

The interest of the case for the present purpose is in what is said about the foundation of the law of general average contribution, whether it is essentially of a contractual nature or whether it really rests on the old law of the sea and is based on what COTTON, L.J., called the equitable considerations. BRETT, M.R., said (ibid., at p. 220):

> "By what law does the right arise to general average contribution? LORD BRAMWELL in his judgment in *Wright* v. *Marwood** considers it to arise from an implied contract, but although I always have great doubt when I differ from LORD BRAMWELL, I do not think that it forms any part of the contract to carry, and that it does not arise from any contract at all, but from the old Rhodian laws, and has become incorporated into the law of England as the law of the ocean. It is not as a matter of contract, but in consequence of a common danger, where natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one in order that the whole adventure may be saved. If this be so, the liability to contribute does not arise out of any contract at all, and is not covered by the stipulation in the charterparty on which the defendants rely. I therefore disagree with the decision of the Divisional Court in this case."

BOWEN, L.J., said, with regard to this question (ibid., at p. 223):

> "But does [the stipulation in the charterparty] cover this claim for general average contribution? What is this claim, and how does it arise? In the investigation of legal principles the question whether they arise by way of implied contract or not often ends by being a mere question of words. General average contribution is a principle which comes down to us from an anterior period of our history, and from the law of commerce and the sea. When, however, it is once established as part of the law, and as a portion of the risks which those who embark their property upon ships are willing to take, you may if you like imagine that those who place their property on board a ship on the one side, and the shipowner who puts his ship by the quay to receive the cargo on the other side, bind themselves by an implied contract which embodies this principle, just as it may be said that those who contract with reference to a custom impliedly make it a portion of the contract. But that way, although legally it may be a sound way, nevertheless is a technical way of looking at it. This claim for average contribution, at all events, is part of the law of the sea . . ."

Then there is *Strang, Steel & Co.* v. *A. Scott & Co.* (6) ((1889), 14 App. Cas. 601), a case heard before the Judicial Committee. I think the essence of the problem which faced the court there appears in the sentence (ibid., at p. 605), which states:

> "The learned judge found, as matter of fact, that the stranding of the ship upon the Baragua Flats was occasioned by the negligent navigation of the master; and he held, as matter of law, that no claim for general average arises to the owners of cargo jettisoned when the peril which necessitated jettison in induced by the fault of the ship."

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* (1881), 7 Q.B.D. 62 at p. 67.

A One finds in later passages (14 App. Cas. at p. 610), that there was considerable text-book authority for the view which that learned judge of first instance had taken, but his view was not accepted by the Judicial Committee. It was said by LORD WATSON (ibid., at pp. 607, 608), delivering the opinion of the Judicial Committee:

> B " Whether the rule ought to be regarded as matter of implied contract, or as a canon of positive law resting upon the dictates of natural justice, is a question which their Lordships do not consider it necessary to determine. The principle upon which contribution becomes due does not appear to them to differ from that upon which claims of recompense for salvage services are founded. But, in any aspect of it, the rule of contribution has its foundation in the plainest equity. In jettison, the rights of those C entitled to contribution, and the corresponding obligations of the contributors, have their origin in the fact of a common danger which threatens to destroy the property of them all; and these rights and obligations are mutually perfected whenever the goods of some of the shippers have been advisedly sacrificed, and the property of the others has been thereby preserved. There are two well-established exceptions to the rule of contribution for general average, which it is necessary to notice. D When a person who would otherwise have been entitled to claim contribution has, by his own fault, occasioned the peril which mediately gave rise to the claim, it would be manifestly unjust to permit him to recover from those whose goods are saved, although they may be said, in a certain sense, to have benefited by the sacrifice of his property. In any question with them he is a wrongdoer, E and, as such, under an obligation to use every means within his power to ward off or repair the natural consequences of his wrongful act. He cannot be permitted to claim either recompense for services rendered, or indemnity for losses sustained by him, in the endeavour to rescue property which was imperilled by his own tortious act, and which it was his duty to save. *Schloss* v. *Heriot* (3) is the leading English authority upon the point. F In that case, which was an action by the shipowner against the owners of cargo for contribution in an average loss, a plea stated in defence, to the effect that the ship was unseaworthy at the commencement of the voyage, and that the average loss was occasioned by such unseaworthiness, was held to be a good answer to the claim by ERLE, C.J., and WILLES and KEATING, JJ. The second exception is in the case of deck cargo ";

G I need not refer to that. Then LORD WATSON said (14 App. Cas. at p. 609):

> " It appears from the proceedings in this suit that the average claims at the instance of cargo owners exceed 30,000 dollars, and that there is a small claim on account of ship. The fault of the master being matter of admission, it seems clear, upon authority, that no contribution can be recovered by the owners of the Abington, unless the conditions ordinarily existing between H parties standing in that relation have been varied by special contract between them and their shippers. But the negligent navigation of the master cannot, in the opinion of their Lordships, afford any pretext for depriving those shippers whose goods were jettisoned of their claim to a general contribution. They were not privy to the master's fault, and were under no duty, legal or moral, to make a gratuitous sacrifice of their goods, for the sake of others, I in order to avert the consequences of his fault. The Rhodian law, which in that respect is the law of England, bases the right of contribution not upon the causes of the danger to the ship and cargo, but upon its actual presence; and such exceptions as that recognised in *Schloss* v. *Heriot* (3) are in truth limitations on the rule, which have been introduced, from equitable considerations, in the case of actual wrongdoers, or of those who are legally responsible for them. The owners of goods thrown overboard having been innocent of exposing the Abington and her cargo to the sea peril which

> A necessitated jettison, their equitable claim to be indemnified for the loss of their goods is just as strong as if the peril had been wholly due to the action of the winds and waves."

Later cases illustrating or recognising the same points are *Louis Dreyfus & Co.* v. *Tempus Shipping Co.* (7) ([1931] A.C. 726), and *Hain S.S. Co., Ltd.* v. *Tate & Lyle, Ltd.* (8) ([1936] 2 All E.R. 597 at p. 606).

B The equitable defence, as I am calling it, embodying the principle that a person cannot recover from any other person in respect of the consequences of his own wrong will be found in another branch of the law or in a different application of the law in *Vincent* v. *Southern Ry. Co.* (9) ([1927] A.C. 430 at p. 438), and in *Smith* v. *Baveystock & Co., Ltd.* (10) ([1945] 1 All E.R. 278 at p. 282). Other cases on circuity of action are *Charles* v. *Altin* (11) ((1854), 15 C.B. 46 C at p. 62), *The Glenfruin* (12) ((1885), 10 P.D. 103 at pp. 108, 109), *Akt. Ocean* v. *B. Harding & Sons, Ltd.* (13) ([1928] 2 K.B. 371 at pp. 384, 385 and 390, 391). Then there is *Susan V. Luckenbach S.S.* (*Owners*) v. *Admiralty Comrs., The Susan V. Luckenbach* (14) ([1951] 1 All E.R. 753 at p. 757).

As to the scope of the word " remedies " in Rule D of the York-Antwerp Rules, clearly it is wide enough to cover the respondents' cross-claim for the same D amount as the claimants are claiming. If the cross-claim is still open, the claimants' claim can be defeated by it because judgment should be given for the respondents in order to avoid circuity of action. That has not been disputed. The question which is disputed at this stage of the argument is whether the word " remedies " in Rule D is wide enough to cover the so-called "equitable" defence, that the casualty was caused by the claimants' own fault. Counsel for E the claimants argued that the word "remedies" refers only to positive legal steps which may be taken to assert and enforce a claim, and does not include a mere defence to a claim. Using a very familiar metaphor, one can say that according to his argument a remedy is in the nature of a spear, which a man uses to attack somebody else, and is not in the nature of a shield, with which he seeks to repel somebody else's attack on him.

F On this point counsel for the respondents referred to the OXFORD DICTIONARY to which I have referred and I find that the first three meanings given to the word " remedies " are:

> " (1) A cure for a disease or other disorder of body or mind: any medicine or treatment which alleviates pain and promotes restoration to health. G (2) A means of counteracting or removing an outward evil of any kind; reparation, redress, relief. (3) Legal redress ",

and then other meanings are given.

Reference was made to STROUD'S JUDICIAL DICTIONARY, Vol. 3, at p. 2529, under the word " remedy " which cites several cases and gives extracts from statutes. I did refer to these cases but I was not able to obtain any material H help from them on the present problem.

Then there was cited, also by counsel for the claimants, WEBSTER'S ENGLISH DICTIONARY, which I believe was published in the United States, and I think that the material extract which he read was: " (3) The legal means to recover a right or to obtain redress for a wrong ". Counsel for the respondents also referred to the derivation of the word "remedy" from the Latin remedium and remedior I and said that the word fundamentally means something healing or curative. He said that an antidote is a remedy and a plea to a claim is an antidote to an ill.

Mainly, I am influenced by the evident objects of Rule D of the York-Antwerp Rules, which are to keep the whole question of alleged fault outside the average adjustment and to leave the legal " remedies " in respect of fault unimpaired. There is no reason to suppose an intention to destroy defences while keeping alive cross-claims. The intention which may reasonably be inferred is an intention to preserve the legal position intact at the stage of enforcement. Suitable effect is given to that intention by construing the word " remedies " in

Rule D as wide enough to cover defences as well as cross-claims, shields as well as spears, pleas as well as counts.

Next one has to consider what is, for the purposes of a case such as this, the meaning of the word " fault " in English law. In *The Carron Park* (15) ((1890), 15 P.D. 203), the headnote states:

> " By a charterparty it was agreed that the defendants' steam vessel should go to New Fairwater, and there load from the agents of the plaintiffs a cargo of sugar and proceed therewith to Greenock, the defendants not to be responsible ' for any act, neglect, or default whatsoever of their servants during the said voyage '. The agents commenced loading the vessel with sugar belonging to the plaintiffs, and during the loading the cargo was damaged by water through a valve in the engine-room having been negligently left open by one of the engineers of the vessel:— . . . The defendants counterclaimed for a general average contribution from the plaintiffs:—Held, that their right to contribution was not affected by the negligence of their servants, for which by the terms of the exception they were not responsible, and that they were entitled to recover."

The President of the Probate Division (SIR JAMES HANNEN) said (ibid., at p. 207):

> " With regard to the counter-claim for general average, I think the defendants are entitled to recover. The claim for contribution as general average cannot be maintained where it arises out of any negligence for which the shipowner is responsible; but negligence for which he is not responsible is as foreign to him as to the person who has suffered by it. The loss would not have fallen on the shipowner, and the expenditure or sacrifice made by him is not made to avert loss from himself alone, but from the cargo owner. This question was considered in the case of *Strang, Steel & Co.* v. *A. Scott & Co.* (6). That was a case of jettisoned cargo; LORD WATSON, in delivering judgment, says (14 App. Cas. 609): ' The fault of the master being matter of admission, it seems clear upon authority that no compensation can be recovered by the owners of the ' (ship) ' unless the conditions ordinarily existing between parties standing in that relation have been varied by special contract between them and their shippers '. Here it appears to me that the relation of the goods owner to the shipowner has been altered by the contract —that the shipowner shall not be responsible for the negligence of his servants in the events which have happened."

In *Milburn & Co.* v. *Jamaica Fruit Importing & Trading Co. of London* (16) ([1900] 2 Q.B. 540), the headnote reads:

> " Where a contract for carriage of goods by sea contains an exception of negligence of the master and crew, the shipowner is entitled to a contribution from the owner of the goods to general average expenses, though the necessity for the same has been occasioned by the negligence of the master:—So held by A. L. SMITH, L.J., and ROMER, L.J., VAUGHAN WILLIAMS, L.J., dissenting."

The first relevant passage is where A. L. SMITH, L.J., after a citation from LORD ESHER in *Burton* v. *English* (5) (12 Q.B.D. 218) said ([1900] 2 Q.B. at p. 546):

> " But, although general average is not the creature of contract, that does not settle the question in the present case; for what the contract of carriage is becomes an important factor when considering, not whether a general average claim for contribution has arisen, but in considering, assuming that such claim has arisen, whether it can be taken away by the cargo owner showing that, as between him and the shipowner, the latter, to use LORD WATSON'S words [in *Strang, Steel & Co.* v. *A. Scott & Co.* (6) (14 App. Cas. at p. 607)], has been a wrongdoer. To create the shipowner a wrongdoer as regards the cargo owner there must be the breach of some

> A duty, and, if by agreement between the two it has been agreed that it shall be no breach of duty for the master to be guilty of negligence, in other words, that as between the two the negligence of the master shall be always excepted, it cannot be said that it is a breach of duty towards the cargo owner for the master to be guilty of that which the cargo owner and shipowner have agreed shall be no breach of duty at all."

B A. L. SMITH, L.J., then said that the appeal raised the question whether *The Carron Park* (15) is good law. He made a citation from that case, and said ([1900] 2 Q.B. at p. 547):

> "This decision of SIR JAMES HANNEN has been acted upon in practice in this country ever since it was given, and we are asked now to overrule it."

C He states (ibid., at p. 547):

> " When read it will be seen that these cases do not deal with the question whether, where a general average expenditure has been incurred, the right to contribute thereto can be taken away by showing that the party incurring the expenditure was a wrongdoer as regards the person called upon to D contribute. Whether he be such a wrongdoer must, as it seems to me, depend upon the contract which existed between the parties. This is not, as before stated, a case in which the question is whether a general average claim has arisen, for that in this case is not disputed, but the question is whether the shipowner has been a wrongdoer to the cargo owner. The shipowner says to the cargo owner, a general average loss has occurred to E which you must contribute, and you cannot show that I have been guilty of negligence so as to absolve you from contributing thereto, for by express contract between us negligence is excepted."

ROMER, L.J. ([1900] 2 Q.B. at pp. 554, 555), said:

> " Between shipowners and charterers such negligence was to be ' mutually F excepted ', so that both parties could be regarded as equally blameless in respect of it. Let me then first consider how the case would have stood between the parties to the charterparty if all the goods on board the vessel during a voyage had been the property of the charterers, and then by the master's negligence a condition arose necessitating a sacrifice at the expense of the shipowners for the common good, so that prima facie a claim for G general average contribution against the owners of the cargo had arisen. In my opinion there could have been no answer to the claim. The charterers could not have brought themselves within the exception to general average claims which is so well known, and was discussed by LORD WATSON in [*Strang, Steel & Co.* v. *A. Scott & Co.* (6)] cited in the judgments already delivered. For the charterers could not have said as against the shipowners H that the negligence of the master was to be attributed to the shipowners, so as to place the latter in the position of persons who had brought about the peril necessitating the common sacrifice by their own wrong. There would have been no ground for treating the shipowners and the charterers as standing on a different footing at the moment when the common sacrifice became necessary. As between themselves they stood at that moment on I a footing of equality. Neither the goods as against the ship, nor the ship as against the goods, had any claim by reason of any peril arising, or loss which might have resulted, from the master's negligence; and the position of equality is the very essence of the right to contribution. It would in my opinion be matter for regret if the opposite view were upheld, for the result would be that, though, if loss ensued to the goods by the peril, the shipowners could not be made responsible for the loss, yet, if to avoid that peril a sacrifice is made at the expense of the ship, there would be no right of contribution."

Then there is *Louis Dreyfus & Co.* v. *Tempus Shipping Co.* (7) ([1931] A.C. 726), which I have already mentioned, and there is a passage in the judgment of GREER, L.J., in the Court of Appeal where he said ([1931] 1 K.B. at p. 211): A

> " It seems to me that the question which has to be asked in cases of this kind is: ' Is the danger which occasions the sacrifice or the expense sought to be recovered one for which the shipowner is responsible to the cargo owners, so that it can be said that he has made the sacrifice or incurred the expense not for the benefit of all concerned, but for his own benefit only? ' " B

In the House of Lords, LORD WARRINGTON OF CLYFFE said ([1931] A.C. at p. 742):

> " The next question is how does the contract between the shipowner and the cargo owner affect the right of the former to contribution by the latter to general average expenses. I agree with GREER, L.J., that the right to contribution arises whenever the expenditure is incurred or the sacrifice made in the interest of both the parties and not of one of them alone. In the present case, inasmuch as the whole of the loss of or damage to the cargo falls on the cargo owner, the expenditure in question is incurred in the interest of both parties, and a due proportion thereof in the shape of contribution in general average would be recoverable by the shipowner." C D

LORD ATKIN said this (ibid., at p. 748):

> " The defence argued by Mr. CARVER, K.C., and Mr. SCRUTTON was that if the bills of lading had contained a negligence clause still the shipowner would not have been entitled to contribution, and that the decision in *The Carron Park* (15) was wrong. The [Court of Appeal] by a majority (A. L. SMITH, L.J., and ROMER, L.J.: VAUGHAN WILLIAMS, L.J., dissenting), gave judgment for the shipowner and affirmed *The Carron Park* (15). A. L. SMITH, L.J., a judge of large experience in these matters, said ([1900] 2 Q.B. 540 at p. 546): ' To create the shipowner a wrongdoer as regards the cargo owner there must be the breach of some duty, and if by agreement between the two it has been agreed that it shall be no breach of duty for the master to be guilty of negligence, in other words, that as between the two the negligence of the master shall be always excepted, it cannot be said that it is a breach of duty towards the cargo owner for the master to be guilty of that which the cargo owner and shipowner have agreed shall be no breach of duty at all '. ROMER, L.J., expressed the same reasoning, pointing out that, with the negligence clause, at the moment of the sacrifice shipowner and cargo owner between themselves stood on a footing of equality." E F G

It appears, therefore, in my opinion from the citations which have been given that for the relevant purpose a " fault " is a legal wrong which is actionable as between the parties at the time when the general average sacrifice or expenditure is made. In the present case there was a legal wrong, and it was actionable as between the parties at the time when the general average expenditure was made. There was, therefore, a " fault " in this case. Whatever effect the third para. of art. III, r. 6, of the Hague Rules may have on the rights of the parties in other ways, it did not deprive the legal wrong of its character as a " fault ". H I

Now I have to consider what effect, if any, the third para. of art. III, r. 6, of the Hague Rules has had on the legal position. Has it destroyed the respondents' equitable defence, and has it destroyed their cross-claim? In my view quite clearly that paragraph has not destroyed the equitable defence because it brings about only a discharge of liabilities and not a barring of defences. Therefore, if I am right in my conclusion that the equitable defence is one of the " remedies " preserved by the second part of Rule D of the York-Antwerp

Rules, 1950, that defence is unaffected by the third para. of art. III, r. 6, of the Hague Rules and defeats the claimants' claim.

What effect, if any, does the third para. of art. III, r. 6, have on the respondents' cross-claim ? This is a rather elusive problem because the cross-claim is in a sense artificial, being intended ultimately to have only the effect of repelling the claimants' claim, if any. The problem can be stated in this form. Has the claimants' claim been discharged under the third para. of art. III, r. 6, from liability on the respondents' cross-claim for damages equal to the amount of the claimants' claim against the respondents for general average contribution ? There is a gap in the wording of the third para., which reads:

> " In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered."

There are no express words to provide a subject-matter for the " loss or damage ", and there are no express words to identify " the goods "; but in my view there is an implied reference to the cargo owner's goods. The liability of the carrier and the ship must be a liability to the cargo owner who is the other party to the contract of carriage, and the loss or damage for which the carrier or the ship is initially liable must be loss or damage arising out of the contract for the carriage of the cargo owner's goods and the goods of which the date of delivery or non-delivery is significant for the cargo owner must be his goods. In my view the loss or damage referred to must be loss or damage which is related to the cargo owner's goods, and the delivery of the goods must mean the delivery of his goods. But how close is the relation required between the loss or damage and the cargo owner's goods ? Can the loss or damage be confined to actual loss of or physical damage to the cargo owner's goods ? That can be plausibly suggested when regard is had to the provisions of art. III, r. 6, of the Hague Rules, taken as a whole, but it is difficult to maintain in the face of the decision of the House of Lords in *G. H. Renton & Co., Ltd.* v. *Palmyra Trading Corpn. of Panama* (17) ([1956] 3 All E.R. 957 at pp. 962, 965, 968, 969), that the " loss or damage to or in connexion with the goods " referred to in art. III, r. 8, is not confined to actual loss and physical damage, and the decision of DEVLIN, J., in *Anglo-Saxon Petroleum Co., Ltd.* v. *Adamastos Shipping Co., Ltd.* (18) ([1957] 1 All E.R. 673 at p. 680), that the " loss or damage " referred to in s. 4 (1) and (2) of the United States Carriage of Goods by Sea Act, 1936* is not confined to actual loss and physical damage.

It can be argued for the claimants that there is a sufficient connexion between the damage in this case, which is the respondents' liability to pay general average contribution, and the respondents' goods, because the liability arises from the fact that those goods were carried on the voyage on which the casualty occurred and they could be held under lien for general average contribution until a general average bond was given or some equivalent arrangement was made. That is certainly arguable, but in my view the connexion is too remote. The liability to pay general average contribution is not related to the respondents' goods but to the ship's expenditure in the present case, and it might in some other case be related to the jettison of or damage to some other person's goods. The respondents' goods were duly delivered, and there was no loss or damage of or to or in connexion with them. There is this further consideration: If the cargo owner has sustained loss or damage of or to or in connexion with his goods which are or should have been delivered to him, he is in any normal case aware of the loss or damage at or about the date of delivery, and it is not unreasonable that time should run against him from that date. If, however, his goods have been duly and safely carried, discharged and delivered, and for some reason or in some way not connected with his goods, a general average A contribution is required for ship's expenses or jettison of or damage to some other person's goods, the date for delivery of his goods has no adequate significance or relevance to the claim for general average contribution or his liability in respect of it or his cross-claim for the shipowner's fault, and in regard to those matters it is not fair or reasonable that the time should start running against him as from the date when his goods are delivered to him. At that date and B for long afterwards he may have little or no knowledge of the ship's expenses or the other person's goods or what happened to them. The cases of *Schmidt* v. *Royal Mail S.S. Co.* (19) ((1876), 45 L.J.Q.B. 646) and *Greenshields, Cowie & Co.* v. *Stephens & Sons* (20) ([1908] A.C. 431 at p. 436), help to show that matters related to general average contribution are outside the scope of provisions such as this. C

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* The Act of 1936 gives legal effect to the Hague Rules.

I therefore decide that the claimants have not been discharged under the third para. of art. III, r. 6, of the Hague Rules, from liability on the respondents' cross-claim. The cross-claim is available and can be set against the claimants' proposed claim, and to avoid circuity of action judgment would be given for the respondents.

I will merely mention two other points which were argued for the respon- D dents: (1) That the so-called " New Jason clause ", which is the second para. of cl. 9 of the bill of lading, affects the interpretation of Rule D of the York-Antwerp Rules, 1950*; and (2) that the word " fault " in Rule D does not cover unseaworthiness or failure to exercise due diligence to make the ship seaworthy. Having reached a decision on other grounds, I will not deal with those two points. E

The decision of the court on the question of law stated in para. 32 of the Special Case is in the negative. On the facts found and the true construction of the contract, the claimants are not entitled to recover the said sum of £22 10s. 4d. or any sum from the respondents in respect of contribution to general average. The award of the learned arbitrator as set out in para. 33 of the Special Case is affirmed.

Award in favour of the respondents upheld.

Solicitors: *Richards, Butler & Co.* (for the claimants); *Waltons & Co.* (for the respondents).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

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* Although this point did not arise for the arbitrator's decision in view of his award on the first question, his hypothetical decision on it is indicated at p. 103, letter G, ante. The relevant terms of the second paragraph of cl. 9, known as " the New Jason Clause ", were as follows:—" In the event of accident, danger, damage or disaster before or after the commencement of the voyage, resulting from any cause whatsoever whether due to negligence or not, for which or for the consequence of which the carrier is not responsible, by statute, contract or otherwise, the goods, shipper, consignee and/or owner of the goods shall contribute with the carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the goods."

GLEDHILL *v.* LIVERPOOL ABATTOIR UTILITY CO., LTD. AND ANOTHER.

[COURT OF APPEAL (Lord Merriman, P., Hodson and Morris, L.JJ.), January 21, 22, 23, 24, 25, February 21, 1957.]

Factory—Lifting tackle—Chains used in abattoir for attaching animals to elevator—Chains strong and without fault, but unsuitable for purpose for which required—Whether " of good construction ", " adequate strength ", and " properly maintained "—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 67), *s.* 23 (1), *s.* 24 (1), *s.* 152 (1).

Negligence—Duty to take care—Factory owner and servant of contractor working factory—Chains supplied by factory owner for use by contractor's servants in factory—Chains unsuitable for purpose for which required—Injury to servant of contractor—Nature and quality of chains well known both to servant and to contractor—Whether factory owner liable to servant of contractor.

The plaintiff was employed as a slaughterman by the first defendants (referred to hereinafter as " the employers ") in an abattoir which was owned and controlled by the second defendants, the L. corporation, and which was a factory within the meaning of the Factories Act, 1937. Pursuant to an arrangement between the corporation and the Ministry of Food* and under a contract between the Ministry and the employers, pigs were slaughtered for the Ministry by the employers in the abattoir. After being electrically stunned in a pen the pigs were lifted to the floor above by means of an elevator consisting of a continuously revolving conveyor belt. The pigs were attached to ring shackles on the conveyor belt by chains which were supplied by the corporation. One end of the chain was adjusted so as to form a slip link which was placed round one of the rear legs of the pig, a hook at the other end of the chain was then attached to an upward-moving shackle on the conveyor belt, and the pig was carried to the floor above, head downwards. In 1953 the corporation were asked by the employers to supply new chains, as the chains which were then in use, and which had been in use for some years, had broken on two or three occasions. The new chains supplied by the corporation were strong and without fault, but were unsuitable for the work for which they were required, in that they were of a heavier type than those formerly in use and it was, therefore, more difficult to form a slip knot which would grip tightly the leg of a pig. Both the plaintiff and the employers knew this, because on many occasions pigs had slipped out of the chains while being lifted and had fallen to the floor of the pen, the slaughtermen had complained to their foreman about the unsuitability of the chains, and the foreman had passed on the complaint to the employers; but the employers made no complaint to the corporation about the unsuitability of the chains in this respect. After the heavier chains had been in use for about a year, a pig which was being lifted had nearly reached the first floor level when its leg slipped out of the slip link of the chain by which it was attached to the elevator and the pig fell on the plaintiff, who was injured. The plaintiff brought an action against the employers for damages for negligence and failure to maintain a safe system of work. By their defence the employers denied liability and pleaded that the corporation were at fault, being in breach of their statutory duty under s. 23 and s. 24 of the Factories Act, 1937†. The plaintiff thereupon joined the corporation as defendants. The trial judge held that the employers and the corporation were liable to the plaintiff in damages, and that, as between the employers and the corporation, each should contribute one half of the damages. On appeal by the corporation,

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* By the Transfer of Functions (Ministry of Food) Order, 1955 (S.I. 1955 No. 554), which came into operation on Apr. 7, 1955, the Ministry of Food was dissolved, and the functions of the Minister of Food in England were transferred to the Minister of Agriculture and Fisheries, whose style and title were changed to Minister of Agriculture, Fisheries and Food.

† The relevant terms of the sections are printed at p. 120, letter G, and p. 121, letter F, *post.*

Held: the corporation were not liable to the plaintiff in damages for the following reasons:

(i) the corporation were not in breach of their statutory duty under s. 23 (1) (a) of the Factories Act, 1937, to provide chains " of good construction " and " adequate strength ", because the phrase " good construction " did not import suitability for the particular purpose for which the chains were used (*Beadsley* v. *United Steel Companies, Ltd.*, [1950] 2 All E.R. 872, applied), and the strength of a chain being greater than was necessary was not a breach of the obligation not to use a chain unless it was of " adequate strength ".

(ii) assuming in the plaintiff's favour, but without deciding the point, that the chain came within the application of s. 24 (1) of the Act of 1937, the chain complied with the first four requirements of the sub-section (which were similar to the requirements of s. 23 (1) (a)), in that the chain was " of good construction, sound material, adequate strength and free from patent defect ", and the corporation were not in breach of the further requirement of s. 24 (1), namely, to see that the chain was " properly maintained ".

Dicta of Lord Asquith of Bishopstone in *Latimer* v. *A.E.C., Ltd.* ([1953] 2 All E.R. at p. 456) considered.

(iii) the full and complete knowledge possessed by the plaintiff of the unsatisfactory features of the chains defeated his claim against the corporation at common law, whether the plaintiff was regarded as a neighbour towards whom duties of the kind set out in *M'Alister* (*or Donoghue*) v. *Stevenson* ([1932] A.C. 562) were potentially owed by the corporation, or whether he was regarded as a neighbour towards whom the corporation potentially owed the duties of an invitor to an invitee; the plaintiff never became the servant of the corporation.

Dicta of Lord Porter and Lord Normand in *London Graving Dock Co., Ltd.* v. *Horton* ([1951] 2 All E.R. at pp. 7 and 10) applied.

Appeal allowed.

[**Editorial Note.** As regards the consequence of opportunity, or lack of it, for examination of equipment supplied, the present case may usefully be compared with *Davie* v. *New Merton Board Mills, Ltd.* ([1957] 2 All E.R. 38), where liability was established. As regards the effect of knowledge on the part of a person injured as a defence to a claim by him for negligence in creating a dangerous state of affairs on premises resulting in his injury, the present case should be distinguished from *A. C. Billings & Son, Ltd.* v. *Riden* (p. 1, ante), where the plaintiff's knowledge of the danger was not a defence in the absence of unreasonable want of prudence on her part.

For the Factories Act, 1937, s. 23, s. 24, see 9 Halsbury's Statutes (2nd Edn.) 1015, 1016.

As to the duty of a supplier of dangerous goods to warn the ultimate user, see 23 Halsbury's Laws (2nd Edn.) 632, para. 887; and for cases on the subject, see 36 Digest (Repl.) 80-83, *428-454*.

As to the nature of the duty to invitees, see 23 Halsbury's Laws (2nd Edn.) 604, para. 853; and for cases on the subject, see 36 Digest (Repl.) 54-56, *291-305*.]

Cases referred to:

(1) *Beadsley* v. *United Steel Companies, Ltd.*, [1950] 2 All E.R. 872; [1951] 1 K.B. 408; 114 J.P. 565; 2nd Digest Supp.

(2) *Latimer* v. *A.E.C., Ltd.*, [1953] 2 All E.R. 449; [1953] A.C. 643; 117 J.P. 387; 3rd Digest Supp.

(3) *M'Alister* (*or Donoghue*) v. *Stevenson,* [1932] A.C. 562; 1932 S.C. (H.L.) 31; 101 L.J.P.C. 119; 147 L.T. 281; 36 Digest (Repl.) 85, *458*.

(4) *London Graving Dock Co., Ltd.* v. *Horton,* [1951] 2 All E.R. 1; [1951] A.C. 737; 36 Digest (Repl.) 54, *296*.

(5) *O'Reilly* v. *Imperial Chemical Industries, Ltd.,* [1955] 3 All E.R. 382; 3rd Digest Supp.

(6) *Chapman or Oliver* v. *Saddler & Co.,* [1929] A.C. 584; 98 L.J.P.C. 87; 141 L.T. 305; 36 Digest (Repl.) 160, *846*.

Appeal.

This was an appeal by the second defendants, Liverpool Corporation (referred to hereinafter as " the corporation "), from an order made by CASSELS, J., at Liverpool on July 14, 1956, whereby he awarded to the plaintiff, Thomas Gledhill, the sum of £600 as damages against the first defendants, Liverpool Abattoir Utility Co., Ltd., who were the plaintiff's employers, and the corporation.

The corporation were the owners of an abattoir known as the Stanley Abattoir. At the material time the Ministry of Food had an arrangement with the corporation for the use of the abattoir, and, by a contract between the first defendants (referred to hereinafter as " the employers ") and the Ministry, the employers slaughtered pigs at the abattoir for the Ministry. The plaintiff was a slaughterman employed in the pen where the pigs were electrically stunned. After being stunned the pigs were attached by chains to an elevator consisting of a continuously revolving endless conveyor belt, on which ring shackles were suitably placed, and were sent to the next floor. The chains were provided by the corporation. Each chain had a ring at one end and a double form of hook at the other. The chain was adjusted so as to form a slip link which was placed round one of the rear legs of a pig, the hook at the other end of the chain was then attached to an upward-moving shackle on the conveyor belt, and the pig, head downwards, was then carried up. When the level of the floor above was reached, the hook would attach to a horizontal rail or track so that the chain would cease to be attached to the shackle when it followed a downward course on the endless conveyor belt. Only one pig at a time was attached to the conveyor belt, but when a pig would be reaching the first floor level a slaughterman would be getting ready to attach another pig. On June 17, 1954, when a pig which was being elevated was almost at first floor level, its leg slipped through the slip link of the supporting chain and it fell on the plaintiff who was injured.

The chains in use at the time of the accident were heavy, strong and large linked. These chains had been supplied by the corporation about a year before the accident on a request by the employers, because the chains previously in use, which were of a lighter type and had been in use for some years, had broken on two or three occasions. With the heavier type of chain it was more difficult than with the lighter type to form a slip knot which would grip tightly the leg of a pig, and on several occasions a pig had slipped out of the chain while being lifted and had fallen on to the floor of the pen; but no damage had been done until the injury to the plaintiff. The slaughtermen had frequently complained to their foreman that the new chains were unsatisfactory in that they did not always grip the leg of a pig sufficiently tightly, and the foreman had complained to the employers. The foreman had also made a similar complaint direct to the corporation's chief engineer. The employers, however, made no complaint to the corporation in respect of the new chains except about some stiffness in moving the chains and the pigs along the horizontal rail on the first floor level, and the employers continued using these chains for about two years after the accident (that is, until the hearing of the action). The plaintiff himself had made no complaint to the corporation, but he knew of the frequent complaints made by the slaughtermen to the foreman.

The plaintiff brought an action against the employers, alleging negligence on their part and failure to maintain a safe system of work. By their defence the employers denied negligence, pleaded contributory negligence on the part of the plaintiff, and also pleaded that the corporation were at fault and were in breach of their statutory duty under the Factories Act, 1937, s. 23 and s. 24. The plaintiff thereupon joined the corporation as defendants, alleging that they had been guilty of breach of statutory duty and of negligence, and the employers served a notice on the corporation claiming indemnity or contribution. A

CASSELS, J., found that, although the chains were strong and without fault, they were unsuitable for the work for which they were required, in that owing to the size of the links they did not always provide an effective grip of the leg of a pig. He held (i) that the employers were liable to the plaintiff in that they had negligently failed to maintain a safe system of work; (ii) that the corporation were also liable to the plaintiff in damages; and (iii) that the plaintiff was not guilty of contributory negligence. He awarded the plaintiff £600 damages and costs against the employers and the corporation, and, as between the employers and the corporation, he ordered that each should contribute one half of the damages and costs. The corporation now appealed, both the plaintiff and the employers being respondents to their appeal. There was no appeal by the employers. B C

H. I. Nelson, Q.C., and *J. M. Davies* for the second defendants, the corporation. D
J. S. Watson, Q.C., and *W. D. Collard* for the first defendants, the employers.
G. E. McClelland for the plaintiff.

Cur. adv. vult.

Feb. 21. **LORD MERRIMAN, P.:** The judgment which MORRIS, L.J., is about to read is the judgment of the court. E

MORRIS, L.J., after stating the facts so far as was necessary for the purpose of considering the position of the corporation and after referring to the character of the chains in use at the time of the plaintiff's injury, said that the case must be approached on the basis that the chains were strong and, as chains, were without fault, but were unsatisfactory in that when ordinarily used they might not properly grip the leg of a pig, and that the plaintiff and the employers knew this. HIS LORDSHIP continued: It is admitted by the corporation on the pleadings, and the admission was repeated before us, that the abattoir constituted a factory within the meaning of the Factories Act, 1937, and was at all material times owned by and in the possession and control of the corporation. F

The Factories Act, 1937, s. 23 (1) (a) and (2), reads: G

> " (1) The following provisions shall be complied with as respects every chain, rope or lifting tackle used for the purpose of raising or lowering persons, goods or materials:—(a) no chain, rope or lifting tackle shall be used unless it is of good construction, sound material, adequate strength and free from patent defect.
>
> " (2) In this section the expression 'lifting tackle' means chain slings, rope slings, rings, hooks, shackles, and swivels." H

This section clearly applies, and accordingly it becomes necessary to consider whether there was a breach of it. The chains complained of in this case were either chains as such or were " chain slings " so as to bring them within the definition of " lifting tackle ". The provisions requiring compliance under s. 23 are " as respects every chain, rope or lifting tackle used for the purpose of raising or lowering persons, goods or materials ". The particular provision under (a) prohibits user " unless " the condition of the chain, rope or lifting tackle is as prescribed. It was pleaded that the chain slings " were not of good construction in that they did not grip the animal securely or sufficiently ". The question is thus raised as to the meaning of the phrase " good construction ". Does the phrase import or denote suitability for some particular purpose? The decision in *Beadsley* v. *United Steel Companies, Ltd.* (1) ([1950] 2 All E.R. 872) I shows that it does not. The case dealt with the words " good construction ". SINGLETON, L.J., in his judgment said (ibid., at p. 874):

> " If the legislature had intended to make the occupiers of a factory responsible because a chain or lifting tackle which was not suitable was used, it would have been quite easy to say: ' No chain, rope or lifting tackle shall be used unless it is of good construction, sound material, adequate strength, free from patent defect and suitable for the purpose for which it is used '. Those last words do not appear in the sub-section."

BIRKETT, L.J., in his judgment (ibid., at p. 875), said that the words " good construction " meant " well made ". It is necessary also to consider the words " adequate strength ". It may well be that the question whether strength is adequate can be answered only by reference to, and when there is knowledge of, the task which is involved. Section 23 (1) (c) provides that no chain, rope or lifting tackle shall be used for any load exceeding the working load thereof as shown by the table referred to in s. 23 (1) (b) or marked on it as denoted in s. 23 (1) (b). It may be that the " adequate strength " of a chain, rope, or lifting tackle must be in relation to its safe working load. Thus a chain or rope, when new, will have a prescribed safe working load. The effect of wear and tear may be to diminish strength. If strength ceases to be adequate, the chain or rope must no longer be used. In our judgment, however, it is not necessary to express any final view in these matters, for we cannot think that, where there is an obligation not to use a chain unless it is of adequate strength, a breach is established by proving that the strength was more than was necessary. It would be irrational to suppose that a rope or chain must be of a strength precisely equal to, but not a whit above, the strain imposed on it. The chains which were in use were well made and were strong enough to carry considerably heavier loads than they were in fact called on to carry. We cannot think, therefore, that they were other than of good construction and of adequate strength. In our judgment no breach of s. 23 is shown.

We pass to consider s. 24 of the Factories Act, 1937. Sub-section (1) and sub-s. (8) of that section read:

> " (1) All parts and working gear whether fixed or movable, including the anchoring and fixing appliances, of every lifting machine shall be of good construction, sound material, adequate strength and free from patent defect, and shall be properly maintained.
>
> " (8) In this section the expression ' lifting machine ' means a crane, crab, winch, teagle, pulley block, gin wheel, transporter or runway."

The definition of " maintain " in s. 152 (1) is: " ' Maintained ' means maintained in an efficient state, in efficient working order, and in good repair ". It is said that the elevator at the abattoir is either a " transporter " or a " runway " within s. 24 (8) and that the chains constituted " parts ". It seems to us that the chains fall more naturally within the compass of s. 23. It is argued, however, that the chains are " parts " of the elevator. They are certainly not fixed parts as are the shackles. Instead of having chains at all, a rope or wire might be used which at one end would hold an animal and at the other end would be tied to one of the shackles. The chains which, in fact, are in use are attached to the elevator at ground level, but pass away from the elevator at first-floor level. In one sense, therefore, the chains are merely attachments which are from time to time joined on to the elevator, but not so as to be " parts " of it; but it is said that they may be regarded as being so necessary in the process of lifting the animals that they are " parts " of the elevator. There is no evidence how this matter would be regarded by technicians qualified to give an accurate description of the elevator. In these circumstances we propose to proceed on the basis, but without accepting it, that the chains are comprehended within the wording of s. 24. The fact that the chains come under s. 23 does not of itself negative the possibility that they may also be covered by s. 24. If s. 24 is A being considered, the question which arises is whether, on the facts of this case, the addition of the words " and shall be properly maintained " brings about a different result.

In *Latimer* v. *A.E.C., Ltd.* (2) ([1953] 2 All E.R. 449), the wording of s. 25 (1) of the Factories Act, 1937, came under consideration. That sub-section provides:

> " All floors, steps, stairs, passages and gangways shall be of sound construction and properly maintained." B

LORD ASQUITH OF BISHOPSTONE, in his speech (ibid., at p. 456) adopted the view that it was the " sound construction " which had to be " maintained in an efficient state, in efficient working order and in good repair ". He held that the words " of sound construction " control, colour or canalise the whole of s. 25 (1), C and the definition. On this view, the obligation, if s. 24 (1) applies to these chains, is that they must be of good construction, of sound material, of adequate strength and free from patent defect, and must continue to be in all these conditions, in that as regards each one of them the chains must be maintained in an efficient state, in efficient working order and in good repair. On this approach, if the chains were of good construction and of adequate strength, then there is no D evidence at all which in any way suggests that the chains did not at all times continue to be of good construction and of adequate strength. If an alternative approach is adopted and if the words " and shall be properly maintained " are read as imposing different and additional obligations, then under s. 24 (1) the chains would have to be (a) of good construction, (b) of sound material, (c) of adequate strength, (d) free from patent defect, (e) maintained in an efficient E state, (f) maintained in efficient working order, and (g) maintained in good repair. For the reasons that we have already given, the chains were in the condition denoted by (a) (b) (c) and (d). There is no suggestion that they were not maintained in good repair. Can it be said that the chains were not maintained in an efficient state or in efficient working order? While it is open to us to draw inferences from any facts which have been found, we cannot think that F it would be correct to say that the chains were not in an efficient state or in efficient working order. At the date of the hearing they had been in regular use for about three years. The complaint made against them is that they are not of the particular strength and have not links of the particular size that would make their use most agreeable and convenient for those who handle them. To that extent and in that way they are not the most suitable in character, but G there is nothing wrong with their " state " or with their " working order ". If, therefore, s. 24 of the Factories Act, 1937, applies, then on the view of the matter most favourable to the plaintiff a breach of statutory duty by the corporation is not, in our judgment, established

We pass now to consider the common law position. The learned judge held the corporation liable on the basis of the law as laid down in *M'Alister* (*or* H *Donoghue*) v. *Stevenson* (3) ([1932] A.C. 562). He held that the corporation knew that the plaintiff would be using the equipment which they were providing, and that they failed to take reasonable care to ensure that the chains were free from defect, the defect being that on some occasions the chains did not effectively grip the legs of the pigs. It has to be remembered that the corporation supplied new chains when they were asked to do so by the employers and that the new I chains were in use for about a year before the plaintiff was injured. A large number of pigs was dealt with in the course of a year. The number was stated as being either a hundred thousand or a hundred and twenty-five thousand and the great majority was lifted without incident. No case of physical injury had occurred prior to the time when the plaintiff was hurt. It was open to the employers to devise any system that they chose whereby the chains could safely be attached to the legs of the pigs. In *Donoghue* v. *Stevenson* (3), LORD ATKIN said ([1932] A.C. at p. 599):

> "My Lords, if your Lordships accept the view that this pleading discloses a relevant cause of action you will be affirming the proposition that by Scots and English law alike a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."

The way in which the learned judge stated the matter was as follows:

> "It is said on behalf of the plaintiff that [the corporation] might be brought in under the law which is known as *Donoghue* v. *Stevenson* (3) and the way in which it is argued is that the plaintiff was [the corporation's] neighbour and that [the corporation] knew that the plaintiff and men like him would be engaged in the process with which they were familiar, which involved the use of the equipment which [the corporation] were providing, and that the plaintiff can be regarded as the ultimate consumer—or perhaps I might substitute for the word 'consumer' the word 'user'—and that the purpose for which the chains were being used and the manner in which they would be used was well within the knowledge of [the corporation], certainly through Mr. Alexander, their engineer."

The questions arise whether, on the facts of this case, the corporation owed a duty to the plaintiff and whether there was a breach of any such duty and whether, if there was, damage resulted from such breach. It is submitted by the corporation in the first place that there was intermediate examination of the chains by the employers; that the chains themselves were in no way defective as regards their strength, and that it was for the employers to come to a conclusion whether the chains would satisfy their system of work or how to adapt their system so as safely and effectively to use the chains. It is further submitted by the corporation that the plaintiff himself also had ample opportunity of examining the chains supplied by the corporation, and, further, that he full well knew all about the chains for a long time before the time of the accident.

In our judgment the plaintiff cannot bring himself within any application of the principles laid down in *Donoghue* v. *Stevenson* (3). The corporation supplied new chains at the request of the employers, and if the employers were not content with what they received they could have made further requests, which doubtless would have met with compliance. The corporation knew that the employers could examine the new chains, as could also the plaintiff and other slaughtermen, and furthermore that the features of the new chains would at once be apparent to those who would use them. The chains were perfectly strong, but it transpired that, being big, they would not always readily afford a holding grip. In our judgment, however, there was no absence of reasonable care in supplying the chains and no expectation that any injury would result from their use. The corporation were entitled to assume that, if the chains did not prove suitable or convenient, they would not be used. They cannot be held responsible for their user by those who had full knowledge that some difficulties were presented in some cases and on some occasions. In certain circumstances the plaintiff might be a "neighbour" of the corporation towards whom they owed a duty of care. Such duty, if it arose, would relate only to the safety of the plaintiff, but could not be measured by, or made co-extensive with, the obligations of an employer towards those whom he employs. In the present case the full and complete knowledge possessed by the plaintiff (that is to say, knowledge of the features of the new chains) defeats his attempt to hold the corporation liable. The conclusion is the same whether the plaintiff is regarded as a neighbour towards whom duties of the kind denoted in *Donoghue* v. *Stevenson* (3) were potentially owed by the corporation or whether he is regarded as a neighbour towards whom the corporation potentially owed the duties of an invitor to an A invitee. On either approach the knowledge possessed by the plaintiff exonerates the corporation. In *London Graving Dock Co., Ltd.* v. *Horton* (4) ([1951] 2 All E.R. 1) LORD PORTER pointed out in his speech that in the circumstances pleaded in *Donoghue* v. *Stevenson* (3) actual knowledge by the purchaser of the ginger beer bottle as to the true state of affairs would have been a complete answer to the claim. LORD PORTER said ([1951] 2 All E.R. at p. 7): B

> " Your Lordships' House held that, assuming the facts alleged to be true, the manufacturer would have escaped if it was natural to expect that the intermediate vendor would take care to see that the contents were in order. The pursuer, however, could recover from the manufacturer because such an examination was not to be expected. The law required him to be careful C not to run the risk of injuring a person whom he contemplated, or ought to have contemplated, as likely to be injured by his negligence, but an examination by the retail vendor, if rightly expected, could be relied on by the manufacturer and would have been a complete answer to the claim. Still more so would knowledge by the purchaser of the true position, whether such knowledge was actual or such as the circumstances would warrant the D manufacturer to assume. The defence did not have to show that the pursuer drank the contents with a full knowledge of the risk. It would have been enough if examination and consequent knowledge were to be expected."

So in the same case LORD NORMAND, in speaking of the notice of warning of unusual dangers to be given by an occupier to an invitee, said ([1951] 2 All E.R. at p. 10): E

> " When there is already knowledge, notice or warning will have no effect and the omission of it can do no harm. So, the defendant who has failed to give warning may yet succeed if he proves that the injured person had knowledge of the unusual danger. But whether it be knowledge gained without a warning or knowledge conveyed by a warning, it must be sufficient to F avert the peril arising from the unusual danger. The knowledge must, therefore, be full knowledge of the nature and the extent of the danger. In the present case, the learned judge has found that the respondent had full knowledge of the nature and the extent of the peril, and the finding is beyond doubt warranted by the evidence which shows that the respondent had before his accident complained of the same defects in the staging as G were proved at the trial."

So in the present case the plaintiff had full knowledge of the nature and extent of the complaint in regard to the chains. He had such knowledge for about a year before his accident.

The claim of the plaintiff seems very much like an attempt to saddle the H corporation with the responsibilities of an employer, an attempt bearing some resemblance to that unsuccessfully made in *O'Reilly* v. *Imperial Chemical Industries, Ltd.* (5) ([1955] 3 All E.R. 382). In that case it was sought to say that there was a relationship of master and servant of a temporary character. A lorry driver employed by British Road Services had been engaged over a long period of years in carrying loads under the control of the defendants between I their various depots. Loading and unloading was done under the supervision of the defendants, who supplied the necessary equipment. The plaintiff, while unloading at one of the depots, was injured through the unsafe system of work of the defendants. It was held in this court that he had failed to prove a relationship of master and servant pro hâc vice and that his claim failed. It was further contended in that case on behalf of the plaintiff that, in all the circumstances and by giving instructions to the plaintiff, the defendants came under a duty akin to or of the same nature as that between master and servant. That contention failed. JENKINS, L.J., said ([1955] 3 All E.R. at p. 388):

> "If there is here no relationship of master and servant in the ordinary sense, as I hold there is not (indeed it could not be contended that there was), and if the facts here do not suffice to discharge the heavy onus lying on those who seek to make out a case of employment pro hâc vice, as in my view they do not suffice, then it seems to me that the plaintiff's case must necessarily fail. I decline to erect in cases of this kind a new duty which is neither the duty subsisting between invitor and invitee nor the duty arising from the relationship of employer and employee."

Chapman or Oliver v. *Saddler & Co.* (6) ([1929] A.C. 584) depended very much on its special circumstances. A firm of stevedores employed by a shipowner and a porterage company employed by the consignees of the ship's cargo were unloading a ship. The cargo was of maize in bags. The stevedores provided rope slings by which they raised the cargo to the ship's deck. The porterage company then had to transport the cargo to the dockside by means of a dock crane. The stevedores permitted the porters to use their rope slings which would already be round the bags and it was a matter of mutual convenience that the same slings should be used throughout. The stevedores knew that the porters relied on them to take care that the slings were safe. The porters themselves had no opportunity of examination. It was held that in the special circumstances the firm of stevedores owed a duty to the porters to see that the slings were in a fit condition to take the weight of the load. A sling broke and a porter was killed. On the facts it was held that the stevedores had failed in the discharge of the duty which they owed. The facts in the present case are quite different. Whatever may have been the provisions of the contract between the corporation and the Ministry of Food and of the contract between the Ministry and the employers (as to which we have no knowledge), there was ample opportunity for independent examination of the chains by the employers and, indeed, by the slaughtermen themselves. It was submitted by counsel for the employers that the corporation remained in possession and control of the abattoir and of their machinery within it, and that the corporation and the employers were engaged in a joint operation, in the course of which the corporation equally with the employers were using the chains which were provided. Even if that could be said to have been the position, however, the plaintiff never in any way became the servant of the corporation. If the plaintiff be regarded as an invitee of the corporation, his claim must fail, since on the evidence he was well aware of any such element of danger as the use of the chains may have involved. Reliance on the principles enunciated in *Donoghue* v. *Stevenson* (3) does not avail the plaintiff because of the ample opportunities for examination of the chains enjoyed by the employers and by himself, and furthermore because of the complete knowledge which he possessed as to all the features of the chains of which he now complains.

In our judgment no case against the corporation was established either by the plaintiff or by the employers. In the result, therefore, we allow the appeal of the corporation. The liability to the plaintiff should remain solely with the employers who, in our judgment, should bear the costs incurred by the corporation.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Cree, Godfrey & Wood*, agents for *Town clerk*, Liverpool (for the corporation); *P. R. Kimber* (for the employers); *Silverman & Livermore*, Liverpool (for the plaintiff).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

LONDON TRANSPORT EXECUTIVE *v.* BETTS (VALUATION OFFICER).

[COURT OF APPEAL (Lord Evershed, M.R., Morris and Pearce, L.JJ.), July 10, 11, 1957.]

Rates—De-rating—Industrial hereditament—Purposes of user—Purposes other than those of a factory—Maintenance of occupier's road vehicles—Distinction from reconditioning—Rating and Valuation (Apportionment) Act, 1928 (18 *&* 19 *Geo.* 5 *c.* 44), *s.* 3 (1), (2).

London Transport Executive occupied a depot for work on its omnibuses, each omnibus being dealt with every three and a half years. The body of the omnibus was detached from the chassis, which was sent elsewhere for reparation treatment; the body was then carefully examined and any damaged part was replaced or repaired, including the seating, panelling of the exterior, etc. On the average twenty-five per cent. of the identifiable parts of the body of an omnibus had to undergo treatment of some kind and a proportion of that twenty-five per cent. were replaced by different new or reconditioned parts. The body was then replaced on a chassis, which was not necessarily its original chassis, all the omnibuses being of a pattern and no purpose being served by using only the original chassis. On the question whether the depot was an industrial hereditament for rating purposes within s. 3 of the Rating and Valuation (Apportionment) Act, 1928, or was excepted from that definition by s. 3 (2) (b) as being a " place used . . . for the . . . maintenance of " the executive's road vehicles "notwithstanding that it is situate within the . . . precincts forming a factory . . . and used in connexion therewith", and thus would " be deemed not to form part of the factory " by s. 3 (2) (b),

Held: the depot was not an industrial hereditament within the meaning of s. 3 of the Rating and Valuation (Apportionment) Act, 1928, for the following reasons—

(i) the exception, enacted by s. 3 (2) (b) of the Act, of " any place used . . . for the . . . maintenance of " road vehicles from being part of a factory within s. 3 of the Act applied where the place so used was the whole, as well as where it was merely part, of the hereditament.

(ii) whether the operations carried on at the depot constituted maintenance of the road vehicles or reconditioning or reconstruction was a question of degree and so of fact for the Lands Tribunal, and, there being evidence on which the tribunal could have reached its decision that the hereditament was used for the purposes of maintenance of road vehicles, that decision should stand.

Hall & Co., Ltd. v. *South-East Area of Surrey Assessment Committee* ((1933), 4 D.R.A. 29), and *B.P. Refinery (Kent), Ltd.* v. *Walker* ([1957] 1 All E.R. 700) applied.

Appeal dismissed.

[**Editorial Note.** The depot was used also for the manufacture of destination blinds, etc., but the extent of these manufacturing operations was negligible compared with the general scope of the whole of the operations and could be disregarded under the de minimis rule*. The judgment proceeds on the basis of its being conceded that the operations of repair treatment should be regarded as being carried on on the whole of the depot to the exclusion of everything else (see p. 129, letter G, post).

In the present case the maintenance of London Transport Executive's road vehicles was found to be carried on and this aspect of the case may be compared, in regard to the detaching of the bodies of vehicles and the treating of a body and chassis as different units, with *Automobile Proprietary, Ltd.* v. *Brown* ([1955]

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* See p. 129, letter D, post.

2 All E.R. 214) where the Court of Appeal considered a contention that the reconditioning of units was part of the maintenance of vehicles.

As to what constitutes an industrial hereditament and use for the maintenance of the occupier's road vehicles, see 27 HALSBURY'S LAWS (2nd Edn.) 444-448, paras. 879, 880; and for cases on the subject, see DIGEST Supp.

For the Rating and Valuation (Apportionment) Act, 1928, s. 3, see 20 HALSBURY'S STATUTES (2nd Edn.) 176.]

Cases referred to:

(1) *Potteries Electric Traction Co., Ltd.* v. *Bailey* (*Stoke-on-Trent Revenue Officer*), [1931] A.C. 151; 100 L.J.K.B. 153; 144 L.T. 410; 95 J.P. 64; Digest Supp.

(2) *Hall & Co., Ltd.* v. *South-East Area of Surrey Assessment Committee*, (1933), 18 R. & I.T. 77; 4 D.R.A. 29.

(3) *B.P. Refinery* (*Kent*), *Ltd.* v. *Walker*, [1957] 1 All E.R. 700; 121 J.P. 231.

(4) *Scottish Motor Traction Co.* v. *Edinburgh Assessor*, *Wylies, Ltd.* v. *Glasgow Assessor*, 1931 S.C. 416; Digest Supp.

(5) *Re London Passenger Transport Board*, (1942), 13 D.R.A. 64.

(6) *Automobile Proprietary, Ltd.* v. *Brown*, [1955] 2 All E.R. 214; 119 J.P. 328; 3rd Digest Supp.

(7) *Thorogood* v. *Van Den Berghs & Jurgens, Ltd.*, [1951] 1 All E.R. 682; 115 J.P. 237; sub nom. *Thurogood* v. *Van Den Berghs & Jurgens, Ltd.*, [1951] 2 K.B. 537; 2nd Digest Supp.

Case Stated.

London Transport Executive appealed by way of Case Stated against a decision of the Lands Tribunal given on Feb. 18, 1957 ((1957), 1 R.R.C. 141), dismissing an appeal by the executive against a decision of a local valuation court of Central Middlesex Local Valuation Panel given on Mar. 11, 1955. The local valuation court had directed that the hereditament known as Aldenham depot, Elstree, owned and occupied by the executive, should be entered in Part I of the valuation list for Harrow Urban District with a rateable value of £20,300. The executive appealed to the tribunal on the ground that at all material times since Aug. 10, 1953, the depot had been occupied and used for industrial purposes, the major overhaul and rebuilding of road omnibuses, and ought to be treated as an industrial hereditament in accordance with the Rating and Valuation (Apportionment) Act, 1928. The Lands Tribunal held that the hereditament was used for the maintenance of the executive's road vehicles within s. 3 (2) (b) of the Act and that it was therefore not an industrial hereditament within the section, and was properly entered in Part I of the list. The executive appealed to the Court of Appeal, asking for an order remitting the case to the Lands Tribunal with a direction (i) that the tribunal was wrong in law in holding that the depot should be entered in Part I of the valuation list, and (ii) that the depot should be entered in Part II of the valuation list as an industrial hereditament within the meaning of the Act of 1928.

Michael Rowe, Q.C., and *D. G. Widdicombe* for London Transport Executive.
Maurice Lyell, Q.C., and *P. R. E. Browne* for the valuation officer.

LORD EVERSHED, M.R.: The question in this appeal is that of the liability for rates of premises known as the Aldenham Road services depot or factory of London Transport Executive. London Transport Executive is responsible for the conduct of the London transport services, particularly its omnibus services, and the executive has laid down, as part of its working policy, that an omnibus (assuming it has not met with some calamity in the meantime) after every three and a half years' service on the roads goes to this factory for " treatment ", to use a neutral word, of a somewhat elaborate character. The body of the omnibus is detached from the chassis and at the relevant date for the purposes of this appeal the chassis was taken elsewhere for reparation treatment. The body is then subjected at the Aldenham road depot to careful examination. Any part that has suffered damage is put right either by replacing it or by some other repairing work. That includes all the detail of the body like the seating, panelling of the exterior, and so forth. Taking an average over a number of omnibuses and over an appreciable period, something like twenty-five per cent. of the identifiable parts undergo treatment of some kind and a proportion of that twenty-five per cent. are replaced by a different new or reconditioned part.

The body is then replaced on a chassis, leaving an omnibus which might be fairly described as being as good as new. Certainly from the photographs it so appears. It is, however, a point of significance, and illustrative of one of the questions that we have to decide, that any body removed from its chassis at the Aldenham depot is by no means necessarily replaced on the same chassis. For this purpose all the omnibuses can be treated as of a uniform pattern, so that, for the business purpose of the executive, there is no point in putting any given body on any given chassis provided only that for licensing and taxation purposes there is one identifiable whole.

The problem arises under s. 3 of the Rating and Valuation (Apportionment) Act, 1928, as amended. Section 3 (1) provides:

> "In this Act the expression 'industrial hereditament' means a hereditament . . . occupied and used . . . subject as hereinafter provided, as a factory . . .: Provided that the expression industrial hereditament does not include a hereditament occupied and used as a factory . . . if it is primarily occupied and used for the following purposes or for any combination of such purposes, that is to say . . . "

There are then set out under lettered sub-paragraphs six purposes, e.g., those of a dwelling-house and a retail shop; but for present purposes the most significant is the last:

> "(f) any other purposes, whether or not similar to any of the foregoing, which are not those of a factory or workshop."

Section 3 (2), as amended, provides:

> "For the purposes of this Act—(b) . . . any place used by the occupier for the housing or maintenance of his road vehicles . . . shall, notwithstanding that it is situate within the close, curtilage or precincts forming a factory . . . and used in connexion therewith, be deemed not to form part of the factory . . . but save as aforesaid, the expressions 'factory' . . . have . . . the same meaning as in the Factory and Workshop Acts, 1901 to 1920."

The two sub-sections are striking instances of the possible results of referential legislation. By adopting this form of words Parliament has produced a result so involved and in certain respects so difficult of apprehension that some problems which emerge must be almost insoluble; certainly an attempt to follow the parliamentary intention is apt to lead one into circular argument.

The executive claims that the Aldenham depot is an industrial hereditament as defined in this section. If it is, it is entitled to the benefit of derating. The questions which we have to determine are two. The first is whether the use of this factory or the conduct of the operations briefly described falls within sub-s. (2) (b) as constituting use for " maintenance of road vehicles ". If it does not constitute such use, there is nothing to exclude the Aldenham depot from being an industrial hereditament and therefore entitled to the benefit of derating.

A second point also has arisen. The executive says that the language of sub-s. (2) (b) is only applicable to a case in which the place used for the maintenance of road vehicles is part only—however great the part, still, part only—of the hereditament as a whole; and, since here it can be taken that the operations which I have described are carried out on the whole of the hereditament, nothing in para. (b) has the effect of excluding this depot from the benefit of the section.

I will say something of the effect of this section and indicate the extreme difficulties which, by the language it has chosen to use, Parliament has presented to the court. One asks first whether the hereditament is occupied and used as a factory " subject as hereinafter provided ". At this stage in the reading of the section the reader has not had indicated to him what is a factory; but he finds later in the section the reference to the Factory and Workshop Acts, 1901 to 1920. The operations conducted at the Aldenham depot qualify the premises as a factory under those Acts. But immediately after the opening sentence of the sub-section comes the proviso which I have read. So the question arises whether, assuming the premises could otherwise properly be regarded as a factory, that prima facie conclusion is displaced by the fact that as a whole they are primarily occupied and used for a purpose which is not that of a factory.

It appears that specific manufacturing operations are carried out on parts of the depot. What are known as destination blinds are made there to some extent, i.e., devices in the front of omnibuses, so contrived that the conductor or driver can by turning a handle indicate to the public where the bus is going. So also to some extent are plant and equipment for use in the operations at Aldenham. But, judged from a common-sense point of view, the extent of these manufacturing operations is negligible compared with the general scope of the whole of the operations—so much so that they could be disregarded on the application of the de minimis rule. Moreover, they are not carried out in a place devoted exclusively to those manufactures. The manufacture of the new blinds takes place in the part of the premises in which existing destination blinds are repaired or reconditioned, and substantially the same observation applies to the manufacture of the plant and equipment.

A point somewhat debated was whether the repairing operations (assuming that they were maintenance) were such that the hereditament as a whole was in any event primarily used for purposes which were not those of a factory. It is unnecessary, however, if I have followed the argument, for the court to express a conclusion on the matter. When the point comes to be considered, the court will have to decide whether para. (b) of sub-s. (2) operates once only and for one purpose, or whether, having decided that it applies, one must go on to see whether, as a consquence, the proviso to sub-s. (1) has also to be considered. It is unnecessary to decide the point here because it is conceded that we should regard the operations of repair treatment (I use a neutral phrase) as being carried on on the whole of the depot to the exclusion of everything else, so that the hereditament is either wholly used for the purpose of maintenance of road vehicles or none of it is so used, according to whether the repair treatment is or is not maintenance.

Section 3 (1) only affords no clue to whether the operations being carried on are those of a factory. Sub-section (2) begins: " For the purposes of this Act ". I take it, therefore, as stating that for the purposes of this Act the word " factory " has certain meanings, and, similarly, for the purposes of this Act certain places are not be regarded as part of the factory. The essential words are:

> " For the purposes of this Act . . . any place used by the occupier for . . . maintenance of his road vehicles . . . shall, notwithstanding that it is situate within the close, curtilage or precincts forming a factory . . . and used in connexion therewith, be deemed not to form part of the factory, . . . but save as aforesaid . . . ' factory ' ",

has the meaning contained in the earlier legislation.

First there must be something which is a factory within the Act; then part of that hereditament must be used for purposes which under factory legislation would still be clearly factory purposes, but by reason of the nature of those operations is to be deemed not to form part of the factory at all.

It is unfortunate that Parliament, having previously directed the reader's attention to the phrase " for purposes of a factory ", departs from that formula and refers to a place used for a particular purpose being deemed *not to form part of the factory*. It might have been easier if it had adhered to the previous formula and said that a place used for the particular purpose " shall be deemed not to be used for factory purposes ". Still, it has not done so, and the argument of counsel for the executive is that Parliament has not said " shall be deemed not to be or to form part of the factory " but has confined itself to saying " to be deemed not to form part of the factory ". It is contended that by the very language used Parliament shows that this first part of sub-s. (2) (b) is limited in its application to those cases only in which the place used for maintenance is a definable part of what is otherwise a factory, falling short by some fractional margin however small of the whole. At first sight, that result is undoubtedly one which the use of the formula " be deemed not to form part of the factory " does much to support; but, if that argument is right, the result is highly capricious if indeed not illogical to the point of absurdity.

Section 3 (1) (f) provides that a hereditament which otherwise would qualify as an industrial hereditament by virtue of its use as a factory, does not so qualify if it is primarily used for a purpose which is not the purpose of a factory. Sub-section (2) (b) is saying that for the purposes in hand part of a factory (which I will assume occupies ninety per cent. of it) used for the maintenance of road vehicles is not deemed to be part of a factory. It would be strange if para. (f) of sub-s. (1) had no application to the case where ninety per cent. of the total use of the hereditament was of a nature that took that part wholly outside the scope and definition of a factory altogether. It is conceded by counsel for the executive that, if an undertaking is a " factory " but ninety per cent., or any part less than one hundred per cent., of it is used for the maintenance of road vehicles, the occupier will be deprived of the benefit of derating as to that part; but he says that if the whole one hundred per cent. is used for the maintenance of road vehicles, then he can get the benefit of derating for the totality. I should be very reluctant to read this paragraph in a way which would produce that result. On the whole, notwithstanding the absence of the words " to be or " where they would be expected, I do not feel that the language is so compelling as to lead me to that conclusion; and I find assistance in the few words, " notwithstanding that it is situate within the close ", etc. The formula " close, curtilage or precincts " is one that may be found in the earlier factory legislation, but according to the plain sense of the language, the paragraph is, I think, saying: " *any* place used for the maintenance of road vehicles notwithstanding that it is— [I paraphrase that as ' even though it be ']—within the close, the confines, of a factory, still is not to be deemed part of the factory; and if it so happens that the place is the whole, then none of it forms part of the factory and the whole is excluded ". I do not say the language is wholly happy, but I cannot find such a construction to be subversive of the meaning of the words used. I think that such a reading of the paragraph gives common sense and coherence to the two sub-sections read together.

It was said that the point was determined in *Potteries Electric Traction Co., Ltd.* v. *Bailey* (1) ([1931] A.C. 151). In that case the company owned and operated a fleet of omnibuses and on the premises in question operations were carried out which, with one exception, were not directly on the vehicles themselves brought there for the purpose but on the component parts to be used in the reparation of the vehicles. In the Court of Appeal the view had been taken that work which could be described as maintenance work on these individual parts or manufacture of the parts themselves should be regarded as constituting maintenance of the vehicles, because the parts when so made or reconditioned were intended to be used substantially, though not in fact exclusively, for the specific purpose of repairing or maintaining the vehicles. The House of Lords held that that view was incorrect and that the destination of the component parts when made or repaired was irrelevant for the purposes in hand. If the parts had not been made or repaired on these premises, they would have had to be bought elsewhere, and one was not entitled to pay regard to the circumstance that the purpose of making and repairing these parts was in order that the company should not have to buy them but should be able to use them for the reparation elsewhere of its vehicles.

There was one exception to the general conclusion. A defined part of the hereditament was used as a paint shop where the vehicles were painted or repainted, and the House of Lords agreed with the court below in treating that identifiable part as constituting a place used for the maintenance of vehicles within sub-s. (2) (b) of the Act, so that to that extent the part of the whole was excluded from the factory definition.

Counsel for the executive drew our attention to the fact that, according to the Case for the appellant in the report, the point with which we are now concerned under sub-s. (2) (b) was directly raised together with a number of other points. From the facts that I have stated, however, the question in the end plainly did not arise for determination, the House being left with a situation in which a definable and relatively small part only of the hereditament constituted a place used for the maintenance of road vehicles. But reliance was placed by both sides on the language used particularly by LORD THANKERTON, when he said (ibid., at p. 181):

> "Sub-sections (1) and (2) [of s. 3 of the Rating and Valuation (Apportionment) Act, 1928] appear to me to lay down three conditions which must be complied with in order to qualify the hereditament to be entered in the special list as an 'industrial hereditament'—namely:—(a) That the hereditament, or some part of it, is occupied and used as a factory or workshop within the meaning of the Factory and Workshop Acts, 1901 to 1920; (b) if so, that any place used by the occupier for the housing or maintenance of his road vehicles or as stables, which is within the close, curtilage or precincts forming such factory or workshop, is to be deemed not to form part of such factory or workshop for the purposes of s. 3, and (c) if such hereditament is primarily used and occupied for any of the purposes specified under heads (a) to (f) of the proviso to sub-s. (1), then the hereditament is not an industrial hereditament."

The fact that counsel for both parties have relied on that language as supporting their respective but divergent contentions emphasizes that, as I think, LORD THANKERTON was not directing his mind to this point at all and certainly not attempting to answer it. For the reasons given I say no more on whether the language of his para. (c) supports the view that, having reached an answer under sub-s. (2) (b), one still has to consider primary use under para. (a). Though LORD THANKERTON'S para. (b) follows substantially s. 3 (2) (b) his para. (b) is not a transliteration of the words of sub-s. (2) (b), and, indeed, counsel for the executive relied on that as indicating that LORD THANKERTON was construing sub-s. (2) (b) so as to provide for him the answer to the present case. I have been unable, however, to find any clear answer to the present problem in the language which I have read, and in my judgment the *Potteries* case (1) cannot be relied on as providing any answer sufficient to guide or direct us in the present case. I do not find anything in the opinions either of LORD THANKERTON or of any of the other noble Lords which compels me to a conclusion different from that already indicated as to the meaning of sub-s. (2) (b). In my judgment, accordingly, it follows that the executive cannot claim the benefit of derating on the ground that, if it is maintaining its road vehicles at the Aldenham depot, it is doing so on the whole of the hereditament and so is able to say that para. (b) of sub-s. (2) does not apply to it. I think on that hypothesis it does. A

It is therefore necessary to consider the second question, whether what the executive is doing at the Aldenham Road depot is maintenance as that word is used in the paragraph. It is pointed out by counsel for the valuation officer that the word " maintenance ", a common English word, is not qualified by any adjective. There are references to operations in the *Potteries* case (1) as being B " ordinary " maintenance, and in their context the words were used in contrast to operations which could not be called maintenance at all; but, again, I am satisfied that nothing in that case provides any guide to the problem here.

In his very lucid decision, the member of the Lands Tribunal referred to several cases cited to him which were also cited to us. In *Hall & Co., Ltd.* v. *South-East Area of Surrey Assessment Committee* (2) ((1933), 4 D.R.A. 29) CHARLES, J., C said (ibid., at p. 37):

> " The words [maintenance, etc.] depend upon the circumstances and facts of each case, necessarily fluctuating, and, as they fluctuate, changing from overhaul to maintenance, or maintenance to overhaul. It is indeed a matter of degree, and being a matter of degree, it is clear in my judgment D that it is a matter of determination of fact upon the evidence."

I agree. I think it is a matter of degree to be judged according to the circumstances of the case, and to the facts which I have already mentioned I will now make some slight additions as being to my mind highly relevant in considering the circumstances of this case.

London Transport Executive is responsible for a large fleet of omnibuses in E London. An undertaking with those responsibilities plainly has to determine on some standard, not only of efficiency and safety, but also I think of convenience, and indeed of appearance. I have already said that their omnibuses, as I understand the facts of the present case, may be taken as identical in design. Any parts would therefore be interchangeable from one vehicle to another. It F seems to me from the facts that the practice of taking these omnibuses every three and a half years to the Aldenham depot and there subjecting them to the close scrutiny and treatment which they receive is a manifestation of a policy aimed at keeping on the roads of London omnibuses having a standard of efficiency, safety and appearance which in the exercise of its statutory duties the executive thinks proper. The question is whether what is done, this series of G operations which takes three weeks in respect of any individual vehicle, can reasonably be called maintenance as that word is ordinarily understood; or whether they amount to reconditioning or reconstruction or something which should be described by some word with a significance distinct from maintenance.

The matter was expressed at the end of the decision by the tribunal in the following language (1 R.R.C. at p. 147): H

> " As in all questions of degree it is not easy to say on which side of the line a certain process may be said to fall but after a careful consideration of the evidence in the light of the view which I had of the depot on Sept. 19, I have arrived at the decision that the processes carried out at the depot can properly be described as the maintenance of vehicles. It is, I think, I material that at the material dates, no manufacture of new parts other than destination blinds was taking place at the depot. The work done at the depot was work necessary to maintain the vehicles as a fleet in running condition, and the fact that, in order to carry out the work more expeditiously and efficiently, reconditioned parts were substituted in place of reconditioning and replacing the defective parts actually removed cannot in my view change what is in fact a repair into a reconstruction. Nor I think can

> the fact that, instead of dealing with each dented plate or mudguard as the damage occurs, such repairs are carried out to a programme, alter the essential character of the work. Looking at each of the individual processes they seem to me to fall clearly within what, if one was dealing with a single vehicle, might properly be called maintenance, and I do not think that because they are done collectively to a fleet of vehicles they can be said to lose this character."

I find in that exposition of his conclusion no error in law. It is not to be forgotten that, according to the Lands Tribunal Act, 1949, the decision of the Lands Tribunal on questions of fact is final. Section 3 (4) so provides, giving, however, the right to an aggrieved party to take the matter to this court as being erroneous in point of law. In *B.P. Refinery* (*Kent*), *Ltd.* v. *Walker* (3) ([1957] 1 All E.R. 700) questions of degree again arose, and we then considered to what extent it was competent or proper for this court to substitute a conclusion of its own for that of the tribunal on these questions of degree. Cases may arise (and in certain instances they arose in the *B.P. Refinery* case (3)) in which this court thinks that the tribunal has misdirected itself as a matter of law in reaching its conclusion on the question of fact—in that case whether specific things were buildings or in the nature of buildings. We considered in that case fully the extent of the right and duty of this court to interfere in matters of this kind. After stating that the tribunal may misdirect itself and thereby expose its decision to review, DENNING, L.J., said ([1957] 1 All E.R. at p. 715):

> "There is, however, a considerable area where two reasonable men, each of whom properly understood the statute, could reasonably come to different conclusions. In such cases the mere fact that the tribunal comes to a different conclusion from that to which some of the members of this court might come does not mean that the tribunal falls into an error in point of law. The question is then one of degree in which the tribunal of fact is supreme so long as it does not step outside the bounds of reasonableness",

and he supported that conclusion by certain references to authorities.

I apply that test here. I am not to be taken as saying that had I tried this case I would have come to a different conclusion, but I find it impossible to say that a tribunal properly understanding the statute could not reasonably conclude, in the special circumstances of this case and against the background of the whole operations and the responsibilities of the London Transport Executive, that these operations were maintenance of the executive's road vehicles. That an omnibus body may be married after its original divorce to some chassis which was not previously part of its make-up is no doubt a forceful point. But it does not seem to me to suffice, because to try to find the original chassis and reunite the two components as before could achieve nothing but the occupation of time; in other words, efficiency plainly requires the conjunction of body and chassis in the way that it is in fact carried out. To take an example, it would be absurd to suppose that one must ensure that every wheel taken off and given a new tyre went back on to the axle and near or off side position from which the wheel had been detached.

Taking the matter as a whole, viewing it broadly and in the light of the whole evidence, it seems to me impossible to say that the conclusion which the tribunal reached was not a reasonable conclusion justified by the language of the section. I therefore hold that the executive fails on that question also and the appeal must be dismissed.

MORRIS, L.J.: I concur entirely in the judgment that my Lord has delivered. I find myself agreeing so fully with its reasoning that I cannot usefully add anything.

PEARCE, L.J.: I, too, agree with all that has been said.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *M. H. B. Gilmour* (for London Transport Executive); *Solicitor of Inland Revenue* (for the valuation officer).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

MACALPINE *v.* MACALPINE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), April 12, June 26, 27, 1957.]

Divorce—Foreign decree—Notice of foreign proceedings not given to respondent spouse—Petitioner's fraud procuring absence of notice—Decree treated as nullity by English courts.

The parties were married in England in 1930. In 1942 the husband went to the United States of America and the wife remained in England at an address which at all material times was known to the husband. Since 1948 the husband had been resident and domiciled in the United States. In 1948 the husband instituted proceedings in the State of Wyoming for divorce and in his affidavit in support of his petition he swore that the wife's address and whereabouts were unknown to him; a similar allegation was made in his petition. In consequence, notice of the suit was published only in Wyoming local newspapers and no notification of the proceedings was ever given to the wife. In 1949 the husband obtained a decree of divorce in Wyoming. In 1951 the husband went through a ceremony of marriage with one C. in the State of Colorado. In 1954 the wife learnt of the divorce proceedings in Wyoming. On petition by the wife for divorce on the ground of the husband's adultery,

Held: the decree would be treated as a nullity by the English courts since it would be contrary to natural justice to recognise a decree obtained in proceedings of which the wife was prevented by the husband's fraud from having notice; therefore the marriage between the parties was still subsisting and a decree nisi of divorce would be granted to the wife.

Observations of LORD PENZANCE in *Shaw* v. *A.-G.* ((1870), L.R. 2 P. & D. at p. 162) and of LINDLEY, M.R., and VAUGHAN WILLIAMS, L.J., in *Pemberton* v. *Hughes* ([1899] 1 Ch. at pp. 790, 796) applied.

[As to the finality of a foreign decree of divorce and the principle that it will not be recognised where procured in proceedings contrary to natural justice, see 7 HALSBURY'S LAWS (3rd Edn.) 115, 116, para. 203; and for cases on the subject, see 11 DIGEST (Repl.) 481-483, *1082-1096*.

As to the necessity of notice to the defendant of proceedings in which a foreign judgment is obtained, see 7 HALSBURY'S LAWS (3rd Edn.) 146, para. 258; and for cases on the subject, see 11 DIGEST (Repl.) 518, *1323*, *1324*.

As to foreign judgments obtained by fraud, see 7 HALSBURY'S LAWS (3rd Edn.) 147, 148, para. 261.]

Cases referred to:

(1) *Castrique* v. *Behrens*, (1861), 3 E. & E. 709; 30 L.J.Q.B. 163; 4 L.T. 52; 121 E.R. 608; 11 Digest (Repl.) 524, *1373*.

(2) *Bater* v. *Bater*, [1906] P. 209; 75 L.J.P. 60; 94 L.T. 835; 11 Digest (Repl.) 482, *1087*.

A (3) *Bonaparte* v. *Bonaparte*, [1892] P. 402; 62 L.J.P. 1; 67 L.T. 531; 11 Digest (Repl.) 482, *1085*.

(4) *Shaw* v. *A.-G.*, (1870), L.R. 2 P. & D. 156; 39 L.J.P. & M. 81; 23 L.T. 322; 11 Digest (Repl.) 481, *1082*.

(5) *Pemberton* v. *Hughes*, [1899] 1 Ch. 781; 68 L.J.Ch. 281; 80 L.T. 369; 11 Digest (Repl.) 487, *1115*.

B (6) *Rudd* v. *Rudd*, [1924] P. 72; 93 L.J.P. 45; 130 L.T. 575; 11 Digest (Repl.) 472, *1036*.

(7) *Robinson* v. *Fenner*, [1913] 3 K.B. 835; 83 L.J.K.B. 81; 106 L.T. 542; *subsequent proceedings*, [1913] 3 K.B. 845, n; 11 Digest (Repl.) 518, *1326*.

(8) *Jacobson* v. *Frachon*, (1927), 138 L.T. 386; 72 Sol. Jo. 121; 11 Digest C (Repl.) 518, *1327*.

(9) *Boetcher* v. *Boetcher*, [1949] W.N. 83; 93 Sol. Jo. 237; 2nd Digest Supp.

(10) *Maher* v. *Maher*, [1951] 2 All E.R. 37; [1951] P. 342; 2nd Digest Supp.

(11) *Igra* v. *Igra*, [1951] P. 404; 2nd Digest Supp.

(12) *Wood* v. *Wood*, [1957] 1 All E.R. 14.

D **Petition.**

In this case the wife petitioned for divorce on the grounds of the husband's desertion and adultery.

By her petition dated Aug. 27, 1956, the wife alleged that she was married to the husband on Oct. 30, 1930, in London; that there were no children of the marriage; that she was living in London and that the husband was a farmer E living in the State of Colorado in the United States of America; that the husband was domiciled in the State of Colorado and that she had been resident in England for upwards of three years immediately preceding the presentation of the petition; that on Feb. 11, 1949, a district court in the State of Wyoming in the United States of America pronounced a decree absolute of dissolution of the marriage in proceedings instituted by the husband and that the parties had not resumed F cohabitation since the date of that decree. The wife then alleged:

> "The . . . decree absolute was obtained by the fraud of the [husband]. Particulars. (i) The [husband] fraudulently concealed from the [wife] that he was instituting the [divorce] proceedings which were unknown to the [wife] until she was informed thereof by a third person in the year 1954. (ii) On Dec. 1, 1948, the [husband] by affidavit sworn in support of his G petition in the said proceedings falsely and fraudulently swore that he did not know the whereabouts or the address of the [wife] and that he had not heard from her for more than three years. (iii) On Feb. 11, 1949, the [husband] by affidavit sworn in the said proceedings falsely and fraudulently swore that the residence of the [wife] was unknown to him and could not with reasonable diligence be ascertained. In the premises the said decree H absolute is of no force or effect and the . . . marriage is a valid and subsisting marriage."

The wife then alleged that the husband had deserted her in that from 1943 onwards the husband had lived in the United States of America and that by his institution of the proceedings and by obtaining the decree absolute he had evinced an intention to bring cohabitation between himself and the wife to an end. She I further alleged that the husband had committed adultery with Helen W. Macalpine (formerly Colbert) and as particulars thereof

> "The [wife] will rely upon the fact that on Sept. 15, 1951, the [husband] went through a ceremony of marriage with Helen W. Colbert in Denver . . . and has since cohabited with the said Helen W. Colbert."

The suit was undefended and came before SACHS, J., on Apr. 12, 1957, when, after hearing the evidence of the wife and an expert on American law, HIS

LORDSHIP adjourned the case for argument by the Queen's Proctor. At the conclusion of the hearing on that occasion the allegation of desertion was withdrawn. A

C. T. Reeve for the wife.
Colin Duncan for the Queen's Proctor.

SACHS, J.: In this case the marriage took place in October, 1930, when both the parties were aged thirty-one. They lived together at various addresses and finally at 2, Albion Gate, London, which was their matrimonial home until the outbreak of war when the husband rejoined His Majesty's Forces. There is no issue of the marriage. In 1942 the husband was posted to the United States of America, where he became a member of the military mission. He returned to this country temporarily in September, 1945, when the wife was still residing at Albion Gate. Then he returned to the mission, was in due course demobilised, but, save for an occasional visit to this country, has remained in the United States. According to the evidence he now farms at Kremmling in the State of Colorado, and on the facts in evidence before me it can be safely assumed that from 1948 onwards he has been domiciled there. The wife has remained in England, living consistently at Albion Gate, until March, 1949, when she moved to a flat in Hill Street. Her petition as presented on Aug. 27, 1956, comes within the jurisdiction of this court by virtue of the provisions of s. 18 (1) (b) of the Matrimonial Causes Act, 1950. B C D

As regards the period September, 1945, to January, 1954, the husband and wife kept up a somewhat desultory correspondence which was friendly in tenor. Each party seems to have written to the other some two or three times a year; there was never an interval as long as a complete year between the letters sent by the husband or between the letters sent by the wife. The husband did not invite the wife to join him in the United States and the wife did not suggest that she should do so, indeed, to use the words of counsel for the wife, the position was one of consensual separation. E

During that period from 1945 to 1954, the wife was on friendly terms with the husband's mother, who lived in Guernsey, and used both to correspond with her and to visit her. The husband's mother was also during that period in regular correspondence with the husband. Throughout the period between 1945 and March, 1949, the husband by virtue of his correspondence with the wife and with his mother was fully aware of the wife's address and as to how he could communicate with her. In December, 1948, he chose to initiate proceedings for divorce against the wife in a district court in the State of Wyoming. The petition itself is dated Dec. 2, 1948, and the affidavit in support is dated the previous day. The ground on which the decree was sought appeared in para. 4 of the petition, which reads: F G

> "That the [husband] and [wife] have lived apart for eight years without cohabitation, and that such separation is not upon a ground that would justify said separation if said ground were charged to [the husband]." H

Paragraph 6 of the petition reads:

> "That the [husband] does not know the whereabout of the [wife] and her address is unknown, [the husband] having not seen nor heard from her for more than three years and she is a non-resident of the State of Wyoming." I

The facts alleged in para. 6 were verified by the husband's own affidavit in support of the petition, and in addition the husband's attorney by a duly authorised affidavit dated Dec. 2, 1948, swore as follows:

> "That he is reliably informed by [the husband] and your affiant therefore states, that the residence of the [wife] is unknown and cannot with reasonable

> diligence be ascertained for it is believed that the present residence of the [wife] is somewhere in South Africa."

Thereupon it appears that a notice of suit was published in Wyoming local newspapers of Dec. 3, 10, 17 and 24. No notification of the proceedings was sent by registered post either to the wife's address at Albion Gate or to the husband's mother in Guernsey with a view to it being forwarded from there. If the district court had been made properly aware of the true facts as regards the wife's situation and as to the way in which communications would normally have reached her the court would have ordered the husband to send a notification of the proceedings by registered mail, and that notification would either have been sent to Albion Gate or to the mother for forwarding to Albion Gate or both.

On Feb. 11, 1949, the husband filed a further affidavit relating to the absence of knowledge of his wife's whereabouts. This was in the following terms:

> "That he is the plaintiff in the above entitled action; that the residence of the [wife] is unknown to affiant and cannot with reasonable diligence be ascertained and that service of summons cannot be made within this state on the [wife]."

Thereupon he was granted a decree absolute on Feb. 11. I pause only to note that the statement of the husband in para. 6 of his affidavit verifying the petition, the information which he gave to his attorney as stated in the affidavit of Dec. 2, and the facts as deposed to in the husband's affidavit of Feb. 11 were to his knowledge wholly untrue.

Next, as to the period from the date of the above decree to January, 1954, the husband and wife continued in the friendly but desultory type of communication to which I have already referred. The husband made no mention of his having obtained a divorce and indeed some of the phrases in his letters are quite clearly written with a view to leaving his wife in continuing ignorance on that subject. In September, 1951, he "married" one Helen W. Colbert in the State of Colorado. He did not inform his first wife of that fact and, moreover, a letter which he wrote in August, 1953, is clearly designed to let her continue under the impression that there had been no such thing as a divorce or a re-marriage on his part. However, in January, 1954, the wife got to know the true position. She was then in Guernsey visiting the husband's mother who was seriously ill, and it was then that she was told by the husband's mother of the facts. When the husband came over to this country in February of that year he visited the wife every day. On the first occasion he told her nothing about the divorce or re-marriage, but on the second occasion the wife tackled him and he admitted the true position. On that occasion he used words which indicated that he thought that according to the law of this country he had committed bigamy.

From what I have stated above it is clear that the husband in 1948 deliberately set about deceiving the court of Wyoming into letting the petition come to trial without the wife being sent proper notification as to the proceedings that were being taken. The statements relating to his knowledge of his wife's whereabouts both in his own affidavits and in the affidavit which he authorised his attorney to swear were in essence palpably untrue. Accordingly, the Wyoming decree was obtained by fraud. Owing to his further subsequent concealment of the true state of affairs from his wife she did not discover what had happened until 1954, and I am satisfied that there was no undue delay after that date having regard to the difficulties of the position in her coming to this court to obtain such relief as she may be entitled to. The petition in the present cause by para. 8 alleges that the above decree was obtained by fraud and that accordingly it has no force. On that footing the wife claims that the husband has committed adultery with Helen Colbert, the woman with whom he is purported to be married.

The wife in the present proceedings has stated in evidence that she wishes to be freed from doubt as to what her status is; that she resents being put into a position of what might in this country be taken to be the guilty party in a divorce suit; and that she wishes for good reasons that this injustice should be rectified if the court has power so to do. On these matters I unhesitatingly accept her testimony as I do on all the facts to which she has spoken. If the court's duty, however, is to recognise the above decree as valid, the wife has stated by her counsel that she wishes alternatively to establish either through the judgment of this court or by formal declaration that she is no longer a married woman. On the evidence before me it is clear that according to American law the Wyoming decree could be set aside by the wife if, on taking suitable action in the courts there, she established the facts which I have found to be proved. It is equally clear that according to the same law the decree in question is voidable and not void and that thus it would, unless set aside on some such application as I have indicated, be held to be valid throughout the United States. Although there is no specific evidence to that effect I do, if and in so far as it may be relevant, assume it to be the law that the decree would on such an application as I have indicated be set aside without reference to whether or not the wife could persuade the Wyoming court that according to the law of that state she had a defence to the original petition there. Counsel for the wife tendered no evidence on this point as he submitted it was immaterial in that one must assume that the law there on that matter follows English law and that accordingly any judgment obtained by fraud falls also in that state to be set aside ex debito justitiae when once the matter is properly brought to the court's attention.

The point for decision here today is accordingly a short one. Where a foreign court, having proper jurisdiction over the subject-matter of the suit, has made a decree as to status and the decree is shown to have been procured by fraud which prevented the other spouse having notice of the proceedings, is that decree to be treated as a nullity in this country ? Or is it regarded in this country as valid unless and until a proper application is successfully made in the foreign country to set it aside ? As there could not be excluded with certainty the possibility that other parties in addition to the husband and wife might be affected by the decision of this court (e.g., when clauses in trusts or wills fall to be construed), and as further the issue itself was of some importance and is not covered by direct authority, it seemed best to ask for the assistance of the Queen's Proctor in argument. That assistance has been duly given and I take this opportunity of thanking counsel once more for the very real help which he gives in cases in which he represents the Queen's Proctor. As appears from the judgment of the Court of Queen's Bench in *Castrique* v. *Behrens* (1) ((1861), 3 E. & E. 709), the principles on which the courts of this country disregard a foreign judgment obtained by fraud differ according to whether that foreign judgment was in rem or in personam. Similarly it appears that the principles on which the courts here act in the latter class of case do not necessarily apply when the judgment of the foreign court affects matrimonial status. Accordingly, I propose for the purpose of this judgment to rely only on authorities which deal with the effect of fraud in relation to the procurement of a foreign decree of divorce.

It has been clear ever since *Bater* v. *Bater* (2) ([1906] P. 209), that where the foreign decree has been procured by fraudulent evidence at trial before a court of competent jurisdiction, the courts here will none the less treat the decree as valid as long as it subsists in that foreign country. It is equally clear that where the fraud leads the foreign court to assume jurisdiction over the subject-matter of the suit, when but for that fraud it had none, then the courts in this country will treat any resulting decree as a nullity; see *Bonaparte* v. *Bonaparte* (3) ([1892] P. 402), where all possible steps were taken by the petitioner to mislead the court in Scotland into holding that he was domiciled in that country. There is, however, no reported decision how the courts here should regard a foreign decision procured by fraud that does not relate either to the evidence adduced at trial or to procuring the court falsely to hold that it had jurisdiction to deal with the marriage contract. There are, however, a considerable number of dicta of high authority that indicate the way in which the question in the present case may be approached. In *Shaw* v. *A.-G.* (4) ((1870), L.R. 2 P. & D. 156) where the foreign court granted a decree to a wife whose husband was domiciled in England and who had not seen the advertisements of the petition, LORD PENZANCE (ibid., at p. 162) stated that a judgment obtained in this manner,

> " . . . has, therefore, in addition to the want of jurisdiction, the incurable vice of being contrary to natural justice, because the proceedings are ex parte and take place in the absence of the party affected by them."

In *Pemberton* v. *Hughes* (5) ([1899] 1 Ch. 781) in which an irregularity of a foreign court which granted a decree of divorce was held not to affect its validity here, LINDLEY, M.R., said (ibid., at p. 790):

> " If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court, unless they offend against English views of substantial justice."

And VAUGHAN WILLIAMS, L.J., said (ibid., at p. 796):

> " The true principle seems to me to be that a judgment, whether in personam or in rem, of a superior court having jurisdiction over the person, must be treated as valid till set aside either by the court itself or by some proceeding in the nature of a writ of error, unless there has been some defect in the initiation of proceedings, or in the course of proceedings, which would make it contrary to natural justice to treat the foreign judgment as valid, as, for instance, a case where there had been not only no service of process, but no knowledge of it."

In *Bater* v. *Bater* (2), ROMER, L.J. ([1906] P. at p. 237), cites with approval the principle as enunciated above by LINDLEY, M.R. In *Rudd* v. *Rudd* (6) ([1924] P. 72), HORRIDGE, J., considered that these principles were applicable to the case before him and used them as a basis of the second ground of his decision, the position being in that case that the rules of the foreign court as to service by registered post had been bona fide followed without, however, bringing the proceedings to the respondent's notice.

It is thus clear that there is an unbroken line of statements of judges of high authority that a foreign decree of divorce obtained in proceedings the course of which ran contrary to natural justice is to be treated here as a nullity. In that respect the principles on which the courts in this country view foreign decrees in matrimonial causes is no different from that in which they view foreign judgments in rem. In *Robinson* v. *Fenner* (7) ([1913] 3 K.B. 835), an action on a foreign judgment, CHANNELL, J., reviewed the law as to judgments obtained contrary to our ideas of natural justice and in conclusion stated (ibid., at p. 844):

> " The real question is the competence of the foreign court in the matter of its jurisdiction over the subject-matter of the suit and over the parties to it, and of the competence of the court in the particular suit by its having duly summoned the parties and given a hearing."

A similar view appears to have been expressed by ATKIN, L.J., in *Jacobson* v. *Frachon* (8) ((1927), 138 L.T. 386), a case which related to a French judgment in a sale of goods matter. Dealing with the principal point which there arose ATKIN, L.J., said with regard to that French judgment (ibid., at p. 392):

> " . . . it can be impeached if the proceedings, the method by which the court comes to a final decision, are . . . ' contrary to the principles of natural justice ' . . . principles it is not always easy to define or to invite everybody to agree about . . . Those principles seem to me to involve this, first . . . that the court being a court of competent jurisdiction, has given notice to the litigant that they are about to proceed to determine the rights

> between him and the other litigant; the other is that . . . it does afford him an opportunity of substantially presenting his case before the court."

Failure of natural justice in the course of proceedings of a foreign court may thus be said to go to the root of its competence in a manner similar to absence of jurisdiction over the subject-matter before it. Further, it is also clear that up to 1924, at any rate, it was the consistent judicial view that where the respondent had no notice of the proceedings of the foreign court it necessarily followed that the courts in this country would treat the resulting decree as having been procured in proceedings which were contrary to natural justice. The difficulty however arises that there is no decision of the courts of this country where absence of such a notice has on the facts been held to be the sole ground for so treating a decree of divorce and that there have been at any rate three decisions of courts of first instance since 1949 in which such decrees have been held valid despite that absence of notice: *Boetcher* v. *Boetcher* (9) ([1949] W.N. 83); *Maher* v. *Maher* (10) ([1951] 2 All E.R. 37); *Igra* v. *Igra* (11) ([1951] P. 404). In *Maher* v. *Maher* (10), BARNARD, J., expressly disapproved of the application by HORRIDGE, J., in *Rudd* v. *Rudd* (6) to the facts of that particular case of the principle that foreign decrees secured by proceedings contrary to natural justice should invariably be treated here as a nullity. In each of those three cases, however, it was either held or assumed that the foreign court had acted in accordance with their own rules relating to substituted service or to the dispensing with service.

In the light of the authorities that I have cited I consider that the issue for decision in the present case must nowadays be approached on the following basis. First, a decree of divorce pronounced by a foreign court of competent jurisdiction is treated as a nullity by the courts of this country if obtained as a result of proceedings which took a course contrary to natural justice. I use the word " treated " as a nullity because to my mind it is not necessary to show either that the decree is in its particular circumstances regarded by the law of the foreign court as void as opposed to voidable or that the decree if obtained in parallel circumstances in this country would here be regarded as void as opposed to voidable. Secondly, where the respondent has had no notice of the proceedings the decree is prima facie one obtained by a procedure contrary to natural justice. Thirdly, that where it is proved to be the case or where it can be assumed to be the case that on information bona fide given to it the foreign court has held that its own rules as to service or substituted service have been duly complied with, and that it is despite that fact that no notice of the proceedings has been received by the respondent, then the courts of this country, by way of exception, will not generally regard that absence of notice as resulting in the foreign court's proceedings being contrary to natural justice. (I use the word, " generally " because in the cases so far decided the rules of the foreign court as to substituted service appear to have been of the same type as our own, and there has not yet fallen for consideration the position, which I hope is unlikely to occur, where the rules of the foreign court themselves are repugnant to our views here of natural justice.) In the present case the absence of notice of proceedings was procured by the fraud of the husband and does not fall within the above exception created by the three recent cases. Nor is there any reason whatsoever why there should not be applied here the rule that prima facie such absence of notice results in the proceedings being contrary to natural justice. It is a case where the husband deliberately set out to procure that natural justice should not obtain, succeeded in what he sought to do, and has created the conditions in which it is right to hold as I do that the decree of the court of Wyoming must be treated as a nullity here.

I would add that I have had due regard for and appreciate the force of that general statement by PEARCE, J., at the conclusion of *Igra* v. *Igra* (11) ([1951] P. at p. 412) of which the phrases applicable to the present case are:

A
> "It has long been accepted that the court of the domicil is the proper tribunal to dissolve a marriage. Its decisions should, as far as reasonably possible, be acknowledged by other countries in the interests of comity. Different countries have different personal laws, different standards of justice and different practice. The interests of comity are not served if one country is too eager to criticize the standards of another country or too reluctant B to recognize decrees that are valid by the law of the domicil."

I have considered it in relation to the fact that the present decision results in the second marriage of the husband being a nullity in this country whilst in the State of Colorado it will, according to the expert evidence before me, be held to be valid. Where, however, a spouse resorts to fraud of the particular type now in C question it seems wholly unreasonable that the respondent should be bound by the resulting decree. Further, in matrimonial jurisdiction, the dangers inherent in any system of substituted service are in the best of circumstances sufficiently great, and it seems wrong to allow a multiplication of those dangers by permitting them to become a potential vehicle of fraud in the field of international private law. Again, if it be urged that the court could not unreasonably say to a wife D that she should go to the United States to have this fraudulent decree set aside, one is entitled to have in mind not merely the present case but others which may arise in varying circumstances. Often, if I may respectfully adopt the phraseology of LORD EVERSHED, M.R., in *Wood* v. *Wood* (12) ([1957] 1 All E.R. 14) it would be a cynical disregard of realities to suggest that a wife should make her way to the courts of the United States or maybe to even some more distant place to seek E a remedy for her husband's fraud.

Accordingly, I hold that the decree of the district court of Wyoming is to be treated in the present proceedings as a nullity, that these present proceedings should be accordingly dealt with on the footing that the marriage of Oct. 30, 1930, subsists despite the above decree, and that the wife having proved adultery on the part of the husband should be granted a decree of divorce accordingly.

Decree nisi.

Solicitors: *Bower, Cotton & Bower* (for the wife); *Queen's Proctor.*

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

KOCHANSKI *v.* KOCHANSKA.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), June 20, 28, 1957.]

Marriage—Foreign marriage—Validity—Marriage in Germany of Polish nationals—Not valid by German law—No subjection to German law—Separate community—Displaced persons—Common law marriage.

The husband and the wife were both born in Poland and had been domiciled there at the beginning of the war in 1939. The husband, an officer in the Polish army, was captured by the Germans and kept in a camp as a prisoner of war and he there met the wife. In April, 1945, the camp was liberated by the Russian army. In May, 1945, the husband and the wife with other liberated Poles went to a displaced persons camp at Nordheim in the British zone of occupation in Germany where they set up a form of military organisation, placed themselves under the direction of the British forces, refused to fraternise with the Germans, but were not part of the occupying forces and lived as a separate community. In June, 1945, the parties were married in the Nordheim parish church according to the rites of the Roman Catholic Church by a Polish priest. The ceremony did not conform to the requirements of German law. The husband petitioned for divorce on the ground of the wife's desertion. On the question of the validity of the marriage,

Held: the marriage was valid by English law since—

(i) the rule that the validity of a marriage as regards formalities was governed by the lex loci celebrationis was based on a presumption that the parties had subjected themselves to that law, but in the present case that presumption was rebutted and the parties had not subjected themselves to German law; and

(ii) it was accordingly open to the English court to apply English common law, and under that law the marriage was valid.

Taczanowska (*otherwise Roth*) v. *Taczanowski* (*Krystek cited*) ([1957] 2 All E.R. 563) applied.

Observations on the applicability of the lex domicilii where compliance with the lex loci celebrationis is impossible.

[As to the lex loci celebrationis governing the forms and ceremonies of marriage, see 7 HALSBURY'S LAWS (3rd Edn.) 93, para. 168, note (l); and for cases on the subject, see 11 DIGEST (Repl.) 462-464, *953-971*.

As to the validity of a marriage at common law, see 7 HALSBURY'S LAWS (3rd Edn.) 94, para. 170, note (r).]

Cases referred to:

(1) *Taczanowska* (*otherwise Roth*) v. *Taczanowski* (*Krystek cited*), [1956] 3 All E.R. 457; *revsd.* C.A., [1957] 2 All E.R. 563.

(2) *Savenis* v. *Savenis*, [1950] S.A.S.R. 309; 11 Digest (Repl.) 461, *499*.

(3) *Scrimshire* v. *Scrimshire*, (1752), 2 Hag. Con. 395; 161 E.R. 782; 11 Digest (Repl.) 462, *955*.

Petition.

In this case the husband petitioned for divorce on the ground of the wife's desertion. The suit was undefended. The facts appear in the judgment.

A. St. J. Davies (*G. L. S. Dobry* with him) for the husband.

Cur. adv. vult.

June 28. **SACHS, J.,** read the following judgment: The parties in the present case went through a ceremony of marriage at the Roman Catholic parish church of Nordheim in Germany on June 10, 1945. Both parties had been born in Warsaw and had been domiciled in Poland at the beginning of the war in 1939. The ceremony was conducted according to the rites of the Roman Catholic church by a Polish Roman Catholic priest who was then acting as chaplain to a camp in Nordheim in which there were then some five thousand Poles. The marriage neither purported to nor did conform to German law, and the first issue to be decided is whether in the circumstances which I will relate the ceremony resulted in a marriage which can be held to be valid by the courts of this country.

The husband in 1939 was an officer in the Polish Army; he was captured and disarmed by the German forces, then he escaped and joined the Polish Home Underground Army. Still later he took part in the gallant and tragic Warsaw insurrection, he was twice wounded, he was decorated for valour, and then he was captured a second time by the Germans. He was treated as a prisoner of war and thus came to be confined in a prisoner of war camp at Zeidheim near Nuremberg. There he met the wife who was then nursing as a Sister of Charity in the prison hospital. On Apr. 28, 1945, all those in Zeidheim Camp were liberated by the Russian army. On May 15 the parties in the present case with some others crossed into the British Zone and they proceeded to a displaced persons camp at Nordheim which came to contain the five thousand Poles to whom I have referred.

There these Poles lived the life of a separate community; indeed, within the camp the orders were in effect " Do not fraternise with Germans, have nothing to do with them ". The community adopted a military or para-military form of organisation; there was a colonel commandant in charge at the head of the camp and he, in due course, formed all those in the camp into four battalions. The husband, who had been a lieutenant in the Polish Army, acted as commander of one of those four units. The colonel then placed himself and the units under the direction of the British Occupying Forces. At this stage it is convenient to mention that I do not consider that the facts in evidence before me warrant a finding that at any material time those in the camp became part of the occupying forces, nor indeed was it submitted that such a conclusion could result from those facts. I only add that to my mind it is very far from being the case that each or every person, or body of persons, who places himself or itself under the direction of an occupying force thereby necessarily becomes a member of that force. As regards the position of these five thousand Poles it is further to be noted that nothing in the evidence suggests that the colonel who assumed charge of the camp had any superior officer from whom he took orders, as in the case of the ordinary military chain of command, nor is there any evidence that he was prepared to accept military orders from any government that either had the de facto or de jure sway over Poland.

In those circumstances it seems apposite simply to describe those in the camp as " a separate community ", a phrase first used in this case by the husband himself in his evidence. The Roman Catholics of this community used the parish church of Nordheim as their church, a Polish priest officiating as I have stated in his capacity of chaplain to the camp. Contemporaneously the same church was used by the German Roman Catholics resident in the locality, a German Roman Catholic priest officiating on those occasions. In that church marriages between the Polish members of the camp were celebrated and similarly in the same church marriages between Germans were celebrated. Although there is evidence of a breakdown at this period of some of the German administrative services such as that of the police and of the post office, there is no evidence that in this particular locality marriages according to German law were impossible or even difficult to celebrate; indeed, the inference which I draw from the evidence is that the husband and wife could have married in conformity to German law had they so elected. The reason why they chose to celebrate the marriage in the manner above referred to was doubtless partly because they were members of a community whose life was based on having nothing to do with the Germans, and partly because the leaders of that community would have advised that such a celebration was valid according to Polish law. Indeed A it was established in evidence before me that by the Polish law in force on June 10, 1945, a marriage outside Poland of Poles born in Warsaw is valid in either of two events: first, if celebrated according to lex loci celebrationis, or secondly if celebrated by a religious ceremony such as that which obtained in the present case. The latter alternative covered any marriage by the camp chaplain at the Nordheim church and it is to be noted that in the chaplain's B office was kept an appropriate register of marriages, in which the present marriage was entered on folio 38.

The marriage between these two Poles at Nordheim is thus one which would clearly be held to be valid by a Polish court under the law which anyone in the above community would have expected to apply and which I hold they elected to apply. Counsel for the husband, to whose assistance I am much indebted, C was, however, constrained to concede, for reasons to which I will later refer, that he could not safely submit that this court could for that reason hold the marriage to be valid. He relied on the contention that there had been a valid common law marriage between the parties. In their recent and highly important decision of *Taczanowska* (*otherwise Roth*) v. *Taczanowski* (*Krystek cited*) (1) ([1957] 2 All E.R. 563) the Court of Appeal fully considered the authorities D relating both to the origin of the rule under which the validity of a foreign marriage as regards formalities is generally governed by lex loci celebrationis, and also to the principles on which the courts of this country will exceptionally recognise a common law marriage celebrated in a foreign country. Thus it is not necessary for me to look further than that decision to ascertain what in the present case are the principles to be applied when considering the above submission of counsel for the husband. E These clearly emerge as follows: First, the validity of a foreign marriage as regards formalities is as a general rule governed by the law of the country in which it is celebrated. Secondly, the basis of that general rule is a presumption that the parties to the marriage have subjected themselves to the law of that country. Next, this presumption is rebuttable, the onus of establishing an exception to the general rule being on who ever F asserts that exception. Next, once it is shown that the parties did not subject themselves to the law of the country in question, then it is open to the court to apply the common law of this country. Finally, a common law marriage knows of no distinction of race or nationality.

Hitherto the decisions of the courts as to the circumstances in which an exception to the general rule, stated above, has been established appear, broadly G speaking, to have been confined to two categories of circumstances. The first of which, *Taczanowska* v. *Taczanowski* (1) is itself an example, relates to members of armies operating in the field and of occupying forces. The second relates to persons who are in effect so marooned that there is no set of formalities in the relevant area with which they can reasonably comply. This category covers, for instance, areas in which no such set of formalities has ever existed, areas where H chaos has so supervened that conformity is a matter of insuperable difficulty (*Savenis* v. *Savenis* (2), [1950] S.A.S.R. 309) and areas where conformity would go contrary to the conscience. The present case, however, is not one in which it can be said, as in *Taczanowska* v. *Taczanowski* (1), that one of the parties to the marriage was a member of an occupying force. Indeed it cannot be safely said, despite the nature of the form of organisation adopted in the displaced persons camp, I that they were members of any force. Nor is the present case one in which, as in *Savenis* v. *Savenis* (2), any insuperable difficulties existed precluding the celebration of a marriage conforming to the laws of Germany. So the present marriage does not seem to fall into either of the two categories.

Once, however, it is appreciated that in the case of such a marriage an issue of fact can arise whether in the particular circumstances the presumption of subjection to local law has been rebutted, it ceases to mattter whether the set of circumstances before the court happens to fall into a particular category that has already been the subject of a decision. Naturally a court will proceed with considerable caution before making further inroads on a general rule that has the advantage of certainty and which further

> " is agreeable to the law of nations, which is the law of every particular country, and taken notice of as such "

(*Scrimshire* v. *Scrimshire* (3) (1752), 2 Hag. Con. 395 at p. 412). That caution seems especially necessary when one considers the almost infinitely variable sets of circumstances that may arise in modern conditions where there are to be found resistance movements, concentration camps, prisoners of war, camps of displaced persons, and groups of persons who may by divers methods be prevented from leaving the country in which they are. That caution may mean, however, in a specific case no more than that the exception to the general rule must be clearly established by evidence. Suffice it accordingly to say that in the present case I am simply concerned with an organised community that found itself in an unusual position, and to add that nothing in this judgment is intended to decide whether or in what circumstances an individual who does not fall within one of the above two categories and who is acting in isolation can assert that he has not subjected himself to the law of the locality in which he goes through a form of marriage. The community in the present case consisted of Poles who had just been liberated from prisoner of war or similar camps and had thus escaped from a much hated form of subjection. The whole basis of their life in the displaced persons' camp—no matter whether technically military or civilian—was one of having nothing to do with those who had now ceased to hold them in that subjection. The very presence in Germany of this community was not of a voluntary nature: they were at Nordheim because the compulsions of war conditions had not yet ended sufficiently to allow them a choice of where to go. Any presumption that the recently liberated members of this community had at the material time subjected themselves to the laws of a country that they then hated fervently and at whose violent hands they had suffered severely is, to my mind, clearly rebutted. Indeed to hold that they had at that time so subjected themselves would be an odd conclusion.

The presumption of subjection to German law having been rebutted, it is open to this court to apply the common law, and as the celebration, by a Roman Catholic priest in a Roman Catholic church, was of the same type as that which was the subject of the decision in *Taczanowska's* case (1), it follows that the marriage was valid at common law. As, however, the marriage was one which was valid by the law of the only courts which the parties would have had in mind at the time of the celebration and which they, so far as they could, elected to apply, and as the common law of England could hardly have been foreseen by either party as providing in future the test of validity of that marriage, it is necessary to state the reason why the latter law has been applied, even after lex loci has been proved not to govern the case, when the former might appear to provide a simple and attractive answer. Up to the time of the decision in the *Taczanowska* case (1) it was commonly considered by those concerned with such matters in these courts, that where there was a foreign marriage in country A between two persons domiciled in country B, if the local law of A proved inapplicable then the court first turned to the law of country B to test the formal validity of the marriage. An example of this view is to be found in DICEY'S CONFLICT OF LAWS (6th Edn.) (1949) at p. 772, where it is stated:

> " It may, however, be assumed that, when compliance with the local form is impossible, our courts will hold the marriages of foreigners valid, at any rate if held good by the law of the country where the foreigners are domiciled."

A It is to be noted that the same statement appeared in the same words in the first edition in 1896. Again, WESTLAKE ON PRIVATE INTERNATIONAL LAW (1925) (7th Edn.) at p. 63, states as follows:

> "Where a marriage valid according to the lex loci actus is impossible . . . parties may marry with the forms, so far as it is possible to observe them, and with the consents, respectively required by their own law."

B The latest example of this view appeared in the reasoning of KARMINSKI, J., in the *Taczanowska* case (1) ([1956] 3 All E.R. 457). Further it is to be noted that before, in relation to foreign marriages, the presumption of subjection to (or election of) lex loci became so firm a feature of the law of this country, the question of which law applied was, according to a then much respected authority, C considered to depend on a factual election by the parties to the marriage, and that election was considered to lie simply between lex loci and lex domicilii (see PHILLIMORE'S COMMENTARIES ON INTERNATIONAL LAW (3rd Edn.) (1889) Vol. 3 at p. 324).

On the appeal in the *Taczanowska* case (1) the court, dealing with a marriage in which the law of country B was adverse to its validity, held that the courts D of this country could, when the application of local law had been eliminated, apply the common law of this country to the benefit of the parties concerned. When coming to that decision it was presumably open to the court, for the matter was res integra, after the elimination of lex loci to rule in principle either that the courts of this country must in all circumstances look only to the English common law as regards the formal validity of a foreign marriage or alternatively E that the courts here could, if the law of country B favoured the validity of the marriage, give the parties the benefit either of the common law or of the law of their own domicil, i.e., country B. The second alternative would have the advantage of assisting comity of decisions as between courts of various countries, and would be consistent with an assumption that a foreign court would, in parallel circumstances, uphold the validity of a British common law marriage between F persons domiciled in this country, even though that marriage was invalid according to the formality laws of the country of that foreign court. In *Taczanowska's* case (1) HODSON, L.J., stated ([1957] 2 All E.R. at p. 572) that when once local law had been eliminated

> "If it be said that, since the parties are not British subjects, the common law of England does not apply to them, my answer is that such is the law G prima facie to be administered in the courts of this country."

The lord justice then goes on to refer to the obstacles which might arise in some instances of applying lex domicilii of the persons concerned. In using the words "prima facie" he appears to leave the door open to the second of the above two alternatives.

PARKER, L.J., on the other hand, stated (ibid., at p. 575):

> H ". . . nor do I see any reason why we should look to the law of the domicil of the spouses at the time of the marriage. No doubt, English law will look at the law of domicil to determine capacity, but for no other purpose. Indeed, if English law were to look to the law of the domicil, what would be the position where the two spouses had different domicils? In my judgment, I there is no authority or reason which requires us to look to any other law, once the lex loci is inapplicable."

This passage may appear to go near to closing the door to that second alternative. That passage, however, must be read subject to it being addressed to the argument unsuccessful in the Court of Appeal on the particular facts that the courts of this country were required to look solely to lex domicilii when once lex loci was eliminated and thus could in no circumstances apply lex fori, i.e., the common law. ORMEROD, L.J., does not deal specifically with the point.

It was because of the passages that I have cited that counsel for the husband felt constrained not to press the point that this marriage between two Poles should here be held valid on the ground that the courts of Poland would so recognise it. It is for that reason that once German law was shown not to be applicable, I have decided the issue of validity on a common law basis and it has seemed proper not to consider to the point of decision what is the effect of the marriage being valid by Polish law. In the present case the result would, of course, be the same if the court were permitted to apply that law, for as regards the present marriage the laws of both countries are in accord: indeed, such is the width of the rule as to what may constitute a common law marriage that it may well be found to cover a high proportion of celebrations valid by foreign law, other than proxy marriages, marriages of repute, or the like. I trust, however, that it is not improper for me to hope for the sake of international comity of decisions as regards the validity of foreign marriages that, when the time comes for a decision on the point here left open, it will be found that, on a true interpretation of the decision in *Taczanowska's* case (1), the long-standing passage in DICEY, which I have cited previously [see p. 145, letter I, ante], still contains a correct assumption.

Turning now to the petition in the present case, once it has been established that the marriage between the two parties to this cause was valid, it only remains to consider whether the husband has proved desertion by the wife for upwards of three years before the date of presentation of the petition. The evidence on that issue is clear, and desertion as from 1946 has been established. The husband is accordingly entitled to his decree as prayed.

Decree nisi.

Solicitors: *E. H. Silverstone & Co.* (for the husband).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* WOOD BROTHERS (BIRKENHEAD), LTD. (In Liquidation).

[CHANCERY DIVISION (Harman, J.), July 15, 16, 1957.]

Surtax—Undistributed income—Direction and apportionment—" Actual income from all sources "—Computation of income—Whether balancing charge included—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *s.* 245, *s.* 248 (1), *s.* 292 (1), (3), *s.* 323 (4).

Following a resolution to wind up a company voluntarily, passed on Apr. 16, 1952, a balancing charge of £18,675, under s. 292 (3) and s. 323 (4) of the Income Tax Act, 1952*, was made on the company in respect of sales of plant and machinery on the cessation of business. Subsequently a direction was made by the Special Commissioners of Income Tax under s. 245 and s. 248 of the Act that the actual income of the company from all sources from Apr. 29, 1950, to Apr. 16, 1952, the period from the end of the last year for which accounts of the company had been made up to the commencement of the winding-up, should be apportioned among the members of the company. In the computation of the actual income of the company from all sources for the period the balancing charge of £18,675 was included. On appeal,

Held: the amount of the balancing charge was not " actual income " of the company apportionable among the members under the direction, since the proceeds of the sale of the plant and machinery (a capital asset) were capital, not income; and the mere fact that a balancing charge had been made did not convert the excess of those proceeds (viz., the excess of the proceeds over the written down value for income tax purposes of the capital asset sold, the amount of which excess was the amount of the balancing charge) into actual income of the company.

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* The terms of these sub-sections are printed at p. 150, letters B to E, post.

Appeal dismissed.

[As to the balancing charge, see 20 HALSBURY'S LAWS (3rd Edn.) 503, para. 966; and as to the apportionment of actual income of companies for surtax purposes, see ibid., 558, para. 1085 and, in liquidation, ibid., 562, 563, para. 1095.

For the Income Tax Act, 1952, s. 245, s. 248 (1), s. 292 (1), (3), and s. 323 (4), see 31 HALSBURY'S STATUTES (2nd Edn.) 232, 235, 283, 284 and 313.]

Cases referred to

(1) *Howard de Walden (Lord)* v. *Inland Revenue Comrs.*, [1948] 2 All E.R. 825; 30 Tax Cas. 345; 2nd Digest Supp.

(2) *Townsend* v. *Electrical Yarns, Ltd.*, [1952] 1 All E.R. 918; 33 Tax Cas. 166; 3rd Digest Supp.

(3) *Kirkness* v. *Hudson (John) & Co., Ltd.*, [1955] 2 All E.R. 345; [1955] A.C. 696; 36 Tax Cas. 28, 57; 3rd Digest Supp.

Case Stated.

The taxpayer company appealed to the Special Commissioners of Income Tax against a direction and apportionment made by the Special Commissioners of Income Tax on Mar. 11, 1955, under s. 245 and s. 248 of the Income Tax Act, 1952, directing that the actual income of the company from all sources as computed for the purposes of Ch. III of Part 9 of the Act, for the period from Apr. 30, 1950, to Apr. 16, 1952, should be apportioned among its members. The actual income so computed was £76,264, and it was apportioned as follows: To preference shareholders £9,732; to ordinary shareholders: A. & E. Wood £22,168 9s.; E. C. V. Wood £22,168 9s.; S. C. V. Wood £22,168 10s.; E. Randle £26 12s. The grounds of appeal were that the actual income as computed was excessive in that it included £18,675, in respect of a balancing charge.

The company, formerly known as Woodson Stores, Ltd., had an issued capital of £65,000, and carried on a wholesale grocery business. It sold its business and ceased trading on Apr. 28, 1951, and on Apr. 25, 1951, it changed its name to Wood Bros. (Birkenhead), Ltd. On Apr. 16, 1952, it went into voluntary liquidation. It was common ground between the parties that a balancing charge fell to be made on the company in respect of sales of plant and machinery on the cessation of its business under s. 292 (1) and s. 323 (4) of the Income Tax Act, 1952, and that the amount of this charge was correctly computed at £18,675. The company's accounts for the year ended Apr. 28, 1951, and from Apr. 29, 1951, to Apr. 16, 1952, were not certified by the auditors until May 7, 1952, and it was common ground between the parties that the whole of the period from Apr. 29, 1950, to Apr. 16, 1952, inclusive was the period from the end of the last year for which accounts of the company had been made up to the time of the commencement of the winding-up within the meaning and for the purposes of s. 253 of the Income Tax Act, 1952. It was also common ground between the parties that the actual income of the company from all sources as computed for the purposes of Ch. III of Part 9 of the Income Tax Act, 1952, for that period fell to be apportioned among its members under s. 245 and s. 248 of the Income Tax Act, 1952. Excluding the balancing charge this amounted to £57,589.

The company contended that the amount which fell to be apportioned among its members under s. 245 and s. 248 in computing the company's actual income from all sources from Apr. 30, 1950, to Apr. 16, 1952, should not include the amount of the assessment on the company in respect of the balancing charge of £18,675. The Crown contended that the amount of the balancing charge was correctly included in the computation of the company's actual income from all sources for the period. The commissioners held that the amount of the balancing charge should not be included in the company's actual income from all sources. They allowed the appeal and amended the direction of the Special

Commissioners by reducing the amount of the company's income to be apportioned among the members from £76,264 to £57,589. The Crown appealed.

John Senter, Q.C., and *A. S. Orr* for the Crown.
P. Shelbourne for the company.

HARMAN, J.: This case raises a complicated point. It concerns a company to which s. 245 of the Income Tax Act, 1952, applies. That section repeats s. 21 (1) of the Finance Act, 1922, which imposed surtax on the undistributed income of certain companies, of which this was one.

The question between the parties is whether, for the purpose of calculating what I may call the surtax income of the company, a balancing charge of some £19,000 ought to be treated as part of the company's actual income. The Crown says that it should, and, therefore, that it should be treated as part of that income for apportionment among the members of the company in order that surtax may be chargeable on it. The company says it should not, and with that view the Special Commissioners agreed. They do not give any reasons.

The company ceased trading in 1951 and sold its plant and machinery. It went into liquidation on Apr. 16, 1952. At that time, no accounts had been made up within the meaning of the Income Tax Acts since Apr. 30, 1950. Therefore, the period over which the company had to be taxed was that from Apr. 30, 1950, to Apr. 16, 1952. This company having gone into liquidation, it follows from s. 253 of the Income Tax Act, 1952, that the company's income over that period is to be deemed to be income of the period available for distribution to the members of the company, and, as I understand it, the Special Commissioners did not have to consider in this case whether or not a reasonable amount had been distributed*. The company is in the position of a company that has not distributed a reasonable part of its actual income from all sources for the period, and the controversy is what was the actual income of the company for the period in question. That has been agreed, excepting for this matter of the balancing charge which was imposed on the company. For the balancing charge to be part of the income of the members, it must be part of the actual income from all sources of the company for the period. The only matter to be considered, therefore, is what is the nature of the balancing charge.

A balancing charge was first imposed by the Income Tax Act, 1945, and it was subsequently embodied in the codifying Act of 1952 by s. 292, which at the relevant period had not been altered, though it was altered very soon afterwards by the Finance Act, 1952. One must therefore look at the Act as it was before it was altered.

Section 292 provides that where any machinery and plant in respect of which various allowances have been made is sold, a balancing charge or a balancing allowance shall arise. A balancing allowance is allowed to the company where the annual allowances and initial allowance have not proved enough to equate the written down value of the plant for income tax purposes with the proceeds of sale. An allowance is made to the taxpayer if he proves to be out of pocket. On the other hand, a charge is made against him if he proves not to be out of pocket; and that is the balancing charge in this case.

The machinery and plant were sold and realised an excess of some £19,000 over the written down value for income tax purposes, and, at first sight, it seems an extraordinary thing that it should be suggested that what is a charge on the company—i.e., a subject-matter on which tax is to be levied—should in some way be the actual income of the company. I found it hard to see how it could be said that that which was a liability of the company could yet be part of its income; but in income tax cases the common sense of the matter has got so overlaid by statute and the ingenuity of counsel and the subtleties of the law generally that things are rarely quite what they seem.

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* Compare on such a question *A. & J. Mucklow, Ltd.* v. *I.R.C.* ([1954] 2 All E.R. 508).

Part 10 of the Act of 1952 deals with reliefs for capital expenditure, and it follows that the expenditure in respect of which the reliefs are given is capital expenditure. The company, therefore, spent capital on plant and machinery and under this Part 10 received an initial allowance and annual allowances in respect of that capital expenditure, against its income year by year. A corresponding part of the company's profits for that reason did not pay the tax which would otherwise have been levied on them. When the sale produces an excess, the balancing charge is made under s. 292, and sub-s. (3) of that section provides:

> " If the sale . . . moneys exceed the amount, if any, of the said expenditure still unallowed as at the time of the event, a balancing charge shall be made, and the amount on which it is made shall be an amount equal to the excess . . ."

Sub-section (4) puts a ceiling on that, so that the amount on which a balancing charge is made cannot exceed the amount of the initial allowance plus the amount of the annual allowances in respect of the machinery or plant.

The charge is made as provided in s. 301, under which any charge made on any person under the preceding provisions of this chapter must be made on that person in charging the profits or gains of his trade. In other words, if a balancing charge is made, the tax is charged together with the tax on the profits of the trade. An allowance is made by deducting it from the profits or gains of the trade. The method of charging the tax is regulated by s. 323 (4):

> " Any charge falling to be made under any of the provisions of this Part of this Act on a person for any year of assessment in charging the profits or gains of his trade shall be made by means of an assessment on the profits or gains of that trade for that year of assessment in addition to any other assessment falling to be made thereon for that year."

The first part of the sub-section links with s. 301. As a result of the assessment, there is a figure on which, together with the other assessment for the year, tax is chargeable under s. 323; but, as it seems to me, the fact that tax is chargeable in that way does not convert part of the moneys received by the company from the sale of a capital asset into the company's income. The company did not have that sum in its coffers as income at any time. It received a certain sum of money for the machinery and plant, and that sum was capital in the company's hands. If it was above the cost of the plant, the excess might be a capital profit, available for dividend. But to say that so much as is liable to a charge in favour of the Crown because excessive allowances have been made thereby becomes income, according to the company, is something which has no warranty in the Act at all; there is nothing to convert capital into income.

As I understand the Crown's argument, it is this. This is in fact a recoupment to the Crown of money allowed to the company in excess of what should have been allowed. Those allowances were made by way of revenue concessions. The result of them was that the company kept in its coffers profits which would otherwise have been subject to tax. Therefore, when the company comes into possession of the excess, the effect is to bring back into the balance sheet for tax purposes those profits which had been franked by the allowances for the earlier years. The matter should be looked at as if these profits were brought back, the frank being removed by the act of sale, and they are profits chargeable to tax and are quasi-profits or gains of the company when truly looked at. That is a way of explaining what would otherwise be inexplicable to me, and it has an air of attractiveness about it. But it seems to me altogether to leave out the key word, which is the word " actual ". The company never had this income in its coffers. It had some proceeds of sale. It never had any actual income, as I see it.

If this had been a case in which the commissioners had had to ascertain under s. 245 whether there had been a distribution of a reasonable part of the actual income of the company in the year, it would have been inconceivable that they could have taken this balancing charge into account, because no part of it was ever a distributable part of the company's income. It was never, in fact, part of the company's income at all, and it was therefore no part of its actual income. In certain circumstances, it might be treated as being or deemed to be the company's income, but that is not what the Act is talking about; it is talking about " actual income ", and not a fictitious or supposed income. Lord Uthwatt, in *Lord Howard de Walden* v. *Inland Revenue Comrs.* (1) ([1948] 2 All E.R. 825) seems to me to have given voice to that very matter. I need not trouble about the subject-matter; it is very far from anything that I have to decide here. Dealing with what is now s. 245 he says (ibid., at p. 831):

> " Thirdly, the direction to the commissioners is to decide at the outset whether a reasonable part of the actual income of a particular company has been distributed. It would be more than curious if in that task they were to direct their minds to an arithmetical total composed of income which is capable of distribution and of ' deemed income ' (such deemed income being merely a figure—not even a book entry) which is incapable of distribution. In a case where company No. 2 owned nothing but shares in company No. 1 the arithmetical total to be considered might well be only ' deemed income '. My Lords, for myself I am content to take the view that in the light of the context the words ' actual income ' can mean only income which is in some real sense capable of distribution. Apart from that context, indeed, the phrase ' actual income ' is hardly apt to include fictional income, and non-existent income composed of amounts deemed to be income is fictional income."

I think that this is a stronger matter than that. There was a book entry here of a receipt. There was no receipt in any income sense at all. These were receipts of proceeds of sale of this machinery on a part of which this tax was levied, the part on which it was levied being charged. I do not think myself that the tax charged was income tax, although it was levied by an assessment and dealt with on income tax principles as if it were part of the profits or gains of the company. Therefore, although it sounds a simple way of putting it, it seems to me that, if the answer to the question, was this actual income, was that it was only income, if at all, in an extremely rarified and fictional sense, that really answers the only question in this case.

There is some authority about it in a case of Donovan, J., *Townsend* v. *Electrical Yarns, Ltd.* (2) ([1952] 1 All E.R. 918) and, of course, his decisions in this sort of matter carry a great deal of weight. He was deciding something just the opposite of this, because, for purposes of his own, the taxpayer was claiming that the balancing charge which had been made on him ought to be added to his taxable profits in order to bring them above a certain figure and so deprive the Crown of an option which it would otherwise have. Donovan, J., said (ibid., at p. 919):

> " In other words, the effect of the balancing charge is to cancel allowances previously given for capital loss through wear and tear where that loss is recouped by the taxpayer on a sale of his machinery ",

and that is a very good and succinct description of what a balancing charge is. He then dealt with the awkward section which I have read, and the words " by means of an assessment on the profits or gains of that trade ". He continued (ibid., at p. 920):

> " Do these words require that the balancing charge must be levied as the company contends? "

It will be remembered that the company contended that the charge should be treated as part of its annual profits or gains.

> "If so, it would seem also to follow that in a year for which a balancing charge has to be made, but in which there are no profits or gains of the trade to be taxed, no balancing charge can be made at all. Or, on the contrary, do the words merely define the kind of assessment by which the balancing charge is to be levied? In considering this problem it has to be remembered that the balancing charge falls to be made because, by the sale of his plant and machinery, the taxpayer has recouped the capital loss in respect of which he was previously given wear and tear allowances. That is the whole purpose of the balancing charge, and there is, therefore, no reason whatever why the effective levy of the charge should depend on whether there are profits or gains of the trade, or, as in this case, on the amount of them . . . bearing in mind that the purpose of s. 17 and s. 55 is clearly to levy a balancing charge on £600, I am faced with the problem whether the words in s. 55, 'by means of an assessment on the profits or gains of the trade', mean literally that there must be an assessment on such profits—that is, do they describe what the result of the assessment is to be, or are they descriptive merely of the kind of assessment the legislature had in mind? I think the latter is the true interpretation."

So do I. I do not quite share the views which the learned judge thereafter expresses as to how he arrived at that, but it seems to me that providing for the balancing charge to be levied on the profits or gains of a trade does not make the balancing charge part of those profits or gains. It clearly is not the profits or gains of the trade, and there, really, is an end of it. But if there were doubt in the matter, I think perhaps a passage in the speech of LORD REID in *Kirkness* v. *John Hudson & Co., Ltd.* (3) ([1955] 2 All E.R. 345) would resolve it. The question there was whether there had been a sale within the meaning of a certain section. LORD REID said (ibid., at p. 362):

> "I find nothing in the Income Tax Act, 1945, to justify giving to the word 'sale' a meaning wider than its ordinary meaning. In a taxing Act, and particularly in a charging section, one assumes that language is used accurately unless the contrary clearly appears, and, in my opinion, s. 17 is a charging section. It is the only section which could authorise the assessment in this case. It is true that its provisions may sometimes favour the taxpayer by entitling him to a balancing allowance. But that does not prevent it from being a charging section as regards those whom it makes liable to pay tax, and 'No tax can be imposed on the subject without words in an Act of Parliament clearly showing an intention to lay a burden on him'. . ."

Now, it seems to me that this s. 292, to which LORD REID was there referring in his speech, so far as it did lay a burden on the taxpayer, is a charging section and must be construed, as they say, "strictly". I am not sure that I have ever understood what the words "construed strictly" mean. One construes the words. I suppose it means that, if there is a doubt, the taxpayer is entitled to the benefit of that doubt. But, after all, the words I have to construe are the two words "actual income". If 100,000 people were asked whether a balancing charge levied on the company was its "actual income", every one of them would say, "No, because it is not income at all". It is a charge, and a charge can only become income in the extremely ingenious arguments of counsel for the Crown to whom I am much indebted; but I do not feel I ought to accept anything so refined and put on the taxpayer a liability to which otherwise he could not be liable. My judgment is that the Special Commissioners came to a right conclusion, and I propose to dismiss the appeal.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Simmons & Simmons*, agents for *March, Pearson & Green*, Manchester (for the company).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

A
KIRKHAM *v.* BOUGHEY.

[Queen's Bench Division (Diplock, J.), July 30, 31, 1957.]

*Damages—Measure of damages—Loss of earnings—Husband and wife in motor
accident—Wife severely injured—Husband not returning to job abroad because
B of wife's injuries and care of children—Less lucrative job taken by husband—
Whether husband can recover damages for loss of earnings.*

*Husband and Wife—Consortium—Damages for loss of wife's consortium—
Measure of damages in action by husband and wife for negligence causing
injuries to them—Whether loss of husband's earnings as result of wife's
injuries recoverable.*

C In September, 1955, K. and his wife were involved in a motor accident
with B., who admitted liability for the accident. K.'s wife was severely
injured and was in hospital for over four months. K. sustained trivial
injuries. At the time he was on a month's leave from his employment
at Lagos, where he worked as a lift erector at a salary of £30 per week. As a
result of his anxiety over his wife's condition and the problem of looking
D after their two children, aged four and seven years, K. did not return to
Lagos at the end of September, 1955, when his leave expired. He had
intended to continue in employment in Africa for a further eighteen months
at the same salary, and work at that rate of salary was available for him
there at all material times. In November, 1955, K. got work as an electrician
at £8 weekly near his home in England, so that he might be able to
E care for the children when he was not at work, and he arranged for the
children to be looked after between the hours of 8 a.m. and 5 p.m. Work
as a lift erector, which would have earned a higher wage, was not available
locally. At the beginning of February, 1956, his wife returned home,
being then able to do light housework. Her condition improved and by
August, 1956, she could do all but the heaviest work. K. then obtained
F work as a lift erector in London at £13 10s. weekly. He made no attempt
to get work in Africa. It was found to have been reasonable in the circumstances
for K. not to have returned to Africa while his wife was in hospital
and subsequently (e.g., for a month or so) until it was clear that she was
making a good recovery. On a claim by K. for damages for loss of earnings
representing the difference between the £30 weekly that he would have
earned in Africa and the amount that he had in fact earned over the period
G during which it was reasonable for K. not to have returned to Africa,

Held: K. was not entitled to damages for loss of earnings, because the
loss did not flow from the injuries that he sustained and his right to recover
damages in respect of the injuries that his wife sustained was limited to
damages for loss of consortium, together with the cost of her medical
treatment, etc., and damages for loss of consortium did not extend (as was
H admitted) to K.'s loss of earnings; K.'s loss of earnings was, therefore,
damnum absque injuria.

Dicta in *Best* v. *Samuel Fox & Co., Ltd.* ([1952] 2 All E.R. at pp. 398, 400)
followed.

Behrens v. *Bertram Mills Circus, Ltd.* ([1957] 1 All E.R. 583) considered.

Per Curiam: visits to a wife in hospital may be a proper step in mitigating
I damage sustained by loss of consortium by reducing the period during
which the consortium is lost; but if the sole justification for a visit is the
comfort or pleasure that it gives to the husband its cost would not be recoverable
as damages (see p. 156, letter I, to p. 157, letter A, post).

[As to the measure of damages for personal injury, see 11 Halsbury's Laws
(3rd Edn.) 255, para. 427, and as regards loss of earnings or profits by personal
injury, see ibid., pp. 258, 259, para. 430; and for cases on the subject, see 17
Digest (Repl.) 101, 102, *165-168*; 36 Digest (Repl.) 199-202, *1048-1070*.

A As to the action by a husband for loss of his wife's consortium, see 16 HALSBURY'S LAWS (2nd Edn.) 611, para. 958; and for cases on the subject, see 36 DIGEST (Repl.) 206, 207, *1081*, *1089*, and 27 DIGEST (Repl.) 86, *640*, et seq.]

Cases referred to:

(1) *Hay* (*or Bourhill*) v. *Young*, [1942] 2 All E.R. 396; [1943] A.C. 92; 111 L.J.P.C. 97; 167 L.T. 261; 2nd Digest Supp.

B (2) *Best* v. *Samuel Fox & Co., Ltd.*, [1952] 2 All E.R. 394; [1952] A.C. 716; 3rd Digest Supp.

(3) *Behrens* v. *Bertram Mills Circus, Ltd.*, [1957] 1 All E.R. 583; [1957] 2 Q.B. 1.

Action.

C This was an action for damages brought by the plaintiffs, Thomas Joseph Kirkham (referred to hereinafter as " the husband ") and his wife, Nora Kirkham (referred to hereinafter as " the wife "), against the defendant Jesse Boughey, for negligence in driving a motor car on Sept. 10, 1955, when the defendant's car collided with a car driven by the husband in which the wife was a passenger. The defendant admitted liability and the only matter in dispute was the assessment of damages. D

The wife, who at the time of the hearing was thirty-five years old, was thrown out of the car which rolled over as result of the collision and crushed her. She suffered severe injuries, including a fractured pelvis, a fractured right hip joint and back, a fractured arm and scars on the face and leg. She was in hospital until Feb. 1, 1956, when she returned home. She was then able to do light housework. Her condition improved steadily and by August, 1956, she was E able to do most of the housework except heavy lifting. She made a good recovery, but was left with a slight limp in her right leg and an inability to walk more than half a mile without a foot prop stop. She was liable, and would continue to be liable, to bouts of back ache, and a scar on her forehead remained but was not seriously disfiguring. The general damages awarded to her by the court were £1,750, together with special damages of £35 18s. 2d., F making in all £1,785 18s. 2d.

The husband's injuries were trivial, viz., a cut on the head and bruised ribs. £40 general damages were awarded to him together with special damages (apart from damages for loss of earnings) of £215 10s. 7d. This sum was agreed at the instance of the judge in order to save costs; its agreement involved no admission that any particular expenses covered by it were recoverable in law. G

The husband claimed also, as part of his special damages, damages for loss of earnings. This claim was disputed and it is on this aspect of the case alone that it is substantively reported here. The facts relevant to this claim were as follows. The husband was a lift erector and was in employment in Lagos at a salary of £30 weekly together with living expenses of £35 per month. This allowance covered his living expenses in Africa. His wife and children remained H in England. At the time of the accident he was on a month's leave expiring at the end of September, 1955. If there had been no accident, he would have resumed work in Nigeria for a further eighteen months at the same salary. After the accident the husband and his children stayed with friends at Birkenhead so as to be near to the wife who was then in hospital. In mid-October the husband returned to his home at Chessington. He did not return to Africa I because of his anxiety for his wife and the problem of the care of the children while his wife was unable to look after them. After his return to Chessington he made arrangements for the children to be looked after by a neighbour from 8 a.m. to 5 p.m. each day and each week-end when he went away to visit the wife. He made no attempt to find work in England until the end of November, 1955, when he took a job locally as an electrician at £8 weekly. This salary was less than he could earn as a lift erector, but there was no work as a lift erector available locally and the need to be at home out of working hours to look after

A the children made it impossible for him to take work as a lift erector in London.
The wife came home on Feb 1, 1956, but the husband remained in his job as an
electrician until August, 1956, when he got work as a lift erector in London
at £13 10s. weekly. He remained in similar work and was so employed at the
time of the hearing, when he was earning a weekly wage of £13 14s. He made
no attempt to obtain work in Africa but, if he had wished to do so, he could
B have obtained work there at the same salary as formerly at any time from
October, 1955, until September or October, 1956, when his former employers
terminated the contract on which they had been engaged, and also after that
time with other employers.

J. C. D. Harington, Q.C., and *A. M. Lee* for the plaintiffs.
C *W. H. Griffiths* for the defendant.

DIPLOCK, J.: What I have to determine is whether, as a matter of law,
damages claimed by the husband under the head of loss of earnings are recoverable.
[HIS LORDSHIP reviewed the relevant facts, stated at p. 154, letter G, to p. 155,
letter B, ante, and continued:] In these circumstances, counsel for the plaintiff
submits that the husband is entitled to receive as damages a sum representing
D the difference between the £30 per week which he could have earned in Africa
and the amount per week which he in fact earned in this country for so long a
period as I am satisfied that it was reasonable for him to refuse to go to Africa
because of his anxiety as to the condition of his wife and the problem of looking
after the children during his wife's absence and subsequent partial incapacity.

It was argued for the defendant that, even if the plaintiff's course of action
E was reasonable, which is not conceded as respects the period after his wife's
return home, this kind of damage was not recoverable in law. It is damnum
absque injuria or, as would have been said before *Hay* (*or Bourhill*) v. *Young* (1)
([1942] 2 All E.R. 396), it is too remote. " Injuria " connotes duty—in this
case a duty to take reasonable care—owed by him who causes the " damnum "
to him who sustains it. Prima facie that duty is owed by the driver of a vehicle
F on a public highway only to those whose persons or property are in geographical
proximity to the driver. That his carelessness in causing personal injuries
to one person to whom the duty to take reasonable care is owed has the inevitable
consequence of causing damage to another person does not, of itself, give
that other person a right to recover those damages from the original tortfeasor;
he must show some legal duty owed by the tortfeasor to himself. Thus, as
G was pointed out by their Lordships in *Best* v. *Samuel Fox & Co., Ltd.* (2) ([1952]
2 All E.R. 394 at pp. 398, 400), a servant who loses lucrative employment
because his master is injured in a road accident cannot recover damages against
the driver whose negligence caused his master's injuries.

Counsel for the plaintiffs has argued that the circle which enclosed those
to whom the driver owes a duty to take care is not a mere geographical circle
H but extends to the family circle of those who find themselves within the geographical
circle, and he does not shrink from the proposition that if a daughter
or a sister gives up lucrative employment to nurse an injured father or brother
she would have a cause of action against the driver provided only that the
court was satisfied that in the circumstances it was reasonable for her so to do.
This extensive proposition, not limited to any special relationship which may,
I in law, exist between husband and wife is unsupported by authority and in
direct conflict with the dicta and, possibly, the ratio decidendi in *Best* v. *Samuel
Fox & Co., Ltd.* (2). However commendable may be the sacrifice made by the
relative of the injured person, she has, in my opinion, no remedy in law against
the driver of the vehicle which caused the injuries, because the driver owes no
duty to her.

Is the husband of an injured wife in a different position from any other
relative ? In one respect at least he is, in that the common law recognises his

right, in the nature of a proprietary right, to consortium, and to this extent the circle of those to whom the driver of a vehicle on the highway owes a duty is widened to include the husband of a married woman who is present on the highway. The husband can, therefore, recover damages against the driver even though the husband was a hundred miles from the highway when the accident took place. What damages can he recover ? To this question the quasi-proprietary nature of his right, I think, supplies a clue. He is in the position of one whose property is on, or in proximity to, the highway, and it is for the damage to his proprietary right, the comfort and services of his wife, that he has a remedy.

To this there is one addendum: the husband is entitled to recover the cost of medical treatment, convalescence, etc. It would, I suppose, be possible to relate this to consortium as money expended in mitigating his damage under that head. Alternatively, and this is how LORD GODDARD, C.J., explained it in *Best* v. *Samuel Fox & Co., Ltd.* (2) ([1952] 2 All E.R. at p. 399), the claim may lie in the husband's legal duty to provide proper maintenance and comfort for his wife. With respect, I prefer this explanation, which would extend, not merely to a husband, but to the parent of an injured infant; although here again there may be vestiges of a proprietary right in the parent. It is to be noted, however, that the duty is a legal duty and the liability of the tortfeasor does not extend to one who, however reasonable and commendable his actions or however close his relationship to the injured person, pays for medical treatment which he is under no legal duty to provide.

The disputed item of special damage does not fall under either of these heads. It is not claimed as damages for loss of consortium; indeed, the particulars do not suggest that the loss of wages was due to any other cause than the husband's own injuries. Counsel for the plaintiffs repudiates the suggestion that his right to these damages is based on loss of consortium. He submits that, if I am satisfied the husband acted reasonably, he must be put in as good a position, so far as money can do it, as if the wrong had not been done to him. This submission begs the question: what was the wrong done to him ? If the husband had not been present at the time of the accident the wrong would have been limited to the injury to his quasi-proprietary right to the consortium of his wife, and it is conceded that the disputed head of damages, as contrasted with the admitted claim for domestic assistance, cannot be claimed under that head. Does it make any difference that in this case the husband was present at the accident and sustained personal injuries himself ? While he is, of course, entitled to recover those damages which flow from his own injuries, I do not see how this can enlarge the measure of his damages for the quite separate wrong to his quasi-proprietary interest in the consortium of his wife.

In principle, therefore, if the matter were res integra I should hold that the loss of wages was damnum absque injuria, and in so holding I am, I think, supported by the dicta of LORD GODDARD and LORD MORTON OF HENRYTON in *Best* v. *Samuel Fox & Co., Ltd.* (2) ([1952] 2 All E.R. at pp. 398, 400).

Counsel for the plaintiffs has, however, pressed on me two matters. First he says it is well-known that husbands are frequently awarded, as part of their damages for injuries to their wives, the cost of visiting the wife in hospital and such damages have been claimed, and, indeed, agreed, in this case. As I have said, I do not know how the agreed figure of special damage was made up. It was done at my urging to save costs and it would be quite wrong to regard this agreement as conceding that the cost of a husband's visit to hospital was recoverable in law. I see no difficulty, however, in reconciling the recovery of this item with the principle which I have already discussed. Visits by a spouse may well be a factor in the recovery of a patient, and a visit to a wife in hospital may thus be a proper step in mitigating the damage sustained by loss of consortium by reducing the period during which the consortium is lost;

but if the sole justification for the visit is the comfort or pleasure that it gives to the husband, then its cost is not recoverable.

The second matter on which counsel for the plaintiffs relies is the recent decision of *Behrens* v. *Bertram Mills Circus, Ltd.* (3) ([1957] 1 All E.R. 583), where, he says, DEVLIN, J., allowed a claim closely analogous to this. *Behrens* v. *Bertram Mills Circus, Ltd.* (3) bristles with points in no way material to this case, but one of the matters dealt with in the judgment was a claim by a husband, who was a midget, to loss of earnings from a joint act which he performed with his midget wife. The wife having been injured seriously and the husband, slightly, there was a period during which the husband, although himself capable of continuing to perform with some other partner, did not do so but waited with his wife until his wife's recovery. He claimed loss of earnings during that period of waiting. DEVLIN, J., held that, having regard to all the very exceptional circumstances, it was reasonable for him to do so and awarded damages measured by his loss of earnings during the period of waiting. The matter is dealt with ibid., at p. 597. It is not quite clear to me that the ratio decidendi is not based on loss of consortium. The sum claimed was a small one and it may well have been that if the husband had gone out on tour the cost of paying domestic assistance, plus the damages for loss of consortium, would have exceeded his loss of earnings by staying at home. If so, it was a proper step to take in mitigation of damages and the loss of earnings would be recoverable.

Counsel for the plaintiffs argues that the ratio decidendi is to be found at [1957] 1 All E.R. at p. 597, where DEVLIN, J., says:

> " In fact, however, he did not go on tour. He preferred to stay at home and accept the loss of earnings; and in the very peculiar circumstances of this case I have held that his choice was a reasonable one. Can he then recover his loss of earnings as damages ? To hold that he can may be breaking new ground in this type of action, but I can see no reason in principle why he should not be thus compensated."

Then come the words on which counsel for the plaintiffs particularly relies:

> " The assessment of damages must be governed by those principles which apply generally in the law of tort and, provided he acts reasonably, he must be put in as good a position, so far as money can do it, as if the wrong had not been done to him. I repeat that on the facts this is a most exceptional case, turning on the exceptional need which the husband had for the support of his wife as a wife. Because of that I think that he is entitled to recover."

I, of course, accept the principle that " the assessment of damages must be governed by those principles which apply generally in the law of tort and, provided he acts reasonably, he must be put in as good a position, so far as money can do it, as if the wrong had not been done to him ". It depends, however, on what is the " wrong done ". I have already given reasons for holding that the only wrong done is the injury to the husband's quasi-proprietary right in the consortium, and if this judgment is to be read as extending the rights of the husband of an injured wife, it is, I think, out of harmony with the speeches of their Lordships in *Best* v. *Samuel Fox & Co., Ltd.* (2). I therefore hold, as a matter of law, that the wages are not recoverable.

The point is, however, a difficult one and I am conscious that I may be differing from the view held by DEVLIN, J. I shall therefore assess the damages on the basis that I am wrong as to my ruling on the law. [HIS LORDSHIP found that a normally affectionate father might, in the circumstances of the present case, reasonably have given up a job in Africa and not have gone back there until he was satisfied that his wife was sufficiently recovered to come home and look after the children, who were aged four and seven years, but that it was not reasonable for the father to have waited until the end of November, 1955, before taking any job at all and that it would not have been reasonable for A him, when his wife had returned and it was plain that she had made a good recovery, to stay in England instead of going back to Africa where a job at £30 weekly would have been available. Therefore damages should be limited to a period expiring a reasonable time (e.g., a month) after the wife's return from hospital. HIS LORDSHIP assessed the damages for loss of earnings if, contrary to his view, such damages were recoverable, at £500.] B

Judgment for the plaintiff husband for £255 10s. 7d., and for the plaintiff wife for £1,785 18s. 2d.

Solicitors: *G. Howard & Co.* (for the plaintiffs); *A. D. Vandamn & Co.* (for the defendant).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*] C

D

KORES MANUFACTURING CO., LTD. *v.* KOLOK MANUFACTURING CO., LTD.

[CHANCERY DIVISION (Lloyd-Jacob, J.), June 27, 28, July 24, 25, 26, 1957.]

Trade—Restraint of trade—Agreement in restraint of trade—Companies each agreeing not to employ persons employed by the other within previous five years—Reasonableness—Restriction on employees' freedom of choice of employment—Public policy. E

Contract—Duration—Whether determinable by reasonable notice—Length of notice—Agreement by trading companies not to employ persons employed by each other within previous five years. F

The plaintiffs and the defendants were two companies who occupied adjoining premises in London and manufactured carbon papers, typewriter ribbons and similar articles. They entered into an agreement by correspondence, each company writing in substantially the same terms to the other that they would not without the written consent of the other " at any time employ any person who during the then past five years shall have been a G servant of yours ". The plaintiffs and the defendants were two of about twenty firms engaged in similar business, of whom at least four of substantial size carried on business in the London area.

Held: the agreement was void as being in unreasonable restraint of trade because—

(i) there was no evidence that the period of five years was appropriate to H any category of employees, and, such a period appearing excessive both for manual workers and more highly skilled employees, it could not be said that the agreement afforded no more than adequate protection to the parties; and

(ii) the agreement was against the public interest in that it restricted an employee's freedom of choice of employment without constituting a fetter I which the employers reasonably required for their protection, and although the agreement had been and might be operated with benevolence, yet benevolence in operation could not remove the evil.

Herbert Morris, Ltd. v. *Saxelby* ([1916] 1 A.C. 688) applied.

The agreement contained no provision for its termination.

Held: a provision for termination of the agreement by either party on twelve months' notice could properly be read into the agreement.

[As to the requisites of a valid restraint of trade by agreement, see 32 HALSBURY'S LAWS (2nd Edn.) 403, para. 674 et seq.; and for cases on the subject, see 43 DIGEST 21 et seq., *135* et seq.]

Cases referred to:

(1) *Crediton Gas Co.* v. *Crediton Urban District Council*, [1928] Ch. 174; *affd.* C.A., [1928] Ch. 447; 97 L.J.Ch. 184; 138 L.T. 723; 92 J.P. 76; Digest Supp.

(2) *Mineral Water Bottle Exchange & Trade Protection Society* v. *Booth*, (1887), 36 Ch.D. 465; 57 L.T. 573; 43 Digest 94, *980*.

(3) *Herbert Morris, Ltd.* v. *Saxelby*, [1916] 1 A.C. 688; 85 L.J.Ch. 210; 114 L.T. 618; 43 Digest 24, *154*.

(4) *Nordenfelt* v. *Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A.C. 535; 63 L.J.Ch. 908; 71 L.T. 489; 43 Digest 22, *139*.

Action.

By their writ the plaintiffs claimed (i) a declaration that an agreement contained in letters which passed between the plaintiffs and the defendants dated Aug. 30, 1934, and Sept. 3, 1934, was a valid and subsisting agreement; (ii) an injunction restraining the defendants themselves or by their servants or agents from employing without the plaintiffs' consent in writing Hugh Anthony O'Neill contrary to the terms of the agreement; (iii) an injunction to restrain the defendants themselves or by their servants or agents from employing without the consent of the plaintiffs in writing any person who during the period of five years immediately preceding the commencement of such employment was in the employment of the plaintiffs.

On the hearing on May 21 and 24, 1957, of a motion by the plaintiffs for an injunction, the plaintiffs and the defendants agreed the issues between them in the action and consented to an order dated May 28, 1957, in which the plaintiffs undertook forthwith to set down the action for trial, and the court dispensed with delivery of pleadings and made certain directions as to delivery and inspection of documents. The issues as agreed were scheduled to the order, and are stated at the beginning of the judgment.

J. G. Strangman, Q.C., and *P. R. Oliver* for the plaintiffs.
Gerald Gardiner, Q.C., and *Robert S. Lazarus* for the defendants.

July 26. **LLOYD-JACOB, J.,** read the following judgment: By an order dated May 28, 1957, the issues between the two parties to these proceedings were defined as follows, and the questions posed for the determination of the court are expressed in this language:

> " (1) Whether (as the plaintiffs contend and the defendants deny) the letters mentioned in the indorsement on the writ of summons were of contractual effect. (2) If the answer to (1) be Yes—whether (as the defendants contend and the plaintiffs deny) such contract was and is void as being in unreasonable restraint of trade and contrary to public policy. (3) If the answer to (2) be No—whether (as the defendants contend and the plaintiffs deny) such contract was terminated by the tacit mutual consent of the plaintiffs and the defendants in or about 1941 or alternatively in or about June, 1955. (4) If the answer to (3) be No—whether (as the defendants contend and the plaintiffs deny) such contract contains an implied term that the same is terminable by reasonable notice given by either party to the other and that six months' notice is reasonable."

The letters to which the first question makes reference were written in 1934. The first, being a letter from the plaintiffs to the defendants dated Aug. 30, 1934, is in these terms:

> " Dear Sirs, In consideration of your agreeing not without our written consent to, at any time, employ any person who, during the then past

> five years, shall have been a servant of ours, we undertake not, without your written consent, to, at any time, employ any person who, during the then past five years, shall have been a servant of yours." A

That letter is signed by Mr. Lefebure, who was the managing director of the company at that time, and still is. The response, dated Sept. 3, 1934, addressed by the defendants to the plaintiffs, is in these terms: B

> " Dear Sirs, We acknowledge receipt of your letter of the 30 ultimo with reference to the employment of our respective employees. We welcome this suggestion from which it is understood that your company and our own will refrain from engaging any person or persons who have been in the employ of either firm during the previous period of five years. As such an arrangement has our fullest support we hereby agree to the terms of your C letter of the above date. We are sure that this arrangement will prove to be of mutual benefit, and we shall be happy at any time to consider other proposals which have for their objects similar safeguards."

That was signed by the then managing director of the defendant company, Mr. O'Brien. D

The defendants no longer contend that these documents do not create contractual obligations between the parties, and an affirmative answer to question (1) is conceded by them.

The history of the matter is as follows. The plaintiffs, under their then name, Koreska (Gt. Britain), Ltd., carried on business in the manufacture of carbon papers and typewriter ribbons prior to 1934 at a factory in Hoxton, and in 1934 E transferred their manufacture to West Road, Tottenham, in the North of London, and occupied premises adjacent to those wherein the defendants carried on a similar business. In the course of time both businesses grew in size and analogous products were added to their articles of manufacture, but they have continued in active competition in respect of their main business interests. It is not in doubt that in relation to these the constant handling of F dyes and dyed material involved in the manufacture creates some difficulty in recruiting manual labour, and, further, that both the technique of manufacture and the introduction of variants give rise to the development of trade secrets which the manufacturers seek to guard. Both companies, as well as a number of other companies, operate independently in what is a highly competitive field. G

It appears from the evidence that the managing directors of these two companies met and discussed some aspects of the likely outcome of the plaintiffs' transfer to Tottenham, and they agreed on the exchange of letters to which reference has already been made. As the correspondence discloses and the evidence confirms, the agreement was invoked in 1936 to secure the discharge by the plaintiffs of a woman worker who had previously been in the employment H of the defendants. Later, in 1939, a Dr. Lant, who had been engaged in a consultative capacity by the plaintiffs, or I think more accurately, by their associates in Vienna, transferred his services to the defendants. This gave rise to some discussion between the companies, but in the result both parties appear to have agreed that the scope of the agreement did not include consultants, and in consequence the matter was permitted to drop. I

Then in 1941 the parties had occasion to consider the operation of this agreement in the light of the changed circumstances created by the war. The Ministry of Labour, under the powers conferred by war-time legislation, were responsible for directing available labour to meet industrial requirements. Both the plaintiffs and the defendants experienced a shortage of labour during the war and looked to the Ministry to assist them to overcome their difficulties. It was apparent to both that refusal to engage any worker directed by the Ministry to seek employment with either, save on grounds which the Ministry could accept as reasonable, would lead the Ministry to refrain from directing any labour into their factories. Neither party was prepared to inform the Ministry of the arrangement whereby they had hitherto restricted their engagement of workers to persons not hitherto employed by the other, and in consequence they sought a way out of the difficulty. There is a conflict of recollection as to what was decided, but, having heard the evidence, I myself have no doubt whatever that neither Mr. Dumont's evidence nor his memoranda can afford any reliable guide in its resolution. He gave me the strong impression that, having succeeded to the office of Mr. O'Brien, who had made this agreement with the plaintiffs in 1934, he determined to allow the plaintiffs to believe it was still operative while seeking freedom for his company to escape it. I have no hesitation in accepting as accurate Mr. Tourlamain's account of the discussion in 1941, as set out in his letter of confirmation. In 1943 the plaintiffs, by their managing director, Mr. Lefebure, whose evidence I accept as reliable, invoked the agreement in respect of a Mrs. Murfitt; and again in 1953 Mr. Lefebure applied it in respect of an application for employment by the plaintiffs made to him by Mr. Ansell, an ex-employee of the defendants. Later, in 1955, the plaintiffs followed the practice adopted in 1939 in regard to consultants by engaging a Dr. Cooke, despite his relationship previously with the defendants in a consultative capacity. This was in no manner inconsistent with the recognition by the plaintiffs of the existence of the agreement and its operation in full.

In 1955 the plaintiffs decided to transfer their main factory to Harlow, and inquiries made of their workpeople disclosed that much of the female labour was not sufficiently mobile to accompany them to their new location. The plaintiffs were naturally anxious to maintain their Tottenham factory in production up to the actual date of removal, and Mr. Lefebure telephoned Mr. Petts of the defendants, and, whether or not he actually mentioned the agreement, sought an assurance that its terms would be observed by the defendants, and offered as a concession that as from the date of removal, his company would waive any objection to the engagement by the defendants of any female labour previously employed by the plaintiffs which had been rendered redundant by the removal. I am satisfied that nothing was said by Mr. Lefebure nor understood by Mr. Petts to indicate that the agreement of 1934 was to be regarded as terminated in any way.

In March, 1957, the plaintiffs' chief chemist, a Mr. O'Neill, gave three months' notice to leave and sought employment with the defendants. The plaintiffs objected on the ground that engagement of this man by the defendants would be in breach of the agreement of 1934, and this has resulted in this litigation, the defendants contending that no such bar exists, or, if it exists, is not enforceable in the Queen's courts.

It is evident from my findings that question (3) must be answered in the negative both in respect of the events of 1941 and the events of June, 1955. Question (4) involves the application of well-established principles whereby the court will seek to secure business efficacy for a contract which by its terms is silent as to its duration, having regard to the principle of the common law that both parties must be deemed to have intended a reasonable commercial bargain between them. The mere fact that the character of perpetuity attaches to the legal personality of the contracting parties is not of itself sufficient to determine that the agreement was intended to be permanent (see per RUSSELL, J., in *Crediton Gas Co.* v. *Crediton Urban District Council* (1), [1928] Ch. 174). Consideration must plainly be given to the nature of the subject-matter involved, and in the present case the agreement relates to the engagement of labour. The fact that it was entered into in anticipation of a removal of the plaintiffs' factory to a new position where competition for labour with the defendants might become acute, as well as the readiness of the parties to consider a modified operation when labour supply in fact became difficult, both point against an intention that the restriction should go on for ever if one party so insisted.

Had the matter been considered at the time, I can well imagine both parties regarding a year's notice of determination as not unreasonable. The position has, however, to be considered as at the date of issue of the writ, when the removal of the plaintiffs' factory to Harlow had avoided the primary competition which the agreement was devised to avoid. In my judgment the period of twelve months is by no means unreasonably short. As the employees of both parties run into the hundreds, it might well take a year to negotiate with all of them agreements to secure an effect similar to that of the agreement here in suit, so that the period of one year cannot be fairly regarded as too long. On question (4) I should be prepared to hold that termination by either party on twelve months' notice can fairly and properly be read into this agreement.

Question (2) remains to be dealt with, and, so far as I know, no agreement of the precise character here under consideration has as yet been considered by the court. In *Mineral Water Bottle Exchange & Trade Protection Society* v. *Booth* (2) ((1887), 36 Ch.D. 465), both CHITTY, J., and their Lordships in the Court of Appeal considered a rule by which the members of a trade protection society were required not to employ certain ex-servants of a fellow member until after two years had expired from the cessation of service. The present agreement is between two only of some twenty or so competitors in business, of whom at least four of substantial size carry on business within the London area. In his judgment in the case referred to COTTON, L.J., expresses the objection to the enforcement of the rule by saying (ibid., at p. 471):

> " . . . it might be used most oppressively by preventing a man who had never been in any confidential position and never desired improperly to use the information he had then acquired from getting employment from another master in the trade which he knew most about, and which he could best carry on."

For my own part, I would hold this objection equally applicable if instead of information it was an acquired skill which the employee desired to offer to another employer. Having regard to the existence of other competing manufacturers in the London area, it cannot be said that this agreement prevents an ex-employee of either party from exercising his skill and knowledge, but it undoubtedly restricts his freedom of choice, and that for a period of such duration as in effect to deny him the opportunity of alternative occupation in his trade within easy reach of his home.

In the speech of LORD PARKER OF WADDINGTON in *Herbert Morris, Ltd.* v. *Saxelby* (3) ([1916] 1 A.C. 688 at p. 707) LORD MACNAGHTEN'S opinion in *Nordenfelt* v. *Maxim Nordenfelt Guns & Ammunition Co.* (4) ([1894] A.C. 535) was quoted and explained. It is there laid down that two conditions must be fulfilled if the restraint is to be held valid: first, it must be reasonable in the interests of the contracting parties, i.e., it must afford no more than adequate protection to the parties thereto; and, secondly, it must be reasonable in the interest of the public, i.e., in no way injurious to the public. Assuming, without deciding the point, that it was a reasonable provision in the interests of these two firms that competition for workpeople should be avoided, it would appear that a five-year ban on a manual worker was wholly unnecessary to secure it. For a man who relies on weekly employment for support, a denial of engagement in his own trade for six months would effectively drive him to some alternative occupation, and the same considerations would in all probability apply also to a woman worker. So far as concerns more highly skilled personnel, Mr. Lefebure very frankly acknowledged that for an assistant works manager, a period of twenty-one months between his dismissal by the plaintiffs and his engagement by the defendants would be effective to protect the plaintiffs' legitimate interests. I have heard no evidence to establish this period of five years as appropriate to any category of employee—still less as appropriate to all categories, and I cannot hold it to be no more than the interests of the parties necessitated.

If the matter be approached from the standpoint of the public interest, the agreement appears equally objectionable. The public interest did in fact require, for some part of the war period, a direction of labour at the instance of a government department—a direction which, but for the willingness of the parties to submit to it, would have been rendered impossible of performance by this agreement. The enforcement of its terms by the court would accordingly at that time have produced a public mischief. In considering this aspect of the case, the court is not primarily concerned with what in practice has been done under the contract, but rather with what may be done and what mischiefs may arise if the full terms of the bargain are applied. The position could well have arisen in which the defendants were seeking additional labour, and workpeople fully competent to meet the demand were applying by the score in the hope of securing work of the kind to which they were accustomed, at a convenient distance from their homes. This agreement would permit the plaintiffs to insist that such workpeople must be denied employment by the defendants, although there may have existed no possibility of the plaintiffs themselves offering alternative employment in a practicable manner to the applicants for work. The disastrous consequences to the community of informing these persons that rejection was the consequence of faithful service to a previous employer require no elaboration.

I entertain no doubt that Mr. Lefebure himself would not wish the agreement to be applied in this fashion, and his attitude when the move to Harlow was in progress fully justifies this opinion. But benevolence in operation, although it may mitigate the effect, cannot remove the evil of tyranny. Even if this court could import into this contract a limitation which the parties did not think it desirable to insert, namely, that written consent would invariably be given in all cases where the employee could not fairly be expected to continue his former employment, there would still remain a fetter on the freedom of the workman to offer his labour where he wished, and this a fetter which no interest of the employers necessarily required for their protection.

I must accordingly hold against the plaintiffs on the second question.

Action dismissed.

Solicitors: *Hardman, Phillips & Mann* (for the plaintiffs); *Richards, Butler & Co.* (for the defendants).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

Re GHEY AND GALTON'S APPLICATION.

[COURT OF APPEAL (Lord Evershed, M.R., Morris and Pearce, L.JJ.), July 15, 16, 1957.]

Real Property—Restrictive covenant—Modification—Covenants imposed in 1908 *and* 1945 *to use premises as private dwelling-house only—No change of character of neighbourhood—Proposed use as convalescent home for employees of owner—Law of Property Act,* 1925 (15 *&* 16 *Geo.* 5 *c.* 20), *s.* 84 (1) (*a*) (*c*).

Blunt House was in a residential area of a seaside town and was subject to restrictive covenants given in 1908 and 1945 prohibiting the use of any part of the premises otherwise than as a private dwelling-house. The premises were within a large area of development originally inaugurated by the predecessors in title of the covenantees. The covenantees granted in 1951 a licence for the use of Blunt House as a school subject to stringent restrictions, e.g., prohibiting games. Certain parts of the development area had been used for schools, but the proportion of the area so used to the purely residential part had remained substantially constant since 1908. A considerable proportion of the houses, however, had been subdivided into residential flats. A commercial company now desired to use Blunt House for the purposes of a convalescent home and rest home for their employees, and applied accordingly to the Lands Tribunal for the modification of the restrictions imposed by the covenants so as to permit such user under the Law of Property Act, 1925, s. 84 (1) (a) or (c). The Lands Tribunal ordered that the restrictions " be and the same are hereby modified to permit the [applicants] to use the said lands and premises as a convalescent home or rest house for their employees ". In the tribunal's decision it was stated that the tribunal would not be prepared to grant any modification which would undermine the underlying principles of the original scheme of development, and, in regard to any possibility that the granting of the application would open up the area to boarding houses, that (in effect) future tribunals would refuse any application that would undermine the original scheme of development.

Held: the restrictions should not have been modified by the Lands Tribunal since—

(i) the burden was on the applicants to prove facts bringing the matter within one of the alternatives in which jurisdiction to modify the restrictive covenants was conferred by s. 84 (1), and

(ii) on the material before the court the restrictions were not obsolete and there was no sufficient evidence either that their continued existence would impede in any real degree the reasonable user of the land or that their modification would not injure persons entitled to the benefit of the restrictions; accordingly, the Lands Tribunal had not jurisdiction to modify the restrictions.

Per LORD EVERSHED, M.R.: I doubt whether it is competent for the Lands Tribunal, under cover of modifying the restrictive covenant, to give in effect no more than a personal licence to one individual . . . or to say what in future other persons exercising the jurisdiction of the Lands Tribunal would do (see p. 169, letters E and F, post).

Appeal allowed.

[As to discharge or modification of covenants, see 14 HALSBURY'S LAWS (3rd Edn.) 572, para. 1063.

For the Law of Property Act, 1925, s. 84 (1), see 20 HALSBURY'S STATUTES (2nd Edn.) 605.]

Cases referred to:

(1) *Re Truman, Hanbury, Buxton & Co., Ltd.'s Application,* [1955] 3 All E.R. 559; [1956] 1 Q.B. 261; 3rd Digest Supp.

(2) *Re Henderson's Conveyance*, [1940] 4 All E.R. 1; [1940] Ch. 835; 109 L.J.Ch. 332; 2nd Digest Supp.

(3) *Driscoll* v. *Church Comrs. for England*, [1956] 3 All E.R. 802; 3rd Digest Supp.

Case Stated by Lands Tribunal.

This was an application under the Law of Property Act, 1925, s. 84, by the then owners of premises known as Blunt House, Meads Road, Eastbourne, in the county of Sussex, for the modification of the covenant to permit the premises to be used as a convalescent or rest home. The object of the application was to enable the proposed home to be established and used by the Metal Box Co., Ltd., or its subsidiary, the Metal Box Benevolent Fund, Ltd., for the benefit of employees of the Metal Box Co., Ltd. The hearing took place on Apr. 16, 1956, and the tribunal viewed the property on Apr. 20. It was stated in the Case that the following facts were proved or admitted. At the time of the application the premises were being used as a private school under licence granted on Oct. 11, 1951, by the covenantee to the applicants. The premises formerly formed part of the Eastbourne Estate of former Dukes of Devonshire which estate now belonged to the trustees of the Chatsworth Settlement. The premises lay within the area of a development plan inaugurated many years ago by the former dukes for their estate. A licence was offered for the conversion of the premises into flats which was not acceptable to the applicants. There had been vast changes* in the neighbourhood since the restrictions were imposed. There had been many conversions of houses into flats and an increase in the extent of the properties in the vicinity used for schools or similar purposes. A licence was granted on Feb. 14, 1956, to use a house called " Elstree " as a rest home. Compton Place (which was owned by the said trustees) was used as a residential school of languages under a lease and licence from the trustees dated Mar. 25, 1954. On Apr. 7, 1955, planning permission was given under the Town and Country Planning Act, 1947, for the change of use of Blunt House from a school to a rest home for staff of an industrial company. The evidence and the inspection of the area led the tribunal to the conclusion that the applicants' proposal to use Blunt House as a well-conducted rest house or convalescent home for the employees of a reputable firm would be more advantageous from the point of view of the owners of the surrounding houses than the conversion of the house into flats. The house was large and both it and its garden had been admirably maintained. It was the tribunal's opinion that the Metal Box Co., Ltd., would maintain it equally well in the future. The tribunal was further of the opinion that in the light of present-day conditions the granting of the application would not undermine the original scheme of development and the trustees must be prepared to adapt that scheme to the economic conditions prevailing today. The applicants having contended, and the objectors having disputed, that the case fell within both para. (a) and para. (c) of s. 84 (1) of the Law of Property Act, 1925, the Lands Tribunal (SIR WILLIAM FITZGERALD) on May 15, 1956, modified the restrictions to the extent that the Metal Box Co., Ltd. " could be permitted to use 'Blunt House' as a convalescent home or rest house for their employees ". The tribunal, in its decision which was annexed to the Case Stated concluded with a passage in the terms set out in the judgment at p. 170, letter B, post. Before the Court of Appeal the case was dealt with on the footing that the Metal Box Co., Ltd., were the applicants.

George Newsom, Q.C., and *L. Abel-Smith* for the objectors.

P. Ingress Bell, Q.C., *W. B. Harris* and *W. J. Glover* for the applicants, the Metal Box Co., Ltd.

LORD EVERSHED, M.R.: In my judgment, the decision of the Lands Tribunal in this case ought not to stand. The application to the tribunal was made by two ladies, Miss Ghey and Miss Galton, of the Blunt House, Eastbourne, asking for an order that certain restrictions (which I will more particularly specify in a moment) " may be modified by permitting the use of the said premises [Blunt House] as a convalescent home or rest home ". It appears that Miss Ghey and Miss Galton were then in some kind of negotiation with the Metal Box Co., Ltd., and before the tribunal it was made plain that the rest home proposed was one that would be conducted by the Metal Box Co., Ltd., or by a subsidiary company known as the Metal Box Benevolent Fund, Ltd., the intention being that this house should be adapted for use as a convalescent home or rest home for persons in the employ of the Metal Box Co., Ltd. In this court it has been made clear to us that, whatever the interest now remaining in Miss Ghey and Miss Galton (if any), counsel has the instructions of the Metal Box Co., Ltd., and its subsidiary, so that we are dealing with the case on the footing that they are persons interested in Blunt House and they are the effective applicants (and are referred to herein as " the applicants ") for the order of modification. No question, therefore, turns on the locus standi of any of the parties.

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* See, however, per LORD EVERSHED, M.R., p. 169, letter I, post.

The objectors to the application, and the appellants in this court, are understood to be the present Duke of Devonshire, and two other persons, in whom, as trustees, is vested the legal estate in property known as Compton Place. Again, no question arises as regards title. The objectors are conceded to be the persons in whom the beneficial interest in Compton Place is vested, subject to an outstanding lease and to a licence, and they are the persons who are entitled, in that capacity, to the benefit of the covenants with which we are concerned.

The locus in quo has been illustrated for us by a plan called Plan " B " which shows Compton Place, a considerable area in the north, and forming a segment of a circle of half a mile diameter. The area enclosed by the circumference of that circle is (putting it quite broadly) a residential area in Eastbourne. In saying " residential ", I am intentionally distinguishing this area from others (which no doubt would not be difficult to find in Eastbourne) occupied by hotels and similar accommodation intended to provide for visitors to Eastbourne. The greater part of the houses, if you take the numbers, undoubtedly consist of residences—either single houses used as such as residences, or, more commonly, houses which have been converted into more than one dwelling-house in the form of flats and maisonettes. But it is true (and this, I think, is perhaps at the bottom of much of the argument of the applicants) that certain premises, some of which are not negligible in extent, in the area are occupied for what counsel for the applicants called institutional purposes, i.e., for the most part for educational purposes, schools of one kind and another; and in one instance premises are occupied as a rest home, that last-mentioned instance being on the very perimeter of the circle.

It conveniently appears from the application what were the restrictions of which modification or discharge was desired, and they are, so far as relevant, contained in two deeds, one dated in 1908 and one in 1945. Before I proceed to state what the nature of the restrictions is, I repeat the dates—1908 and 1945; for those dates make at least this much clear, that these were not covenants which had been bequeathed to the twentieth century by those who developed their land a hundred or more years ago, when social conditions were wholly different from those which obtain today. The covenants may be said to reflect a certain propensity among conveyancers for repetition. The substance of them is that they prohibit any use of any part of the land otherwise than as private dwelling-houses without the consent in writing of the covenantee. In fact the covenants are much longer. They specifically prohibit schools, hotels, public-houses, and any trades or businesses and so forth; but the purpose of them plainly is the preservation of the subject-matter (and the same applies to the whole of this circular area indicated on the plan) as a strictly residential area. To that statement, however, it is necessary and right to observe at once that from 1908 (the date of the first covenant mentioned in the application) certain parts of the area had already been utilised for educational purposes, i.e., for schools of one sort or another. A comparison of plan " B " (which shows the character of the occupation of the area at the present time) with another plan, plan " C " (which indicates the situation in 1908) shows that, by and large, the number and identity of the institutional uses has not much changed. One or two more places have become so used, and one or two that were so used have now come back to private occupation. We have not looked at the documents of title to each one of these schools, but we have looked at one, the grant of a licence for use as a school (made in fact to these two ladies, Miss Ghey and Miss Galton) of the house in question, Blunt House. It is not necessary to read at length the conditions of the licence. It is sufficient to say that they were extremely strict. To take but one example, although a licence was given for use of the premises as a girls' school, any form of game, organised or not, on any day of the week, was prohibited, and it is indeed manifest that the terms of the licence were designed to protect people who were living in what was, and was intended to remain, a residential neighbourhood, from the sort of disturbance that might happen if the kind of activities which would otherwise be associated with a school were permitted. Similarly, as regards the use of the plot known as " Elstree " (in the extreme south-west of the area) as a rest home, the terms of the licence again were most stringent.

That, I hope, is sufficient of the background and justifies the statement which I made earlier that the particular area enclosed in the half-mile diameter circle in plan " B " is a residential area, strictly so called and plainly intended strictly to be so maintained. It is, however, said by the applicants, as regards Blunt House, that the Metal Box Co., Ltd. is (as is plainly the fact) a responsible undertaking, and it can be assumed that the conduct of any rest home or convalescent home by the Metal Box Co., Ltd., or under its directions, will be carried out with the utmost propriety. What is more, it is said that Blunt House, having been given a licence for school use, may be classified, for present purposes, as being already of an institutional character so that no great transition would be endured if Blunt House should no longer accommodate girls of sixteen but should accommodate the sick and ailing employees of the Metal Box Co., Ltd.; and there is, from what one might call a broad human point of view, much to be said for that view.

It is necessary, however, to bear in mind the nature and limitations of the jurisdiction invoked. The Law of Property Act, 1925, s. 84 (so far as is relevant), provides:

> " The authority [now the Lands Tribunal*] . . . shall . . . have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction . . . on being satisfied—(a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the authority may deem material, the restriction ought to be deemed obsolete, or that the continued existence thereof would impede the reasonable user of the land for public or private purposes without securing practical benefits to other persons . . . or . . . (c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction."

There has not been a great number of cases before the courts reporting the views of the judges on the proper application of that section. In a case in this court, *Re Truman, Hanbury, Buxton & Co., Ltd.'s Application* (1) ([1955] 3 All E.R. 559), modification was sought of a covenant which had been first imposed in 1898, intended to maintain as a residential area a certain district which had become adjacent to a main road to Southend-on-Sea. It was pointed out in the course of the case that the habits of the twentieth century—particularly the wish of large numbers of people to go at week-ends by road to Southend-on-Sea—had seriously altered the quietude which at one time perhaps this area had enjoyed, and it was proposed to modify the licence so as to enable the applicants to establish a public-house, conveniently sited on the roadway so as to attract the custom of those passing to and from Southend-on-Sea. Since many of the houses had been turned into shops and the like, there was obviously some reasonableness in the application from the point of view at any rate of the brewers and of the road travellers for whose advantage the public-house would exist. None the less, the court rejected the application; and in the course of his leading judgment Romer, L.J., cited (ibid., at p. 563) and clearly intended to approve and adopt, a passage from the judgment of Farwell, J., in *Re Henderson's Conveyance* (2) ([1940] 4 All E.R. 1). In 1940, the jurisdiction which is now vested in the Lands Tribunal (with a right of appeal on law to this court) was vested in an arbitrator (with a similar right of appeal to a judge of the Chancery Division). The language cited from Farwell, J.'s judgment is as follows ([1940] 4 All E.R. at p. 7):

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* See s. 1 (4) (a) of the Lands Tribunal Act, 1949; 28 Halsbury's Statutes (2nd Edn.) 319.

> " Speaking for myself, I do not view this section of the Act as a section designed to enable a person to expropriate the private rights of another. I am not saying that there may not be cases where it would be right to remove or modify a restriction against the will of the person who has the benefit of that restriction, either with or without compensation, in a case where it seems necessary to release the restriction because it does prevent in some way the proper development of the neighbouring property, or for some such reason of that kind. In my judgment, however, this section of the Act was not designed—at any rate, prima facie—to enable one owner to get a benefit by being free of the restrictions imposed upon his property in favour of a neighbouring owner, merely because, in the view of the person who desires the restriction to go, it will make his property more enjoyable or more convenient for his own private purposes. If a case is to be made out under this section, there must be some proper evidence that the restriction is no longer necessary for any reasonable purpose of the person who is enjoying the benefit of it. There may be some variation of the restriction by reason of a change in the character of the property or the neighbourhood . . ."

It is true to say that in *Re Henderson* (2) para. (c) of s. 84 (1) of the Law of Property Act, 1925, was not being invoked, so that the language of the learned judge was really related, and related only, to the two alternative grounds which are comprehended in para. (a); but the citation adopted, as it was, by Romer, L.J., in this court, seems to me a useful prelude to a consideration of the present case, because it indicates that what has to be done if an applicant is to succeed, is something far more than to show that to an impartial planner the applicant's proposal might be called as such a good and reasonable thing. An applicant must affirmatively prove that one or other of the grounds for the jurisdiction has been established; and, unless that is proved, the person who has the proprietary right, as covenantee, of controlling the development of the property as he desires and protecting his own proprietary interest, is entitled to continue to enjoy that proprietary right.

I have indicated that in the present case three possible grounds for the exercise of the jurisdiction in the applicants' favour are indicated—two under para. (a) and one under para. (c) of s. 84 (1). Repeating them in that order, they are, first, on the ground that the restriction ought to be deemed to be obsolete, for the reasons indicated; second, that its continued existence would impede the reasonable user of the land without securing practical benefits to others; and third, that the proposed discharge or modification would not injure the persons entitled to the benefit of the restriction. It is essential, in my judgment, that one at least of those suggested matters of fact must be proved in order to found the jurisdiction; and I add that even when the jurisdiction is founded there remains (as was also laid down by this court in *Driscoll* v. *Church Comrs. for England* (3), [1956] 3 All E.R. 802) a discretion in the tribunal whether the power should be exercised.

The first difficulty which I think confronts the applicants lies in the form of the Case and the decision. Counsel for the applicants (with his customary candour, if he will let me say so) said that he did not much like either of them; but he has asked us to read between the lines so as to find facts which the tribunal did not itself find; or, alternatively, he asks us to send it back under the powers that we have under R.S.C., Ord. 58A, r. 3 (4). First of all, however, let me read the minutes of the order which the tribunal made, because in themselves they raise a point of substance and of a little difficulty in the applicants' way. The conclusion was, that the covenants

> "be and the same are hereby modified to permit the Metal Box Co. to use the said lands and premises as a convalescent home or rest house for their employees."

It will be observed that that is in effect no more than a licence to a particular company. The covenant is said to be modified so as to permit one individual person (although a persona ficta) to use the lands as a convalescent home exclusively for that person's own employees. In the view that I take, it is unnecessary for me to express a final view on this matter; but starting with a covenant binding the land, the benefit of which runs with the land, I doubt for my part whether it is competent for the tribunal, under cover of modifying the covenant, to give in effect no more than a personal licence to one individual. I think that to do so will, or certainly may in some cases, involve considerable embarrassment hereafter when other persons come and say that they would like a similar privilege. It was the view of the Lands Tribunal that it could protect the respondents against that eventuality (as I shall show in a moment); but there again, I venture to doubt whether it was competent for the Lands Tribunal to say what, in the future, other persons exercising the jurisdiction of the Lands Tribunal would do.

With that introduction, I will now read the essential part of the decision, which is in terms substantially reproduced in the Case. After introductory paragraphs which it is unnecessary to recite, the Lands Tribunal proceeds:

> "I can say immediately that this tribunal would not be prepared to grant any modification which would undermine the underlying principles of the original scheme of development devised by the Duke of Devonshire and now enforced by the Chatsworth Estates."

I pause to say that that seems to me necessarily to be saying that the covenants are not obsolete, and that he (the tribunal) would not regard it as proper to do anything which would "undermine", i.e., subvert, the obviously intended purpose which those covenants were devised to achieve and which they are still capable of achieving. The tribunal goes on: "It must however be borne in mind that there have been vast changes since these restrictions were imposed". I pause again to observe that, having regard to the dates and the facts proved or admitted, I can find no evidence that there have been "vast changes". In fact, there appear to have been no changes at all of any significance since 1908. The tribunal continues:

> "All of these houses are large, attractive buildings of the Victorian and Edwardian periods, and it would be quite impossible to maintain nowadays

> the restriction that they should only be used as private dwelling-houses. This has been recognised by the trustees who have granted permission for most of the houses to be converted into flats, and they are prepared to make a similar concession in regard to Blunt House." A

Again I pause to say that the question of enforcing the covenant to use the individual edifices as single dwelling-houses does not now arise, and no question of that sort is before us. The tribunal then refers, very briefly, to the existence of the schools, and continues: B

> " After hearing the evidence I inspected the area, and I must say that I should have thought the proposal of the applicants would be preferable to the conversion of the houses into flats. This is a large house and both it and its garden have been admirably maintained. There is little doubt in my mind that this prosperous company would maintain it equally well in the future. C Their representative assured me that the convalescent home would be run on the same excellent lines as similar houses they have established in other parts of the country. I think that the main objection is really not so much to this particular application but to the fear of the objectors that this would be, as they put it, ' the thin end of the wedge ', and would open the area up to boarding and guest houses. D As to this I would reassure them by stating that any such development would require further application to this tribunal, and I am confident, as I have already stressed, that the tribunal would refuse any application which would undermine the original scheme of development. I do not think that the granting of this application does undermine that original scheme, and I am prepared to modify [the covenant accordingly]." E

The only slight variation which I find in the Case Stated from the terms of the decision is that, instead of the sentence which I last read, para. 12 of the Case is thus expressed:

> " I was further of the opinion that in the light of present-day conditions the granting of this application would not undermine the original scheme of development and the trustees must be prepared to adapt that scheme to the economic conditions prevailing today." F

The tribunal had previously said (reflecting what I have already read from the decision) that in the tribunal's opinion the use by the applicants of this house as a convalescent home for the employees of a reputable firm would be more advantageous, from the point of view of the owners of the surrounding houses. G With the utmost respect to the Lands Tribunal, I venture to think that the tribunal has somewhat misapprehended its function. The tribunal is not asked to say what the tribunal thinks would be advantageous from one point of view or another to the neighbours. The tribunal is not asked to act as a kind of planning authority; and though I can sympathise with the tribunal's view H that the Metal Box Co. can be relied on to conduct these premises, and, indeed, any premises with which they are concerned, with the utmost propriety, I think the tribunal has gone far beyond what properly is within its competence to give assurances that if other people tried to follow the example of the Metal Box Co. the tribunal would refuse their applications.

I need not pursue that aspect of the matter further. I come back to this, I that it will have been observed from my reading of the decision that no one of the three relevant matters of fact which are required to be established has been established by any finding of the tribunal. The tribunal has not found that these covenants are obsolete. Indeed, as I read the decision, it has found that they are far from obsolete—and so, indeed, plainly, on the evidence, they are. The tribunal, equally, has not said that the continued existence of these covenants would impede the reasonable user of the land for any purpose, public or private, without securing practical benefit to other persons. On that matter we have been assisted by learned counsel on both sides to form a view what exactly those words which I have just recited indicate. It will be remembered that at the end of the passage from FARWELL, J.'s judgment, read by ROMER, L.J., you find the phrase

> "the restriction is no longer necessary for any reasonable purpose of the person who is enjoying the benefit of it."

I am not attempting an exposition of s. 84 (1) of the Law of Property Act, 1925, which would, so to speak, replace the parliamentary language by the language of my judgment. I think, however, that it must be shown, in order to satisfy this requirement, that the continuance of the unmodified covenants hinders, to a real, sensible degree, the land being reasonably used, having due regard to the situation it occupies, to the surrounding property, and to the purpose of the covenants. If that be the right view of para. (a) in s. 84 (1) of the Law of Property Act, 1925, it seems to me quite plain that it cannot, on this evidence, be said that this second part of para. (a) of the sub-section is satisfied. Indeed, some of the general observations of the tribunal seem to me expressly to negative any such view. The tribunal is in truth saying that this is a special privilege to be granted to a particular company in particular circumstances which ought not to be followed in any other instance. Equally, and for similar reasons, I should be prepared to say that there is no sufficient evidence here to support any conclusion that the modification proposed will not injure the persons entitled to the benefit of the restriction, viz., the objectors. All that the tribunal has said is that in its view for the immediate neighbourhood a home for the employees of the Metal Box Co. is preferable to conversion into flats. That again, if I may say so, is not the question which the Act requires to be answered.

For these reasons, it seems to me that the foundation for any modification of the covenant has not here been established; and, that being so, I do not say anything more on the question (already indicated) whether a modification in favour of an individual such as that here involved is in any case permissible. Nor do I think, in the light of the evidence, and having heard the arguments, that it would be right to exercise the power (vested in this court under R.S.C., Ord. 58A) to remit the case back to the tribunal. I shall not be thought to be casting any doubt on the absolute sincerity of the intentions of the Metal Box Co. to run this convalescent home excellently, or any doubt as to the laudable nature of the foundation of such a convalescent home; but in my judgment s. 84 of the Law of Property Act, 1925, does not enable this court, in such circumstances, in effect to expropriate the applicants, the covenantees, merely in order to make possible an entirely estimable enterprise by an entirely estimable company. I think, therefore, that in this case the Lands Tribunal should have refused to make the order; and I would allow the appeal and direct accordingly.

MORRIS, L.J.: I find myself agreeing so fully both with the conclusion and with the reasoning of the judgment of my Lord that I do not think there is anything that I could usefully add.

PEARCE, L.J.: I agree. *Appeal allowed.*

Solicitors: *Currey & Co.* (for the objectors); *Reynolds, Gorst & Porter* (for the applicants, the Metal Box Co., Ltd.).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re MARSHALL (*deceased*). BARCLAYS BANK, LTD. *v.* MARSHALL AND OTHERS.

[COURT OF APPEAL (Jenkins, Romer and Sellers, L.JJ.), July 8, 9, 10, 30, 1957.]

Will—Gift to issue—Adopted child—Child adopted in British Columbia—Child and adoptive parent domiciled in British Columbia—Testator domiciled in England.

Adoption—Foreign adoption—Adopters and adopted child domiciled in foreign country—Rights of child under English will—Whether " child " or " issue " of adoptive parent.

A testator, by his will dated Apr. 12, 1945, left his residuary estate on trust for his wife during her life and gave the ultimate residue of his estate after her death to such of named cousins of his as might be then living, and provided that " should any of the above cousins be then dead leaving issue then living such issue shall take the share which his, her or their parent would have taken had such parent survived me and my said wife and if more than one in equal shares ". It was agreed that in this context the word " issue " meant " children ". One of the cousins named as a beneficiary, C.S.J., had emigrated to Canada in 1912 with his wife, and had become domiciled in British Columbia. C.S.J. had no children of the marriage. On Mar. 9, 1945, C.S.J. and his wife legally adopted A., a child domiciled in British Columbia, under the adoption legislation then in force in British Columbia, which provided (R.S. 1936 c. 6 s. 10 (1)) that as to inheritance and succession to property, an adopted minor should stand " in regard to the legal descendants, but to no other of the kindred of his parent by adoption ", in the same position as if born to that parent in lawful wedlock. The Adoption Act further provided (R.S. 1936 c. 6 s. 12) that in a will the word " child " or " issue " or its equivalent should include " a child adopted by the testator, grantor, or settlor ". The testator died on June 14, 1945, at which date these provisions were still in force. C.S.J. died in February, 1950. The testator's widow died on Jan. 21, 1955. The adoption legislation of British Columbia in force at the date of the widow's death provided (R.S. 1948 c. 7 s. 12) that in a will the word " child " or " issue ", or its equivalent, should include " an adopted child ", the limitation to adoption by the testator having been repealed. Section 10 (1) of R.S. 1948 c. 7, as amended in 1953, differed from the former R.S. 1936 c. 6 s. 10 (1) and provided that as to inheritance and succession to property, an adopted person should stand " in regard to the kindred of his parent by adoption in the same position as if born to that parent in lawful wedlock ". The Adoption Act Amendment Act, 1956*, repealed s. 12 of R.S. 1948 c. 7, and provided, so far as relevant, that for all purposes an adopted child became on adoption the child of the adopting parent, as if the child had been born to that parent in lawful wedlock and that the relationships of persons to one another should be determined accordingly.

Held: the adopted child was not entitled to take under the bequest to the issue of C.S.J. because—

(i) adopted children are prima facie excluded by the rule that when an English testator refers to " the children " of A. he is prima facie taken to be referring only to those persons of whom it can be postulated that they are the lawful children of A. (see p. 178, letter H, post).

Dictum of ROXBURGH, J., in *Re Fletcher* ([1949] 1 All E.R. at p. 735) approved.

(ii) even if (as the court assumed but expressly refrained from deciding) a child who has been adopted under the law of his domicil is not of necessity precluded from taking a gift in an English will to " the child " of his adoptive parent by reason only of the fact that he was not procreated by the adopter, only those who are placed by adoption in a position, both as regards property rights and status, substantially equivalent to that of the natural children of the adopter (such as the position created by the Adoption Act Amendment Act, 1956, of British Columbia) can be treated as being within the scope of the testator's contemplation (see p. 179, letter A, post).

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* The relevant terms of the various enactments of successive adoption statutes of British Columbia are printed at pp. 177, 178, post.

(iii) the status of adopted children and their capacity to take under a gift to " children " in an English will is fixed at the testator's death and subsequent legislation in the country of their domicil enlarging their rights is to be disregarded (dictum of Lord Penzance in *Lynch* v. *Paraguay Provisional Government*, (1871), L.R. 2 P. & D. at p. 271 applied; cf., p. 180, post).

(iv) the relevant legislation for determining the capacity of the adopted child to take was therefore that in force at the time of the child's adoption (see p. 180, letter H, post).

Re Luck ([1940] 1 All E.R. 375) not applied; decision of Harman, J. ([1957] 1 All E.R. at p. 553) on this point explained and affirmed.

(v) the rights and privileges conferred by the adoption legislation of British Columbia in force in March, 1945, fell far short of those which characterise the status of a child, and an English testator could not be supposed to have had in contemplation, in a bequest to " children ", adopted children with such limited rights (see p. 181, letters A to C, post).

Quaere: (a) whether, if a child adopted under the law of British Columbia could take under a bequest in an English will to a " child " of the adoptive parent, the adopted child in the present case would have taken had his status fallen to be determined by the adoption law in force in British Columbia at the widow's death in 1955 (see p. 181, letters E and F, post).

Dictum of Harman, J. ([1957] 1 All E.R. at p. 554) doubted.

(b) whether a child adopted by a foreign adoption can take under a gift in an English will to the " child " of the adopter, however extensive the language of the relevant foreign legislation may be (see p. 176, letter C to p. 177, letter C, post).

Re Luck ([1940] 3 All E.R. 307) explained; dictum of Harman, J. ([1957] 1 All E.R. at p. 556) doubted.

Decision of Harman, J. ([1957] 1 All E.R. 549) affirmed.

[**Editorial Note.** The Revised Statutes of British Columbia, 1924, were superseded by the Revised Statutes of British Columbia, 1936, which were superseded in turn by the Revised Statutes of British Columbia, 1948. The effect of these supersessions was, briefly, that from a certain day new revised statutes came into force and effect and the former statutes (so far as embodied therein or repugnant thereto) were repealed.

The new revised statutes operated as a consolidation of the laws for which they were substituted, but did not operate as new laws. Where the new revised statutes were to the same effect as former enactments which they repealed, they operated retrospectively as well as prospectively. There were certain savings from the repeal. In particular, as regards any transaction or matter anterior in time to new revised statutes, the provisions of the former statutes prevailed, if the effect of the new revised statutes would be different. The foregoing summary is based on s. 6 and s. 7 of the Revised Statutes Act, 1936; s. 10 and s. 11 of the Revised Statutes Act, 1948, were similar.

As to adoption and succession to property in relation to the conflict of laws, see 7 Halsbury's Laws (3rd Edn.) 129, para. 232.

As to succession to movables being governed by the law of domicil at the time of death, see 7 Halsbury's Laws (3rd Edn.) 53, para. 103, note (r); and for cases on the subject, see 11 Digest (Repl.) 393, 394, *505-511*.

As to legitimation by extraneous law, see 3 Halsbury's Laws (3rd Edn.) 94, para. 148.

For the Adoption of Children Act, 1926, s. 5, see 12 Halsbury's Statutes (2nd Edn.) 965.]

Cases referred to:

(1) *Re Wilby*, [1956] 1 All E.R. 27; [1956] P. 174; 3rd Digest Supp.

(2) *Re Luck, Walker* v. *Luck*, [1940] 1 All E.R. 375; [1940] Ch. 323; 109 L.J.Ch. 108; 162 L.T. 192; *revsd.* C.A., [1940] 3 All E.R. 307; 164 L.T. 172; sub nom. *Re Luck's Settlement Trusts*, [1940] Ch. 864; 109 L.J.Ch. 380; 2nd Digest Supp.

(3) *Re Goodman's Trusts*, (1881), 17 Ch.D. 266; 50 L.J.Ch. 425; 44 L.T. 527; 3 Digest 372, *135*.

(4) *Re Andros, Andros* v. *Andros*, (1883), 24 Ch.D. 637; 52 L.J.Ch. 793; 49 L.T. 163; 3 Digest 372, *131*.

(5) *Purcell* v. *Hendrick*, (1925), 35 B.C.R. 516; 2 W.W.R. 689; [1925] 3 D.L.R. 854; Digest Supp.

(6) *Re Brophy, Yaldwyn* v. *Martin*, [1949] N.Z.L.R. 1006.

(7) *Re Pearson, Equity Trustees Exors. & Agency Co., Ltd.* v. *Michaelson-Yeates*, [1946] V.L.R. 356; [1946] A.L.R. 387; 2nd Digest Supp.

(8) *Re Donald, Baldwin* v. *Mooney*, [1929] 2 D.L.R. 244.

(9) *Re Fletcher, Barclays Bank, Ltd.* v. *Ewing*, [1949] 1 All E.R. 732; [1949] Ch. 473; [1949] L.J.R. 1255; 2nd Digest Supp.

(10) *Re Stuart* (June 28, 1957), unreported, Supreme Court of British Columbia.

(11) *Lynch* v. *Paraguay Provisional Government*, (1871), L.R. 2 P. & D. 268; 40 L.J.P. & M. 81; 25 L.T. 164; 35 J.P. 761; 11 Digest (Repl.) 394, *513*.

(12) *Re Aganoor's Trusts*, (1895), 64 L.J.Ch. 521; 11 Digest (Repl.) 395, *514*.

(13) *Starkowski* (*by his next friend*) v. *A.-G.*, [1953] 2 All E.R. 1272; [1954] A.C. 155; 3rd Digest Supp.

Appeal.

The British Columbian adopted child of C.S.J. appealed from the decision of Harman, J., dated Feb. 6, 1957, and reported [1957] 1 All E.R. 549, that he was not entitled to a bequest in an English will to the issue of C.S.J. The facts appear in the judgment and are summarised in the headnote.

P. Ingress Bell, Q.C., and *J. G. Le Quesne* for the adopted child, the eighth defendant.

A. A. B. Fuller for the other beneficiaries, the first seven defendants.

M. W. Cockle for the trustees of the will, the plaintiffs.

Cur. adv. vult.

July 30. **ROMER, L.J.**, read the following judgment of the court: This is an appeal from a decision of Harman, J., whereby he rejected the claim of the eighth defendant, Anthony Francis Stansfeld Jones, to share in the estate of the testator, Chapman Frederick Dendy Marshall. This defendant, who now appeals, is the adopted child of a deceased cousin of the testator, Charles Stansfeld Jones, and he claims by substitution the share which that cousin would have taken had he survived the period of distribution of the testator's estate.

The facts are not in dispute. The testator was domiciled in England and made his will on Apr. 12, 1945. After appointing Barclays Bank, Ltd. to be the executor and trustee thereof he devised and bequeathed the residue of his estate to the bank on the administrative trusts expressed in Form 8 of the Statutory Will Forms, 1925, and directed the bank to pay the annual income of his residuary estate to his wife Adela Rose Marshall during her life and further directed the bank to permit his wife to have the use of certain personal chattels during her life. After then specifically devising certain properties to which he would become entitled on the death of his wife under his marriage settlement, the testator (by cl. 14 of the will) bequeathed on the death of his wife a number of legacies, including a specific legacy of the articles set out in sub-cl. (d) of cl. 14, which he gave to such of four cousins whom he named as might be then living

> "and the following descendants of my late aunt Mrs. Eliza Jones viz. (a) such of the three children of his first marriage of the late Claude Percy Jones . . . as shall then be living (b) Charles Stansfeld Jones (c) Eliza Clara Frances Jones . . . and (d) Anne Gertrude Jones . . . in equal shares except that the children of the late Claude Percy Jones shall take between them one share only (to be equally divided between them if more than one) Provided always that should any of the above cousins be then dead leaving issue then living such issue shall take the share which his, her or their parent would have taken had such parent survived me and my said wife and if more than one in equal shares."

By cl. 15 of the will the testator gave devised and bequeathed all the residue of his real and personal estate not thereby or by any codicil thereto otherwise disposed of

> "to the same persons and in the same shares and subject to the same provisions as set out in sub-cl. (d) of cl. 14 hereof".

It is agreed by the parties, and is indeed clear, that, having regard to the context in which it appears, the word "issue" in the proviso to cl. 14 (d) of the will is to be construed as meaning "children".

The testator died on June 14, 1945, and his will was duly proved by the bank. The testator's widow survived him and died on Jan. 21, 1955. The Charles Stansfeld Jones named in the will pre-deceased the widow, his death occurring on Feb. 24, 1950. On the death of the widow the testator's chattels and residuary estate fell to be distributed and it is only necessary for present purposes to say that the question in issue is whether the eighth defendant, the adopted child of Charles Stansfeld Jones, is entitled to share in the division of the property (which is worth some £30,000) together with the first seven defendants. The claim of the ninth defendant so to share was disallowed by the learned judge and she has not appealed against his decision.

It appears from the evidence that Charles Stansfeld Jones emigrated many years ago and had become domiciled in British Columbia by, at all events, 1912. He was married but had no issue. The adopted child was born on Aug. 25, 1934, at Vancouver, British Columbia, and his parents were domiciled there. On Mar. 9, 1945, he was legally adopted by Mr. and Mrs. C. S. Jones under an order of the Supreme Court of British Columbia. The order was entitled:

> "In the matter of the 'Adoption Act' being Chapter 6 of the Revised Statutes of British Columbia 1936 and In the matter of Anthony Yates",

which was, at the time of the order, the adopted child's name. The order provided that the adopted child

> "born on Aug. 25, 1934, at the City of Vancouver, in the Province of British Columbia, be and is hereby jointly adopted by Charles Robert Stansfeld-Jones and Prudence Rubina Stansfeld-Jones the Petitioners herein";

and it was further provided that the adopted child should take and should thereafter be known by the name of Anthony Francis Stansfeld-Jones. Thenceforward the adopted child lived with Mr. and Mrs. C. S. Jones, as also did the ninth defendant, whom the Jones had adopted some years previously*, but without obtaining an order from the court.

Inasmuch as Charles Stansfeld Jones pre-deceased the testator's widow the question is, accordingly, whether the adopted child is entitled by substitution to the share of the testator's chattels and residue which his adoptive father would have taken had he survived the testator's widow. The learned judge's decision that the adopted child is not so entitled was based on the restricted scope of the adoption legislation which obtained in British Columbia in 1945, when the testator died. He would, however, have decided in the adopted child's favour if the matter had depended on the law as it stood in the province when the widow died in January, 1955. His view was, therefore, favourable to the adopted child on the issue whether he could in any event be treated as a " child " for the purposes of the testator's will, notwithstanding that he was only a child by adoption, but unfavourable to him on the question whether the adopted child's rights and status fell to be decided without regard to the legislation of British Columbia which was passed subsequently to the testator's death.

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* The ninth defendant was adopted in British Columbia in 1913 (see [1957] 1 All E.R. 552, letter A).

It was a matter of considerable argument before us, and one on which conflicting authority was drawn to our attention, whether in any circumstances a child of foreign domicil, who is adopted by a person of the same domicil and in accordance with the law of that domicil, can take under a gift to the child of that person contained in the will of a domiciled Englishman. The learned judge in the present case summed up his answer to this question as follows ([1957] 1 All E.R. at p. 556):

> "If, therefore, I had been of opinion that 1955 was the relevant date, I should have held the eighth defendant entitled to share with the first seven because he and his adoptive parent were both domiciled in British Columbia when he was adopted. I am aware that this is not consistent with the view of BARNARD, J., in *Re Wilby* (1) ([1956] 1 All E.R. 27). He was impressed with the difficulty for an English judge of estimating the effect of foreign systems of law. This is no doubt formidable, but is a task often faced. It is in English courts a question of fact to be ascertained on proper evidence of skilled persons. It does not prevent the law of the domicil prevailing in cases of legitimation by other means, and should not do so, in my view, in cases of adoption which is a kind of legitimation. In any event, *Re Luck, Walker* v. *Luck* (2) ([1940] 3 All E.R. 307), which was apparently not cited to BARNARD, J., points in this direction, and I think I ought to follow it."

This view of the learned judge is largely based on the application to adoption of principles which have become well established in relation to legitimation by such cases as *Re Goodman's Trusts* (3) ((1881), 17 Ch.D. 266), and *Re Andros, Andros* v. *Andros* (4) ((1883), 24 Ch.D. 637); that is to say, that the relevant inquiry in such cases as the present is as to the status of the adopted child, and that it can only be answered by reference to the domiciliary law of the child and the adopter which, when proved, will be accepted and applied by our courts. This has been regarded as the right approach to the problem in, for example, *Purcell* v. *Hendrick* (5) ((1925), 35 B.C.R. 516); *Re Brophy, Yaldwyn* v. *Martin* (6) ([1949] N.Z.L.R. 1006); and *Re Pearson, Equity Trustees Exors. & Agency Co., Ltd.* v. *Michaelson-Yeates* (7) ([1946] V.L.R. 356).

As against this, counsel for the other beneficiaries argued before us that no adopted child in the position of the appellant adopted child can take under a gift in an English will to the " child " of the adopter, however extensive the language of the relevant foreign legislation may be. Counsel's contention is that (apart from the provisions of the Adoption Act, 1950, which are irrelevant for present purposes) under a gift to the child of A. in an English will, no one can take unless he can show that he is in fact the child of A., viz., the result of the procreative act of A. The adopted child, says counsel for the other beneficiaries, was not the child of Charles Stansfeld Jones in this sense and the legislation of British Columbia could not turn him into such a child. This way of looking at the matter has the unanimous support of the Supreme Court of Canada in *Re Donald, Baldwin* v. *Mooney* (8) ([1929] 2 D.L.R. 244).

A In the view which we take of this case it is unnecessary for us to express any concluded opinion on whether the adopted child or the other beneficiaries are right on this difficult question and we prefer to refrain from doing so. Before leaving the point, however, we should say that we doubt whether as much guidance on it is afforded by the decision of this court in *Re Luck* (2) ([1940] 3 All E.R. 307) as HARMAN, J., appears to have thought. The lex domicilii B with which the court was concerned in that case was the law of California, and it is pointed out (rightly as we think) in a footnote to p. 408 of CHESHIRE'S PRIVATE INTERNATIONAL LAW (5th Edn.) that

> " it is important to notice, as F. A. Mann has shown (57 LAW QUARTERLY REVIEW 119), that the Californian method was not adoption, but legitimation by recognition. The unwary might assume from the judgments in the C Court of Appeal that it was equivalent to adoption in the English sense."

We think there is no sufficient reason to suppose that any of the members of this court were directing their attention to a position such as exists in the present case.

Before stating the reasons which have led us to the conclusion that this appeal D must fail it is convenient that we should refer to the legislation regarding adoption in British Columbia. This legislation, in so far as it was drawn to our attention, consists of the Adoption Act (1920) and certain amendments which were made from time to time thereto. As to the Act of 1920 it is only necessary for present purposes to refer to ss. 7, 8 and 10 thereof, which provide as follows:

> "7. Upon the making of the order of adoption: (a) The natural parents E of the minor, and any previous parent by adoption, and the guardian or person in whose custody the minor has been shall be divested of all legal rights in respect of the minor, and shall be freed from all legal obligations and duties in respect of the minor as from the date of the order: (b) The minor shall take the surname of the petitioner as his parent by adoption, or such name as the court on the request of the petitioner may order: F (c) The parent by adoption and the minor shall sustain toward each other the legal relation of parent and child, and shall respectively have all the rights and be subject to all the obligations and duties of that relation, including the right of inheritance and succession to real and personal property from each other, except as those rights are affected by the provisions of this Act.
>
> G " 8 (1) As to inheritance and succession to real and personal property, a minor adopted in accordance with the provisions of this Act shall stand in regard to the legal descendants, but to no other of the kindred of his parent by adoption, in the same position as if born to that parent in lawful wedlock. (2) No person shall by being adopted lose his rights of inheritance and succession to real and personal property from his natural parents or kindred. H (3) If a person adopted dies intestate, his real and personal property received by gift, will, settlement, inheritance, or succession from his natural parents or kindred shall be distributed in the same manner as if no adoption had taken place; and all his other real and personal property shall be distributed in the same manner as if he had been born to his parent by adoption in lawful wedlock.
>
> I "10. The word 'child', or its equivalent, in a will, grant, or settlement shall include a child adopted by the testator, grantor, or settlor, unless the contrary plainly appears by the terms of the instrument."

By virtue of an amending Act of 1936 the words " or issue " were introduced after " child " where that word appears in the first line of s. 10 of the Act of 1920. Subject only to that amendment (which has no bearing on the present case) the rights and obligations arising from legal adoptions in British Columbia at the testator's death in 1945 were governed by the Act of 1920. In 1948 a further

Act was passed. Section 9 and s. 10 of this Act re-enacted, subject to alterations which are not material to the present case, s. 7 and s. 8 of the Act of 1920. Section 12 provided:

> "The word 'child' or 'issue', or its equivalent in a will, grant or settlement shall include an adopted child, unless the contrary plainly appears by the terms of the instrument."

It will be noted that this provision considerably extended s. 10 of the Act of 1920 (as amended in 1936) under which the word "child" or "issue" was only to include an adopted child in an instrument executed by the adoptive parent. By a short amending Act of 1953, s. 10 (1) of the Adoption Act, 1948, was amended by striking out therefrom the words "the legal descendants, but to no other of". For the sake of clarity, and as this amendment was of obvious importance, we will read s. 10 (1) of the Act of 1948 as so amended:

> "As to inheritance and succession to real and personal property, a person adopted in accordance with the provisions of this Act shall, subject to the provisions of sub-s. (2) of s. 3, stand in regard to the kindred of his parent by adoption in the same position as if born to that parent in lawful wedlock."

The foregoing legislation* was that which was in force in British Columbia in January, 1955, when the testator's widow died. In March, 1956, a further Act was passed. This amended the Act of 1948 by striking out s. 9 and s. 10 and substituting (so far as relevant for present purposes) the following:

> "9 (1) For all purposes an adopted child becomes upon adoption the child of the adopting parent, and the adopting parent becomes the parent of the child, as if the child had been born to that parent in lawful wedlock. (2) For all purposes an adopted child ceases, upon adoption, to be the child of his existing parents (whether his natural parents or his adopting parents under a previous adoption) and the existing parents of the adopted child cease to be his parents. (3) The relationship to one another of all persons (whether the adopted person, the adopting parents, the natural parents or any other persons) shall be determined in accordance with sub-ss. (1) and (2)."

Now, without deciding the question one way or the other, we are prepared to assume in the adopted child's favour, for the purposes of this appeal, that a child who has been adopted under the law of his domicil is not of necessity precluded from taking a gift in an English will to the "child" of his adoptive parent by reason only of the fact that he was not procreated by the adopter. But the making of the assumption necessarily involves attributing to the testator, in using the word "child", an intention different from that which he is presumed by our courts to have. It is established beyond controversy that when an English testator speaks of "the children" of A. he is prima facie taken to be referring, and referring only, to those persons of whom it can be postulated that they are the lawful children of A. The rule is clearly stated in Hawkins on Wills (3rd Edn.), at p. 102. Further than, and by analogy to, this we agree with the view which Roxburgh, J., expressed in *Re Fletcher* (9) ([1949] 1 All E.R. 732 at p. 735) to the effect that adopted children are prima facie excluded by the rule equally with illegitimate children. If, then, a different intention is to be attributed to a testator so far as adopted children of foreign domicil are concerned, the rule should not be departed from, in our judgment, further than is necessary; and it is neither permissible nor possible to suppose that the testator intended to bring into the category of children all persons who have been adopted under the lex domicilii, however limited the effect of their adoption may be. It seems to us that only those who are placed by adoption in a position, both as regards property rights and status, equivalent, or at all events substantially equivalent, to that of the natural children of the adopter can be treated as being within the scope of the testator's contemplation. Such a position was conferred by the amending Act of British Columbia which was enacted in 1956. That Act, however, cannot avail the adopted child on any view of the matter, for the date of distribution was already past; and it is necessary, therefore, to inquire whether the earlier legislation was sufficient in its effect to enable the adopted child to succeed.

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* That is to say, the legislation consisting of the Adoption Act, 1920, and the amending Acts of 1936, 1948, and 1953, which legislation, in so far as it was then subsisting, had been embodied successively in the Revised Statutes of British Columbia, 1924, 1936 and 1948.

As a preliminary to this inquiry the question arises whether the relevant legislation was that which existed in 1945, when the testator died, or whether account should also be taken of the amendments which were introduced after the testator's death but before the death of his widow ten years later. The learned judge held that the relevant legislation was the Act of 1920 as amended in 1936, and that the subsequent amendments do not affect the matter. We agree with the learned judge in this conclusion, although he expressed it in language which is perhaps open to some misunderstanding. He is reported to have said ([1957] 1 All E.R. at p. 553):

> "Now, in my judgment, 1945, the testator's death, and not 1955, the widow's death, is the relevant date. It is true that interests in remainder after her death did not vest until that event. Nevertheless, it seems to me that the class of persons capable of taking must be capable of ascertainment when the will first comes into operation. The eighth defendant was not then such a person."

It might be thought from this, as indeed it was thought in *Re Stuart* (10) (June 28, 1957, unreported) which was decided last month in the Supreme Court of British Columbia by WHITTAKER, J., a copy of whose judgment was made available to us, that the learned judge was overlooking the well established rule that, under a gift to A. for life with remainder to the children of B. then living, all the children of B. who are living at the death of A. will take, whether born in the lifetime of the testator or not. We are well persuaded that the learned judge was not intending to negative this elementary proposition. What, in our opinion, the judge was saying was that the legal status on which the capacity of members of the class who would or might take in the future depended was to be determined once and for all by reference to the state of affairs which existed at the testator's death. It appears to us that this is plainly right. On the hypothesis, accepted for the purposes of this judgment, that the testator may be taken to have intended to include in his reference to children persons who achieved by adoption the rights and status which we have indicated above, we are unable to attribute to him the intention of extending his benevolence to persons who did not acquire such rights and status until after his death.

The contrary view would lead to most surprising and inconvenient results. Supposing that in the present case C. S. Jones had in fact had a child of his own when the testator died. Such a child would know that, under the rule of construction to which we have referred, he would have to share the beneficial interest given to C. S. Jones' children with any brothers and sisters that might be born before the date of distribution. But is it to be supposed that the testator intended that such a child would also have to share his interest with any children, however many there might be, whom his father chose to adopt during the lifetime of the testator's widow? And is an intention to be attributed to the testator that, on the same supposition, C. S. Jones' own child would have to share his interest with an adopted child who, at the testator's death, had only limited rights of succession but who became entitled by subsequent (albeit retrospective) legislation to the full rights and status of a child of the adoptive father? We cannot but think that each of these questions requires a negative answer. It may well be that a child, illegitimate at the testator's death, who was legitimated subsequently under legislation in force in the testator's lifetime, would be held to qualify; but that is because there existed in the child, from the moment when the will came into operation, the potentiality of achieving the requisite status. But a child who, at the testator's death, was unadopted or who, though adopted and possessing limited privileges, could only hope to attain the necessary status if it were to be conferred by subsequent legislation cannot be said to enjoy any comparable potentiality.

Accordingly, we think that, so far as adopted children are concerned, their status and capacity to take under a gift to " children " in an English will is (subject, of course, to British legislation) fixed once and for all at the testator's death and that subsequent legislation in the country of their domicil enlarging their rights is to be disregarded. This view would appear to be consonant with principles of long standing in relation to succession. In *Lynch* v. *Paraguay Provisional Government* (11) ((1871), L.R. 2 P. & D. 268), Lord Penzance said (ibid., at p. 271):

> " The general proposition that the succession to personal property in England of a person dying domiciled abroad is governed exclusively by the law of the actual domicil of the deceased was not denied; but it was affirmed by the plaintiff that this proposition had relation only to the law of the domicil as it existed at the time of the death of the individual in question, and that no changes made in that law after the date of the death can by the law of this country be recognised as affecting the distribution of personal property in England. This contention appears to me well founded ";

and Lord Penzance added (ibid., at p. 272) that the position would be the same even though the subsequent foreign legislation had a retrospective effect. This case was followed in *Re Aganoor's Trusts* (12) ((1895), 64 L.J.Ch. 521) and was referred to without disapproval by some of their Lordships in *Starkowski* (*by his next friend*) v. *A.-G.* (13) ([1953] 2 All E.R. 1272).

Counsel for the adopted child was concerned to argue that the relevant time for ascertaining the adopted child's status under the law of British Columbia was the date of distribution. He said (and rightly) that support for that view is to be found in the judgment of Farwell, J., in *Re Luck* (2) ([1940] 1 All E.R. 375). With regard to that, however, it is to be observed, first, that the decision of Farwell, J., was reversed on appeal ([1940] 3 All E.R. 307) and, secondly (as already stated) that the question in that case was one of legitimation rather than one of adoption. Support is also lent to counsel's contention by *Re Stuart* (10) (June 28, 1957, unreported), in which adoption legislation passed after the testator's death but prior to the date of distribution was regarded as relevant to the determination of a question similar to that in the present case. For the reasons, however, which we have stated, we are of opinion that, in considering the adopted child's claim to share in the testator's estate as a " child " of C. S. Jones, regard must be had to the Adoption Acts of 1920 and 1936 and to those alone.

On that assumption we are clearly of opinion that the judge's disallowance of the adopted child's claim was right. The construction and effect of a foreign statute depends, of course, on the law of the country in which it was enacted and this is treated in our courts as a question of fact. No evidence was given in these proceedings by a qualified expert as to the construction which would be placed on the Adoption Acts of British Columbia by the courts of that province. Nevertheless, the parties were in agreement before us that we should approach the construction of these Acts as though they were British Acts of Parliament. There is, we think, no difficulty in construing them on this footing, couched as they are in the English language and containing no terms of art or expressions which are unfamiliar to us. On the construction, then, of the Act of 1920, as amended in 1936, it is quite clear to us that such rights and privileges as it conferred on adopted persons fall far short of those which characterise the status of a child. It is true that under s. 7 of the Act the natural parents of an adopted child are divested of all legal rights in respect of him and are freed from all legal obligations and duties towards him; and that after the adoption the parent by adoption and the minor are to assume towards each other the legal relation of parent and child and to have all the rights and be subject to all the obligations and duties of that relationship. However, in matters of inheritance and succession the rights of the adopted child were to be of a very limited character. In such matters it was only

> " in regard to the legal descendants, but to no other of the kindred of his parent by adoption "

that a child was, by s. 8 (1), to stand in the same position as if born to that parent in lawful wedlock; and by s. 10 it was only in a will, grant or settlement executed by the adoptive parent himself that the word " child " was to include an adopted child in the absence of a contrary intention, and not in instruments executed by other persons. It appears to us to be quite impossible to suppose that an English testator, in a bequest to " children ", could have in contemplation adopted children with such limited rights as these.

That view of the matter is sufficient to dispose of the appeal and it becomes unnecessary to decide whether the adopted child would have succeeded if his position were governed by the Act of 1953. The learned judge was of opinion that he would. He said ([1957] 1 All E.R. at p. 554):

> " In 1953, however, s. 10 (1) of the [Act of 1948*], which in effect repeated s. 10 (1) of the Act of 1936*, was amended by striking out the words ' the legal descendants, but to no other of '. The effect of this is that an adopted person stands in regard to the kindred of his parent by adoption in the same position as if born of that parent in lawful wedlock. If, therefore, the British Columbian legislation is to be followed in England and the relevant date is the death of the widow, the eighth defendant would be entitled to succeed."

We are not altogether sure of this. The amendment to which the learned judge referred did undoubtedly advance the position of adopted children considerably beyond that enjoyed under the earlier legislation. Nevertheless it still fell a good deal short of the status of a child in the true sense; and it was not until the Act of 1956 was passed that the difference between the two categories of children was reduced to vanishing point. It was argued before us by counsel for the adopted child that the Act of 1956 added nothing of material significance to its predecessors but it does not seem to us that this is correct. For example, one effect of s. 9 (1) as substituted by s. 2 of the Act of 1956 would appear to be that an illegitimate child becomes legitimated if it is adopted by its parent, a result which would not have been achieved under the earlier law. Again, if the domicil of origin of an adopted infant is different from that of the adopter's domicil, it may well be that the child's domicil would be regarded thenceforth as that of the adoptive parent if adoption was effected under the later Act; but no such change would have been effected under the provisions of the previous legislation. Accordingly we entertain some doubt whether a person in the position of the adopted child could in any event be regarded as possessing the requisite status of a " child " of C. S. Jones for the purposes of an English will unless the order for his adoption had been made since the passing of the Act of 1956. It is not, however, necessary to decide this and we refrain from doing so.

The appeal must be dismissed. *Appeal dismissed.*

Solicitors: *Knapp-Fisher, Wartnaby & Blunt* (for the adopted child, the eighth defendant); *Candler, Stannard & Co.* (for the other beneficiaries, the first seven defendants); *McMillan & Mott* (for the trustees of the will, the plaintiffs).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

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* I.e., s. 10 (1) of R.S. 1948 c. 7 and R.S. 1936 c. 6 respectively.

Re BANQUE DES MARCHANDS DE MOSCOU (KOUPETSCHESKY).

[CHANCERY DIVISION (Roxburgh, J.), July 5, 9, 10, 11, 12, 23, 1957.]

Company—Winding-up—Foreign bank dissolved abroad—Winding-up in England—Surplus assets—Who is entitled—Companies Act, 1929 (19 *&* 20 *Geo*. 5 *c*. 23), *s*. 338 (1) (*d*).

A bank incorporated in 1866 under Russian law as a company limited by shares was dissolved prior to May 30, 1932, under Soviet-Russian law. On May 30, 1932, a winding-up order was made in England in respect of the bank under the Companies Act, 1929, s. 338 (1) (d), on the footing that the bank was an unregistered company which had then been dissolved, the order being "without prejudice to the claim of the Crown to any of the assets of the [bank] which may have become bona vacantia". The question arose who was entitled to the surplus assets of the bank after satisfying all its liabilities and the costs and expenses of the liquidation. Evidence was given that the effect of the Russian law was that whatever the date of the dissolution of the bank, the bank's assets, so far as they had not been effectively confiscated by the Soviet legislation, were converted into the common ownership of its late shareholders; and that this situation had remained unaffected by any subsequent Soviet legislation.

Held: the surplus assets which were by English law unaffected by the Soviet-Russian legislation for the confiscation of the assets of the bank were not at present payable to the Crown as bona vacantia, but should be dealt with in accordance with Part 5 of the Companies Act, 1948, and on the footing that on the dissolution of the bank the former shareholders of the bank became entitled to participate in any available assets to an extent bearing the same proportion to the assets as their shares bore to the total issued capital of the bank at the date of its dissolution.

Re Azoff-Don Commerical Bank ([1954] 1 All E.R. 947) applied.

Russian & English Bank & Florance Montefiore Guedalla v. *Baring Bros. & Co., Ltd.* ([1936] 1 All E.R. 505) considered.

[**Editorial Note.** The section of the Companies Act, 1948, comparable to s. 338 (1) of the Companies Act, 1929, is s. 399, and that comparable to s. 342 of the Act of 1929 is s. 404 of the Act of 1948.

As to the winding-up of a foreign company, see 6 HALSBURY'S LAWS (3rd Edn.) 843, 844, para. 1729, and as regards bona vacantia in such circumstances, see ibid., p. 845, para. 1732; and for cases on the subject, see 10 DIGEST (Repl.) 1302-1307, *9172-9203*.

For s. 399 and s. 404 of the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 754, 758.]

Cases referred to:

(1) *Russian & English Bank & Florance Montefiore Guedalla* v. *Baring Bros. & Co., Ltd.*, [1936] 1 All E.R. 505; [1936] A.C. 405; 105 L.J.Ch. 174; 154 L.T. 602; 10 Digest (Repl.) 1298, *9154*.

(2) *Re Higginson & Dean, Ex p. A.-G.*, [1899] 1 Q.B. 325; 68 L.J.Q.B. 198; 79 L.T. 673; 4 Digest 490, *4403*.

(3) *Re Henderson's Nigel Co., Ltd.*, (1911), 105 L.T. 370; 10 Digest (Repl.) 1105, *7641*.

(4) *Re Azoff-Don Commercial Bank*, [1954] 1 All E.R. 947; [1954] Ch. 315; 10 Digest (Repl.) 1302, *9174*.

(5) *Re Banque Industrielle de Moscou*, [1952] 2 All E.R. 532; [1952] Ch. 919; 10 Digest (Repl.) 1303, *9178*.

A (6) *Buerger* v. *New York Life Assurance Co.*, (1927), 96 L.J.K.B. 930; 137 L.T. 431; Digest Supp.

(7) *Deutsche Bank und Disconto Gesellschaft* v. *Banque des Marchands de Moscou* (*Koupetschesky*), (1930 D. No. 1435), unreported.

Summons.

B This summons was issued by the liquidator of the Banque des Marchands de Moscou (Koupetschesky) for the determination of the question whether the surplus assets of the bank remaining after satisfying all its liabilities and the costs and expenses of the liquidation (i) passed to the Crown as bona vacantia, or (ii) were distributable among the contributories of the bank in accordance with the provisions of Part 5 of the Companies Act, 1948, or (iii) were distributable C or applicable in some other and if so what manner.

Peter Foster, Q.C., and *Raymond Walton* for the liquidator.
R. O. Wilberforce, Q.C., and *Denys B. Buckley* for the Attorney-General.
Charles Russell, Q.C., and *M. M. Wheeler* for the contributories.

Cur. adv. vult.

D July 23. **ROXBURGH, J.**, read the following judgment: The Banque des Marchands de Moscou (Koupetschesky) (hereinafter called "the bank") was incorporated in 1866 under the laws of Imperial Russia as a company limited by shares. It carried on banking business until, and it may be after, the Russian revolution.

Prior to May 30, 1932, the bank had been dissolved under Russian law. On E that date a winding-up order was made in this court under the Companies Act, 1929, s. 338 (1) (d), on the footing that the bank was an unregistered company which had been dissolved, and the order contained the following provision:

> "And this order is without prejudice to the claim of the Crown to any of the assets of the said company which may have become bona vacantia."

F Section 338 (1) opened with the words:

> "Subject to the provisions of this Part of this Act, any unregistered company may be wound-up under this Act, and all the provisions of this Act with respect to winding-up shall apply to an unregistered company, with the following exceptions and additions . . ."

G A number of exceptions and additions irrelevant to the present purpose followed, and s. 342 of the Act of 1929 enacted:

> "The provisions of this Part of this Act with respect to unregistered companies shall be in addition to and not in restriction of any provisions hereinbefore in this Act contained with respect to winding-up companies by the H court . . ."

The sections of the Act of 1929 which were particularly germane were the following. Section 211 which provided that:

> "The court shall adjust the rights of the contributories among themselves, and distribute any surplus among the persons entitled thereto."

I Section 221 (1) which provided:

> "When the affairs of a company have been completely wound up, the court shall make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly."

Section 296 which provided:

> "Where a company is dissolved, all property and rights whatsoever vested in or held on trust for the company immediately before its dissolution

> (including leasehold property but not including property held by the company on trust for any other person) shall, subject and without prejudice to any order which may at any time be made by the court under the two last foregoing sections of this Act, be deemed to be bona vacantia and shall accordingly belong to the Crown, or to the Duchy of Lancaster or to the Duke of Cornwall for the time being, as the case may be, and shall vest and may be dealt with in the same manner as other bona vacantia accruing to the Crown, to the Duchy of Lancaster or to the Duke of Cornwall."

A

B

First of all, I shall deal with the question of bona vacantia without regard to the provision in the order dealing with that topic. I will then consider whether the special provision in the order has any effect.

The problem of applying the provisions of that Act with respect to the winding-up of companies to a dissolved company produced divisions of opinion in the House of Lords (see *Russian & English Bank & Florance Montefiore Guedalla* v. *Baring Bros. & Co. Ltd.* (1), [1936] 1 All E.R. 505). For example, LORD RUSSELL OF KILLOWEN (who was one of the dissentients) said (ibid., at p. 523):

C

> "The application of s. 338 to the case of a dissolved foreign corporation is no doubt on any view of the present appeal full of difficulties. Many of the provisions contained in Part 5 cannot, if read strictly, apply to such a case. Thus, strictly speaking, there could not be a petition presented by a creditor; there are no creditors of a dissolved company. Nor could a list of contributories be settled. Nor are there any assets of a dissolved company."

D

And again later (ibid.):

E

> "A Russian corporation . . . was dissolved and ceased to exist seventeen years ago. The property which it owned in this country thereupon became the property of the Crown. After the lapse of some fourteen or fifteen years an order is made under s. 338. Upon the happening of that event, it is alleged, the Act . . . enacts . . . that dissolved foreign corporations are to arise from the grave in full life and vigour, and entitled to sue to recover property which for fourteen or fifteen years has been the property of the Crown: or that they are to be so entitled notwithstanding that they do not exist. My Lords, I confess frankly that I find myself unequal to the task of assenting to this view."

F

Again, I cite an extract from the dissenting speech of LORD MAUGHAM (ibid., at p. 530):

G

> "It would seem clear that upon the dissolution of the company according to Russian law its chattels in this country, in the absence of any claim to them by the Russian government, belonged to the Crown as bona vacantia (see *Re Higginson & Dean, Ex p. A.-G.* (2), [1899] 1 Q.B. 325). Under s. 296 (a new section which first appeared in the Act of 1928) the same result would follow, but subject and without prejudice to any order under s. 294 or s. 295. Neither of those sections could be invoked in the present case, and it would seem that unless the Crown waives its claim to the assets in question (as in the case of *Re Henderson's Nigel Co., Ltd.* (3) (1911), 105 L.T. 370) there will be no assets available for distribution."

H

These views did not commend themselves to the majority. I quote one passage from the speech of LORD ATKIN ([1936] 1 All E.R. at p. 518):

I

> "The legislature has provided that a dissolved foreign corporation may be wound-up in accordance with the provisions of the Companies Act. The provisions of the Companies Act as to winding-up are only applicable to corporations which are in existence. Are we to say that the legislative enactment is completely futile: or is there another solution? My Lords, I think that we are entitled to imply, indeed I think it is a necessary implication,

> that the dissolved foreign company is to be wound-up as though it had not been dissolved, and therefore continued in existence. This seems to me with respect the necessary result of saying that it shall be wound-up in accordance with the provisions of the Act. There is nothing abnormal in such a provision. The municipal law of this country as of other countries accepts the principle of international law that countries ordinarily accept the existence of juristic persons brought into being or recognised as existing in their country of origin. Similarly they accept the destruction or cessation of such a juristic personality under the law of its country of origin. But if the municipal law choose, it may in defined conditions refuse to accept or may accept only under conditions either the creation or destruction of a foreign juristic person: whether it has done so is for the municipal court to decide, but if it has then the municipal court must accept the situation. I see nothing incongruous in the legislature saying in effect, we accept the existence of a foreign corporation coming to trade in this country; we shall only impose a condition of registration. But if the corporation does trade here, acquires assets here, and incurs debts here, we shall not accept its dissolution abroad without a stipulation that if desirable it may be wound-up here so that its assets here shall be distributed amongst its creditors (I do not stay to consider whether its English creditors or creditors generally) and for the purpose of the winding-up it shall be deemed not to have been dissolved: for that event would defeat our municipal provisions for winding-up a corporation. This does not appear to me to be recreating or reconstituting a new corporation; it is for particular and limited purposes refusing to recognise the dissolution of the old."

It is indeed strange that counsel did not in that case draw attention to the Joint Stock Companies Winding-Up Act, 1848 (11 & 12 Vict. c. 45). Had they done so, it is possible that the decision might have been unanimous, because it is clear that the procedure of treating a dissolved company as continuing in existence for the purpose of winding it up was well established and understood in England some hundred years ago, and although such confused notions seem to have been abandoned in connexion with English companies soon afterwards, the very similar provisions with regard to dissolved foreign corporations which were subsequently introduced seem to represent a deliberate revival of discarded notions.

One of the grounds for making a winding-up order under the Act of 1848 was "if any company shall have been dissolved" (ibid., s. 5, para. 7). Among the duties of the official manager (under the master's directions) was getting in, selling, and converting the estate and assets and winding-up the business and affairs of the same company, in paying the debts (as therein provided) and in dividing and distributing the surplus assets of the company (whether existing at the time of the dissolution or arising from subsequent calls or contributions or otherwise) among the parties entitled (ibid., s. 34). The sidenote to s. 50 of the Act of 1848 is: "Dissolved companies to sue and be sued in the name of the 'official manager' of the particular company", and a form of order (No. 2) in the Schedule provides:

> "His Lordship doth order that the (blank) company be absolutely dissolved as from this day (or from the blank day of (blank)) and wound up under the provisions of the [Act]."

From that Act I draw the following deductions: (i) That in 1848 Parliament saw no objection in principle or practice to dissolving a company before winding-up its affairs. (ii) That for this purpose it treated the dissolved company as continuing in existence. (iii) That an order for winding-up in the case of a dissolved company displaced the title of the Crown to assets as bona vacantia so far as was necessary for the payment of debts and the distribution of surplus assets among the "parties entitled". I have not been referred to any case in which the

Crown sought to interpose a claim to bona vacantia between creditors and former members. A

This seems to have been likewise the scheme of the provisions which caused so much difficulty in the House of Lords. It is now well settled that an order for winding-up a dissolved foreign corporation under the Act of 1929 or the Act of 1948 defeats the title of the Crown to assets as bona vacantia so far as may be necessary to pay former creditors, and may be made in face of opposition by the Crown: see B *Re Azoff-Don Commercial Bank* (4) ([1954] 1 All E.R. 947). But why stop there? The reasoning of WYNN-PARRY, J., in that case necessarily embraces beneficiaries as well as creditors (ibid., at p. 952):

> " Once it is shown, as, in my view, I have shown, that a section in Part 5 of the Act cuts down the Crown's prerogative by necessary implication, C it follows that every other applicable section of that Part has the same operation if that result is necessary to its effective working."

With this I agree. Now s. 338 and s. 342 of the Act of 1929 and the corresponding s. 399 and s. 404 of the Act of 1948 provide that if an order to wind-up a dissolved company is made, certain other sections, including s. 211, s. 221 and s. 296 of the Act of 1929 (or the corresponding s. 265, s. 274 and s. 354 of the Act of D 1948) shall apply. These provisions are no less mandatory than those affecting creditors, or persons described as creditors, and the reasoning which displaces the Crown's original claim to assets as bona vacantia cannot be halted to the detriment of the parties entitled thereto unless it could be said that in the circumstances the Crown is " the persons entitled thereto." But if s. 211, s. 221 and s. 296 of the Act of 1929 or s. 265, s. 274 and s. 354 of the Act of 1948 are E read together, it is in my judgment impossible to hold that the phrase " persons entitled " means the Crown by virtue of its prerogative right to bona vacantia. It is true that in the earlier case of *Re Banque Industrielle de Moscou* (5) ([1952] 2 All E.R. 532) WYNN-PARRY, J., said (ibid., at p. 534):

> " . . . in a case such as this, where the company has been dissolved long ago under the laws of the country of its incorporation, there can, of course, F be no question as regards contributories."

But I prefer his reasoning in the later case, and no argument has been addressed to me on the basis that the lapse of time is relevant. This reasoning seems also to exclude the possibility that the special condition inserted in the order can affect the position. The court has a discretion in relation to the making of an G order, but none as to its operation when made. By force of the statute itself, which is imperative, the title of the Crown is postponed to the persons entitled to surplus assets. In the case of *Re Banque Industrielle de Moscou* (5), which I have cited previously, WYNN-PARRY, J., construed a provision of this sort on the footing that it was effective, but no argument to the contrary seems to have been addressed to him. But of course the Crown's title to assets as bona H vacantia is only excluded in favour of persons who can prove their title to surplus assets. If the valid claims do not exhaust them, s. 274 of the Act of 1948 will be put in operation in favour of the Crown; and, as this was a Russian corporation, which had been dissolved under Russian law, title must be made under the same law.

Russian law is in an English court a question of fact, and the normal course, I when there is a dispute as to foreign law, is for each side to call experts, who usually differ. Then the judge has the comparatively easy task of choosing between them. In this case, however, the Crown elected to call no evidence, and to decline my invitation to do so, and contented itself with an extensive and able cross-examination of the expert called on behalf of the personal representative of a deceased Russian former shareholder, as a substitute for evidence. The risks involved in such a course are well illustrated by *Buerger* v. *New York Life Assurance Co.* (6) ((1927), 96 L.J.K.B. 930) in the Court of Appeal in which a similar situation occurred. In the course of his judgment, ATKIN, L.J., said (ibid., at p. 940):

> " Now this being the uncontradicted evidence of a Russian lawyer, and the Russian Department of Justice, as to what the law is in Russia today, the defendants, without calling any evidence, ask us to say that the lawyer and the department are mistaken; that the Russian law is something different and that the law in Russia really is that Russian subjects cannot claim against foreign insurance companies. They say that we are bound to come to this conclusion on the interpretation of the decree of Nov. 18, 1919, on which we are to put our own construction. Such a result would appear to me to go far beyond the law and practice relating to the proof of foreign law. It is not sufficient to prove a foreign statute or code by a translation, and then leave the court to place its own construction on it. The code must be interpreted by an expert in the foreign law. It is, of course, true that when he vouches a statute to support his evidence the statute forms part of his evidence, and must be considered in the consideration of his evidence as a whole. And it is also true that where experts on the foreign law differ amongst themselves the court will often have to resolve the conflict by looking at the statutes or documents and deciding for themselves the more probable contention. And this course will be more readily undertaken where the dispute is as to the effect of legislation, as in the United States of America, expressed in English in respect of a jurisprudence which is known to the English judges. And it may also happen occasionally that a foreign expert may arrive at results so extravagant and involving such a misunderstanding of conceptions familiar to lawyers of all countries that an English court may have to reject his evidence, and eventually come to the conclusion that they can safely interpret the words for themselves, or fall back upon the presumption that the proper methods of construction coincide with the English. But in the first instance the English courts must rely on the evidence of competent foreign lawyers."

BANKES and ATKIN, L.JJ., accepted the Russian expert evidence accordingly. SCRUTTON, L.J., dissented on the ground that (ibid., at p. 937) he could see no reason

> " why a court is bound to accept the evidence of an expert witness as to fact, when he supports it by a document the plain words of which render his opinion impossible."

In the present case, the cross-examination of Dr. Dobrin has satisfied me that he is an entirely truthful witness who firmly believes in the evidence which he has given, and who stood up to questions from counsel and me with remarkable understanding, resourcefulness and consistency. It is true that some of his conclusions cause me surprise, but am I entitled to prefer my views to his ? Am I better qualified to expound Russian law than he is ?

The first question to which he addressed his evidence was the position of former shareholders on the dissolution of the bank, apart altogether from the Soviet decrees. He said this in his affidavit (para. 7).

> " Under Tzarist law, a limited company was dissolved and ceased to be a legal entity, not with the ending of its liquidation but on its passing into liquidation. For such a company to go into liquidation meant that it ceased to be a legal entity. This loss of legal status did not involve the conversion of the company's assets into bona vacantia and their loss to the shareholders. Fundamentally it resulted in the conversion of the assets into the common ownership of the late shareholders, subject to the payment of debts."

So far his evidence appears to be undoubtedly right. The position in Russia was not dissimilar to that in England before the Crimean War, and company law evolved slowly in Russia. But the difficulty begins with the Soviet decrees. The surplus asset available for distribution is the residue of a fund in England resulting from the collection of a debt due from an English bank to the dissolved bank, and it is common ground that in so far as the Soviet decrees purported to confiscate that asset, they would not be effective for that purpose in England. This is crucial, and lies at the root of Dr. Dobrin’s reasoning. He states his conclusions as follows:

> “ (16) I now turn to the effect of the Soviet revolutionary legislation on the existence of the bank as a legal entity. This legislation, which commenced, so far as the bank is concerned, with the ‘ Decree of the Nationalisation of Banking ’ passed on Dec. 14, 1917 (hereinafter called ‘ the decree of 1917 ’) provides an example where the peculiar meaning and incidents in Tzarist law of the dissolution of a limited company are of practical significance. In considering the effect of the Soviet legislation, it is important to bear in mind its general underlying technique, intentional or unintentional; the legislation made no attempt to get at the assets of the banking companies by nationalising their shares; the methods adopted were different and consisted, first, of the seizure of the assets of the companies by confiscation and then, in various ways, the destruction of the companies themselves as legal entities.
>
> “ (17) In previous Russian bank cases in the English courts there has been much discussion as to the precise date on which the pre-revolutionary Russian banks must be considered to have ceased to exist as legal entities under Soviet Russian law. But in my opinion, the exact fixing of this date is immaterial when considering the question as to the legal position under Soviet-Russian law of the assets of those banks after the banks themselves had ceased to be legal entities. Whatever the precise date of dissolution may have been, bearing in mind that the banks were Tzarist law companies, their dissolution could not in my view fail to have resulted also in the simultaneous and automatic conversion of their free assets into the common ownership of their late shareholders. In the following paragraphs of this affidavit I therefore limit myself to consideration of the two Soviet decrees which could be said to be chiefly instrumental in the destruction of the banks as legal entities, namely, (a) the decree of 1917 and (b) the ‘ Decree of the Council of the People’s Commissaries confiscating Share Capital of the Former Joint Stock Banks’ published on Jan. 26, 1918 (hereinafter called ‘ the decree of 1918 ’).
>
> “ (19) On the one hand the decree of 1917 was a declaration of policy, namely, the policy of making banking a national monoply by dissolving or liquidating all the private banks through their merger into the state bank. Although intended to cover the banking system of the whole of Russia, it was vague in the extreme and although it provided for the merger of all the private banks into the state bank, the decree failed to give any indication as to the method by which the merger was to be carried out. Indeed, on the face of it, it looks as if under the decree no merger was to be attempted until the future publication of a special decree concerning the method of the merger (see s. 4 of the decree and para. 1 of the instructions) approved by the People’s Commissary of Finance on Dec. 10, 1918).
>
> “ (20) On the other hand, the decree of 1917 was not merely a declaration of policy; it was a declaration of policy to be acted on. In Petrograd, all the offices of the principal private banks were seized by agents of the Soviet government on the day of the passing of the decree, and in actual fact a few hours before it was finally passed, as a first step towards their merger into the state bank; and as the Soviet regime extended to new places, the same procedure was applied in one place after another, at varying intervals of time. Thus the process of nationalisation, dissolution, liquidation or merger (what-

ever one calls it) became decentralised. The unit for this process was not the whole of a bank at once, but each office or branch of a bank, or, rather, all the offices of all the private banks situate in any locality where the Soviet authorities found themselves ready and able to start the process. No branch of a private bank which had not been directly affected by the process was either bound or allowed to declare itself a branch of the state bank on its own authority. Moreover, such a branch had to go on transacting business as best it could in order to avoid being accused of sabotage, and in the circumstances it had no right to transact business otherwise than in the name of the old bank. On the other hand, every branch or office of a bank over which the process of merging it into the state bank had been carried out, was lost for the bank to which it previously belonged.

" (21) The extension of this process to the last functioning branch or office of the bank inevitably had a double effect; first, it resulted in the dissolution of the bank as a legal entity; secondly, having regard to the constitution of the bank as a Tzarist law company, it resulted in the simultaneous conversion of these assets of the bank which were outside the ambit of Soviet confiscation into the common ownership of the persons who immediately prior to the dissolution were the bank's shareholders. So long as the bank remained a legal entity, however crippled, it legally could not fail to be the old bank and belonged to its shareholders. When the bank ultimately ceased to be a legal entity, it ceased to have shareholders, but its assets which were still free from Soviet confiscation automatically became and have remained ever since in the common ownership of its former shareholders.

" (22) As regards the effect of the decree of 1918, I beg leave to quote from the evidence which I gave before the Court of Appeal in *Deutsche Bank* v. *The Bank* (7) (1930 D. No. 1435): 'I now refer to s. 2 of the decree of Jan. 26, 1918, which section is as follows: " All bank shares are declared null and void, and payment of dividends of any kind whatsoever is unconditionally stopped." If read separately, s. 2 of the decree of Jan. 26, 1918, is in my opinion of itself quite sufficient to justify the conclusion that all the old Russian joint stock banks ceased to exist as legal entities of Soviet law not later than the date of the decree. Section 2 declares null and void all bank shares. But without a share there is no shareholder, and without shareholders there can be no company. However, such an interpretation of s. 2 of the decree of Jan. 26, 1918, clearly contradicts the whole course of events as it can be seen from the instructions of Dec. 10, 1918. It contradicts the decree of Sept. 20, 1918, in which the Council of People's Commissars, the same body which passed the decree of Jan. 26, 1918, instructs the Commissary of Finance to go on with the nationalisation (or liquidation) of all the *still existing* private credit institutions. To make ends meet the only construction which I am able to put on s. 2 of the decree of Jan. 26, 1918, is that it was a warning to the shareholders of the old banks that after the carrying out of the liquidation of the banks by the executive in accordance with the decree of Dec. 14, 1917, they will get nothing. Under the principal Act all the assets and liabilities of the old banks were to pass to the state bank. The share capital of a bank is one of its liabilities, and so it looked as if the state bank were to be liable to the shareholders of the private banks for the nominal value of their shares. The decree of Jan. 26, 1918, warned the shareholders that nothing will be paid to them at any time. This threat was however mitigated or entirely taken away by the decree of Apr. 18, 1918, which proceeds on the assumption that holders of shares which are declared null and void are entitled to have their interests under the shares protected. The second part of s. 2 of the decree of Jan. 26, 1918 (" payment of dividends of any kind whatsoever

> is unconditionally stopped ") shows that at that time the banks were still for many purposes in the hands of their old owners and it was not impossible for a bank to arrange the payment of dividend.'
>
> " I adhere to my views as expressed above, namely, that the decree of 1918, however formidable its language, had no real effect on the existence of the bank as a legal entity or on the continued existence of its shares.
>
> " (23) If, however, the true effect of the decree of 1918 was that the bank's shares were thereby annulled, it inevitably follows that the decree of 1918 had the effect of simultaneously destroying the bank as a legal entity, in which case, in my opinion, the inevitable conclusion must be that on Jan. 26, 1918, the assets of the bank which were still free from Soviet confiscation automatically came into the common ownership of its late shareholders. I am unaware of any case where, under Tzarist law, all the shares of a company have simultaneously been declared null and void. But bearing in mind the effect under Tzarist law of the dissolution of a company on its assets, I have no hesitation in saying that such a simultaneous annulment of all its shares inevitably amounted to a dissolution, and would equally inevitably carry with it the natural consequences of a dissolution which I have discussed earlier in this affidavit.
>
> " (24) In my view, therefore, the decree of 1917 was not itself sufficient to bring about the immediate dissolution of the bank, and the ultimate dissolution which was initiated by that decree did not take place until the physical occupation of the bank's branches in Russia had been completed, probably in or about the year 1920. If, however, the effect of the decree of 1918 was to bring about a simultaneous annulment of all the bank's shares (which, for the reasons which I have given, was not in my view its true effect), then this annulment itself inevitably resulted in the dissolution of the bank. But whichever date is taken as the date of dissolution, the necessary result was that the bank's assets, in so far as they had not been effectively confiscated by the Soviet revolutionary legislation, were converted into the common ownership of its late shareholders; and this situation has remained unaffected by any subsequent Soviet legislation."

I have to consider whether these conclusions are " extravagant " in the sense in which Lord Atkin used the word, or " impossible " in the sense in which Scrutton, L.J., used it.

The first thing which I have to bear in mind is that the rules for construing Soviet decrees differ widely from those applied in England to construe English statutes. Who would construe them by reference to a speech or article by a politician, prominent or otherwise ? Yet Dr. Dobrin has given evidence about rules of construction which I must accept. He said this:

> " In September 1917 when Lenin and his party were pronouncing on the problem, he wrote a number of articles (and one in particular of which I have an extract here) dealing particularly with the nationalisation of banks. In that article he declared something which makes no sense to anybody in ordinary conditions. He declared nothing less than this: ' Do not be afraid of our project of nationalising the banks. No one will suffer the slightest injury. Anyone who had shares will after the nationalisation retain his money again in shares as before. Everyone who had a deposit will retain his deposit '. So it made no sense at all, but the declaration was: ' No one will suffer any damage from our nationalisation of banks '. Q.—Is that a statute ? A.—No, my Lord. Q.—Can you construe statutes by speeches in Russia ? A.—Oh yes, you cannot do otherwise, or you get lost. Q.—That is to say, a Russian politician makes a speech and that is the basis of the construction of statutes in Russia—is that right ? A.—Yes, not every speech, but you cannot do this in Russia unless you take into account the circumstances which precede it. Q.—I did ask you a question to which, so far as

> English law is concerned, the answer, of course, would be quite definitely 'No'. But Russian law may be different. Do you seriously tell me—you have done—that in Russia you can construe statutes by the speeches of politicians? In that case I shall know where I am. Is that so? A.—Yes, by speeches of important politicians. Q.—And who decides who is an important politician? A.—I should be at a loss to understand and answer a question of that kind. Q.—I cannot understand any system of jurisprudence which can work on such a basis. A.—In text books laying down the construction of statutes it says in so many words: 'Do not rely on the mere statement of the law. Look at what has been made of the law in practice. Otherwise you will get in an impossible position'. Q.—That is something quite different. What has been made of the law in practice I suppose means how it has been administered—is that right? A.—Yes. Q.—That, with all respect, is nothing to do with speeches by politicians? A.—I understand that; but still speeches by politicians, including Lenin are important. I am referring to his promise that no one will suffer anything from the nationalisation of the banks. If you read the fundamental decree of 1917 that decree declares that all the assets and all liabilities will be taken over, shall be taken over, are to be taken over by the state."

Secondly, the Russian word translated "share" embodies a different concept from the English word "share". When counsel for the Attorney-General suggested that a "share" was a "bundle of rights", Dr. Dobrin answered: "I should prefer 'document of title of a legal nature'".

These reflexions give me pause when I am asked to hold that Dr. Dobrin's interpretation of the relevant decrees ought to be rejected. The crucial decree is that of Jan. 26, 1918, and what I am looking for in it is, not the confiscation of the assets of the bank, but the destruction or forfeiture of the ownership rights which would otherwise result from the dissolution of the bank. The decree is as follows:

> "(1) The share capitals (stock, reserve and special) of the former joint stock banks are transferred to the State Bank of the Russian Republic on the basis of complete confiscation. (2) All bank shares are declared null and void, and payment of dividends of any kind whatsoever is unconditionally stopped. (3) All bank shares must forthwith be surrendered by the present holders to the local branches of the state bank. (4) The holders of bank shares which they cannot produce must submit to the branches of the state bank register records of the shares in their holding, indicating their exact whereabouts. (5) The holders of bank shares who have failed to surrender them in accordance with para. (3), or to submit register records of their shares in accordance with para. (4), within a period of two weeks following the day of the publication of the present decree, are punished by confiscation of all their property. (6) All transactions and deeds of transfer referring to bank shares are unconditionally prohibited. Persons taking part in such prohibited transactions and deeds are punished with imprisonment up to three years."

I must disregard s. 5 because it is not known whether or not the shares with which I am concerned were surrendered or registered. Moreover I must remember that if (as they purported to do) the decrees had confiscated all assets of the bank everywhere, there was no obvious need to bother about extinguishing these rights of co-ownership.

With these considerations in mind, I approach the decree. I accept Dr. Dobrin's evidence that s. 1 refers to the assets of the bank and not to the shares of the shareholders. I might have thought that s. 2 extinguished all rights attributable to former ownership of shares; but here I must remember that the word "shares" bears a different meaning in Russia, that the rules of construction are different, and that even to an English lawyer there is some inconsistency between rendering shares (in the English sense) null and void, and then proceeding to order them to be surrendered or recorded (" indicating their exact whereabouts ") and in any case not to be transferred. There is nothing else in this decree which appears to extinguish rights of co-ownership if (as has happened) assets could be found to which these rights could attach.

I am therefore of opinion that I must accept the uncontradicted evidence of a truthful and highly skilled expert on Russian law. I realise that normally an expert should have recent practical experience as well as academic qualifications, and that though Dr. Dobrin was in Russia till 1925, he has not since had practical experience in Russia of the working of the Soviet decrees, though he has kept in touch as far as has been possible outside Russia. I am satisfied, however, that the particular question with which I am concerned could not have arisen in a Russian court, that nobody could be better qualified to give evidence on this branch of Russian law than Dr. Dobrin, and that I at any rate have no qualifications at all to do so.

Therefore the Crown has, at the present stage of the liquidation, no claim to this fund as bona vacantia and the liquidator must taken the proper steps to discover whether any claimants can prove their title to share in the surplus assets on the footing of this judgment. This investigation will proceed on the footing that on the dissolution of the bank the former shareholders of the bank became entitled to participate in any available assets to an extent which bears the same proportion to the assets as their shares bore to the total issued capital of the bank at the date of its dissolution.

[*Declaration that the surplus assets of the bank which under English law are unaffected by the Soviet legislation for the confiscation of the assets of the bank* (*including the surplus estimated at the sum of £50,000 referred to in the affidavit of the liquidator filed June 20, 1956*) *are not at the present stage payable to the Crown as bona vacantia but should continue to be dealt with in accordance with the provisions of the Companies Act, 1948, and on the footing that on the dissolution of the bank the former shareholders of the bank became entitled to participate in any available assets to an extent which bears the same proportion to the assets as their shares bore to the total issued capital of the bank at the date of its dissolution.*]

Solicitors: *Slaughter & May* (for the liquidator); *Treasury Solicitor; Theodore Goddard & Co.* (for the contributories).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

Re B. (an infant).

[Court of Appeal (Lord Evershed, M.R., Morris and Pearce, L.JJ.), July 25, 26, 1957.]

Adoption—Dispensing with consent to order—Notice of application not served on mother and her consent dispensed with—Right of mother to appeal from county court—"Party"—Adoption Act, 1950 (14 *Geo.* 6 *c.* 26), *s.* 3 (1)—*Adoption of Children (County Court) Rules,* 1952 (*S.I.* 1952 *No.* 1258), *r.* 9.

Court of Appeal—Appellant—Who may appeal—Person who could have been a party—Adoption order made by county court—Notice of application not served on mother and her consent dispensed with—Right of mother to appeal—County Courts Act, 1934 (24 *&* 25 *Geo.* 5 *c.* 53), *s.* 105.

County Court—Appeal—Adoption order—Notice of application not served on mother and her consent dispensed with—Right of mother to appeal—Appeal with leave of Court of Appeal—County Courts Act, 1934 (24 *&* 25 *Geo.* 5 *c.* 53), *s.* 105—*Adoption Act,* 1950 (14 *Geo.* 6 *c.* 26), *s.* 3 (1)—*Adoption of Children (County Court) Rules,* 1952 (*S.I.* 1952 *No.* 1258), *r.* 9.

An applicant applied in the county court for the adoption of a boy aged six, and included in his application a request that the consent of the mother be dispensed with on the ground that her address was unknown. On Feb. 25, 1957, the county court judge made the adoption order and, under s. 3 of the Adoption Act, 1950, dispensed with the consent of the mother, which otherwise would have been required by s. 2 (4). At the time of the hearing it was known to the county court judge and the guardian ad litem of the infant that the mother was living at an address in South Australia. The mother did not consent to the order and, with the leave of the Court of Appeal, she appealed. A question of jurisdiction then arose in view of s. 105 of the County Courts Act, 1934, which conferred a right of appeal only if a party to proceedings in a county court were dissatisfied. By r. 9 of the Adoption of Children (County Court) Rules, 1952, notice of the application was required to be given to every person whose consent was requisite and, though the judge could have ordered that notice need not be served on the mother, yet the rule provided that a person who was required to be served under the rule should "be a respondent" to the application.

Held: the Court of Appeal had jurisdiction to hear the appeal because the mother might appeal by leave of the Court of Appeal as she could have been a party to the county court proceedings; accordingly the adoption order would be set aside and the case would be sent back to a county court for rehearing.

Semble: the Court of Appeal would also have jurisdiction to hear the appeal because the mother was a party within s. 105 in view of the provision in r. 9 by virtue of which she, as a person on whom notice was required to be served, was a respondent.

Appeal allowed.

[As to appeal to the Court of Appeal by person who might have been a party to the action, see 26 Halsbury's Laws (2nd Edn.) 115, para. 227, note (m); and for cases on the subject, see Digest (Practice) 765, 766, *3302-3309*.

For the Adoption Act, 1950, s. 2 (4), s. 3 (1), see 29 Halsbury's Statutes (2nd Edn.) 469, 470.

For the County Courts Act, 1934, s. 105, see 5 Halsbury's Statutes (2nd Edn.) 82.

For the Adoption of Children (County Court) Rules, 1952, r. 9, see 11 Halsbury's Statutory Instruments 197.]

Appeal.

In this case the mother of an infant child appealed against an adoption order made in favour of the applicant by His Honour Judge Rice-Jones at Croydon County Court on Feb. 25, 1957. In his originating application to the county court the applicant included a request that the mother's consent be dispensed with, on the ground that her address was unknown to the applicant. The infant's guardian ad litem, however, obtained the address of the mother, who was living in South Australia. The judge made the adoption order, dispensing with the mother's consent by virtue of his powers under s. 3 (1) of the Adoption Act, 1950. The mother applied on ex parte motion to the Court of Appeal for leave to appeal which was granted. At the hearing of the appeal the question was raised as to the court's jurisdiction to hear the mother's appeal.

R. M. G. Simpson for the mother.
J. B. R. Hazan for the applicant.
C. H. Gage for Croydon Corporation as guardian ad litem.

LORD EVERSHED, M.R.: This case arises under the jurisdiction conferred on the county court by the Adoption Act, 1950. On the merits of the present appeal I propose to say very little. An order was made on Feb. 25, 1957, by the learned county court judge for the adoption of the child by the applicant, and the county court judge, exercising the jurisdiction which s. 3 (1) of the Act confers on him, dispensed with the consent of the infant's mother—though it is not clear on which ground provided by s. 3 (1) the exercise of that jurisdiction was based. In actual fact, the mother (whose address was known to the county court judge at the time, though she lives far away in South Australia) does not consent to the order; and we have come to the conclusion that it would not be right, in all the circumstances, that an order for the adoption of this boy should be made at any rate without giving to the mother a proper opportunity of presenting her case to the county court. Subject, then, only to the question of our jurisdiction, we propose to order that the county court judge's order of Feb. 25, be set aside, and that the matter be referred back to the county court. In accordance with our usual practice, which does not imply any reflection, of course, on the particular county court judge, we also direct that the matter be heard by another county court judge of the appropriate district.

In the course of the argument on the substance of the case there was some debate on the exact significance of the word "neglected" in s. 3 (1) (a) of the Act. We do not, in the circumstances, think it necessary or desirable to say anything on that matter. Therefore, on the merits and substance of the case I shall say nothing more. I have so far assumed (as I think is correct) that this court has jurisdiction to deal with this as an appeal. The right of appeal to this court from a county court is conferred by s. 105 of the County Courts Act, 1934, which reads:

> "If any party to any proceedings in a county court is dissatisfied with the determination or direction of the judge . . . the party aggrieved . . . may appeal . . . to the Court of Appeal . . ."

It was submitted (very properly) that that section does not apply to the mother in the present case, seeing that she is not and was not a party to the proceedings within the meaning of that section. In order to resolve that question it is necessary to turn back to the Adoption Act, 1950. Section 2 (4) of that Act provides:

> "Subject to the provisions of s. 3 of this Act [relating to dispensing with certain consents] an adoption order shall not be made—(a) in any case, except with the consent of every person . . . who is a parent . . . of the infant."

By r. 9 of the Adoption of Children (County Court) Rules, 1952, it is provided as follows:

> " At the time of appointing a guardian ad litem, the registrar shall fix a date and time for the hearing of the application, and shall serve a notice in the form numbered 3 in Sch. 1 to these rules on the following persons: (a) every person, not being an applicant, whose consent to the order is required under s. 2 (4) of the Adoption Act, 1950: Provided that where the applicant includes in his originating application a request that the consent of any such person be dispensed with, the judge may, on the ex parte application of the applicant, order that a notice shall not be served on that person unless he so directs at the hearing of the originating application . . . and any person upon whom a notice is required to be served under this rule shall be a respondent to the application."

It is not in doubt that the mother of this infant, being a person whose consent was required under s. 2 (4) (a) of the Act, unless dispensed with, was a person on whom the notice was required to be served. That, however, is subject to the effect of the proviso which I have read. I am not entirely clear whether in point of fact the terms of that proviso were strictly complied with—whether, on any such application as is there indicated, any order was made dispensing with service of the notice. For present purposes, however, that does not matter.

Counsel for the mother argued that she is a person on whom notice is required to be served under r. 9, even though such service were properly dispensed with under the proviso; and that, being such a person, she is properly described as a " party " to the proceedings. I think for myself that there is great force in that argument. In any event, in my judgment, the general jurisdiction conferred on this court by R.S.C., Ord. 58, would suffice if it could not properly be said that the mother was here a " party " to the proceedings within the meaning of s. 105 of the County Courts Act. According to the note in the ANNUAL PRACTICE (1957 Edn.) at p. 1244, it is said:

> " But in addition, in accordance with old Chancery practice, any person may appeal by leave (obtained on ex parte motion to the Court of Appeal) if he could by possibility have been made a party to the action by service ";

and a number of cases is cited. There cannot be any doubt that by possibility the mother could have been made a party, in the strict sense, by being a respondent to the application; and in fact in the present case leave was given by this court for the mother to bring the matter here. I, therefore, am satisfied in the present case that there is jurisdiction in this court to hear and determine the question of the validity and propriety of the order of Feb. 25, as on an appeal.

Before I leave the case, I would like to add one or two observations. Bringing a matter of this kind to the Court of Appeal is likely to involve a good deal of expense. The rules of this court as to leading fresh evidence are of long standing and are strict. Prima facie, you cannot adduce evidence in this court which was not before the court below; and before additional evidence is adduced the leave of the court (in general) has to be obtained. There can, I think, be no objection to the evidence that was put before us here; and indeed neither the applicant nor counsel for the local authority, as guardian ad litem, did so object. I do suggest, however, that considerable caution and discretion should be exercised in adding to the costs by making a lot of affidavits at this stage. It seems to me that at any rate in any but a very exceptional case this court could do no other than (if it thought appropriate) discharge the order made and send the case back for further adjudication. In other words, I think—again always except in some very unusual case—that it would not be right for this court (which has not the opportunity of seeing the persons concerned and so on) itself to make orders. Apart from all other considerations, this court sits (except, again, in very exceptional cases) in public; and in the interests of everybody it is not desirable that the names of the persons concerned and the facts which are put before the court should become public property, in the very obvious and natural interests of the children concerned. That being so, it has seemed to me that consideration might well be given, at some appropriate stage by the appropriate authority, to some revision of the County Court Rules. Order 37, r. 1, enables a judge of the county court to order a new trial in certain circumstances. It seems to me that the order made on this application could not fairly be called a " trial ", as that word is normally understood. By r. 2 (1) of the same order,

> " Where a defendant to an action or matter . . . does not appear at the hearing and a judgment or order is given or made against him in his absence, the judgment or order and any execution thereon may on application be set aside and a new trial may be granted."

Again, in its context it would not appear to me, I confess, that that rule is applicable to such a case as this. It seems to me worth considering whether an amendment or expansion of that rule might not be made so as to enable, in cases of this kind and other appropriate cases, the costs of an application to the Court of Appeal to be avoided, and to give to a person like the mother in the present case an opportunity of going to the county court and, if the case warranted it, inviting the county court judge to set aside the order he had made and re-hear the matter in the presence of the parent concerned.

I say nothing of the procedure in the Chancery Division, because that is not before us; but a similar problem might, of course, arise there; and similar provisions might be made, if thought appropriate, in the Chancery rules. So far as this case is concerned, I have, I think, said enough. I am satisfied, in the circumstances, of the jurisdiction of this court. I have indicated what order, in the exercise of that jurisdiction, should now be made.

MORRIS, L.J.: I entirely agree.

PEARCE, L.J.: I agree.

Appeal allowed. Case remitted to the county court.

Solicitors: *Kinch & Richardson*, agents for *Copley Singleton & Billson*, Croydon (for the mother); *Norman W. Parris*, Croydon (for the applicant); *Sharpe, Pritchard & Co.* (for Croydon Corporation).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

NOTE.

TRZNADEL *v.* BRITISH TRANSPORT COMMISSION.

[COURT OF APPEAL (Lord Evershed, M.R., Morris and Pearce, L.JJ.), July 4, 1957.]

Railway—Negligence—Engine-driver—Consideration of the proper approach to the duties of engine-drivers in relation to railway employees on the line.

Appeal.

This was an appeal by the plaintiff, Frank Trznadel, from an order made by FINNEMORE, J., at Birmingham Assizes on Dec. 19, 1956, dismissing the plaintiff's claim against the defendants, the British Transport Commission, for damages for negligence.

The plaintiff was employed by the British Transport Commission on their railway undertaking and was a member of a gang which was engaged in working daily on the railway track. Before commencing their work the members of the gang used to assemble each morning at a cabin near the track, and it was the practice of the plaintiff and others to walk to the cabin along the track after entering on the railway property at an entrance at Camp Hill. According to the evidence of Mr. Hook, a witness called by the British Transport Commission, the men had been told to use another approach to the cabin and not to walk along the track, but the learned judge found that the men's practice of walking to the cabin along the track was a known practice.

At this part of the track there were two sets of lines, and an engine or train passed in each direction about every ten minutes. There was an incline in the direction of the Camp Hill goods depot, and the extra engines which were used to push trains up the hill returned down the incline without a train. There was sufficient space between the two sets of lines for a person to be clear of trains passing in both directions. The plaintiff had worked on this length of line for over a year and knew all about the situation and its dangers.

At about 7.30 a.m. on Dec. 10, 1953, the plaintiff was walking to the cabin along the track on the set of lines which would be used by on-coming traffic. Visibility was not good as it was not yet daylight, and, in addition, there were mist and rain. Seeing another ganger, who was about a hundred yards ahead, stepping off the track, the plaintiff realised that a train was coming and also stepped from the track; but instead of stepping into the part known as the cess, which is the part away from the other set of lines, he stepped into the centre of the other set of lines. Owing, perhaps, to the noise of the passing train, the plaintiff did not realise that two engines which had been engaged in pushing trucks up to Camp Hill goods depot, were returning down the incline on the set of lines where he was walking. The engines were coasting down the incline and the tender of the leading engine was to the front, so that the view of the driver was considerably obstructed. The plaintiff was knocked down by the tender and was severely injured. In his action against the British Transport Commission, the plaintiff alleged (a) negligence on the part of the commission in causing or permitting him to use the track, and (b) negligence on the part of the engine-driver. The learned judge held that there was no negligence on the part of the British Transport Commission either vicariously or otherwise.

A. W. M. Davies for the plaintiff.

Neil Lawson, Q.C., and *Tudor Evans* for the defendants, British Transport Commission.

LORD EVERSHED, M.R.: I will ask MORRIS, L.J., to give the first judgment.

MORRIS, L.J., after stating the facts and referring to the evidence of Mr. Hook mentioned above, continued: It is pleaded in the statement of claim that the British Transport Commission were negligent in causing or permitting the plaintiff to use the railway track as a means of access to the cabin without ensuring that it was safe for him to do so. It seems to me to be clear that safety cannot be ensured on a railway track, where at any moment trains may come in either direction along two tracks. The plaintiff knew that there was plenty of space by the side of the track. He did not have to be told that there would be peril if he walked along a track with the risk that a train might come from behind. He knew the lay-out; he knew all the facts and he knew that there was space on the one side. The evidence of Mr. Hook was to the effect that the plaintiff had been told that he must always step out into that part of the side which is known as the cess.

Counsel for the plaintiff submitted that if permission were given, the engine-drivers ought to have been warned ; but the engine-drivers would know that it was always possible that people would be walking along the line who were entitled to be walking there, or that others not so entitled might be walking there. I cannot think that in the circumstances of this case there was any negligence in not giving any special instructions to the engine-drivers. Without, therefore, dealing with the suggestion that there should have been some particular provision of arrangement for approaching the line from what was called the Arthur Street entrance, and assuming that it was the known practice for men to walk down the line as the plaintiff did, I cannot think that the British Transport Commission were negligent in giving permission for such a practice, or that, having given it, they were negligent in failing to take any steps with regard to the plaintiff or others.

That brings me to the allegations of negligence against the engine-driver. It A is said that he did not keep a proper look-out. The learned judge negatived that suggestion. It is quite true that when the tender is leading there is some obstruction of the vision of the engine-driver. To counteract that the engine-driver has to lean out; but he cannot lean out the whole time and he must not lean out too far because of structures that may be by the side of the track. The learned judge approached the case correctly when he pointed out that the B duties of an engine-driver must be different from the duties of a driver of a vehicle on a public road*. As he said, an engine-driver's duties are entirely different. The engine-driver is driving on fixed tracks; he is driving on private property; he has, of course, to watch for the signals, and he has to have in mind that he is driving to a schedule of time. He must take all reasonable steps that he can to ensure that he stops if there is any obstacle ahead. It is not, C however, like a roadway; and those who have permission to use a railway track use the track with the knowledge that a train may be coming which is being driven at speed and cannot be pulled up in a very short space of time, and which is being driven by an engine-driver who cannot have that full check on everything that is on the track that the driver of a motor car on a road must be expected to have. Then it was submitted that the engine-driver ought to have whistled; D but it was pointed out that, if it were laid down that the engine-driver ought to have whistled at this time and at this point because of the fact that some members of this gang might be going to their work, and if that were to be carried to its logical conclusion, the consequence would be that the engine-driver would have to whistle the whole of the time, and that, indeed, engine-drivers would have to whistle very many times of the day at very many places on the tracks. E

I do not think that there was any error at all in the approach of the learned judge when he came to the conclusion that it was not shown that there was any failure on the part of the engine-driver. The learned judge said, having approached this case most sympathetically, that he could not avoid the reflection that the plaintiff himself, in failing to walk on the side and in walking along a track with his back to oncoming traffic, had been doing a most regrettably F unwise thing. If negligence had been established against the British Transport Commission, either vicariously or otherwise, it might be that this would be a case in which a court would have taken the view that the calamity was practically entirely the result of the regrettably ill-advised conduct of the plaintiff himself; but it is not necessary to deal further with that part of the case.

In my judgment no blame for this unfortunate event is to be attributed to the G British Transport Commission. I, therefore, think that the appeal fails.

PEARCE, L.J.: I agree.

LORD EVERSHED, M.R.: I also agree.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Bosworth, Bailey, Cox & Co.*, Birmingham (for the plaintiff); *M. H. B. Gilmour* (for the British Transport Commission).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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* The distinction between the duties of a driver of an engine on a track and those of a driver of a car on a road was discussed by the Court of Appeal in *Lloyds Bank, Ltd.* v. *British Transport Commission* ([1956] 3 All E.R. 291); see per DENNING, L.J. (ibid., at p. 294 and p. 295) and per MORRIS, L.J. (ibid., at p. 298).

A

TRUSTEES OF THE NATIONAL DEPOSIT FRIENDLY SOCIETY *v.* SKEGNESS URBAN DISTRICT COUNCIL.

[COURT OF APPEAL (Hodson, Parker and Ormerod, L.JJ.), July 8, 9, 10, 30, 1957.]

B *Rates—Limitation of rates chargeable—Friendly society—Whether society non-profit making organisation—Whether "main objects are charitable or are otherwise concerned with advancement of social welfare"—Rating and Valuation (Miscellaneous Provisions) Act,* 1955 (4 *&* 5 *Eliz.* 2 *c.* 9), *s.* 8 (1) (*a*).

A registered friendly society had many members and great assets. The trustees of the society conducted mutual insurance among the members C and occupied for the purposes of the society a convalescent home. In the course of their insurance activities the society accumulated considerable reserves in the form of investments, securities and in land. From time to time, when investments were sold, profits were made, and income and rents obtained were also in the nature of profits, from which the members benefited as provided in the society's rules. The benefits provided by the society D were confined to members, and were derived from the members' own contributions. The trustees of the society claimed limitation of rates in respect of the convalescent home under the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (1) (a), on the ground that the society was an organisation which was not established or conducted for profit and whose main objects were charitable or otherwise concerned with the E advancement of social welfare.

Held: (i) although the society had accumulated reserves which produced income and profit, yet the earning of profits was purely incidental and the society was an organisation not established or conducted for profit within s. 8 (1) (a); but

(ii) the trustees of the society were not entitled to limitation of rates F under s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, because

(a) no object of the society was charitable, since none involved benefit to the community (or a section of it) as opposed to the benefit of individuals by reason of some private qualification; and

(b) although the object of the advancement of social welfare should not be G read ejusdem generis with the word charitable in s. 8 (1) (a), yet the society was not "concerned with the advancement of . . . social welfare" within s. 8 (1) (a) because the payment of benefits (which prima facie amounted to social welfare) was confined to individual members and derived from their contributions, with the consequence that the conferring of the benefits was not something that was merely incidental to the advancement of social H welfare for its own sake.

Dictum of LORD MACNAGHTEN in *Inland Revenue Comrs.* v. *Forrest* ((1890), 15 App. Cas. at p. 354) applied.

Decision of the DIVISIONAL COURT ([1957] 1 All E.R. 407) affirmed.

[For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, I see 35 HALSBURY'S STATUTES (2nd Edn.) 394.]

Cases referred to:

(1) *R.* v. *Whitmarsh,* (1850), 15 Q.B. 600; 19 L.J.Q.B. 469; 16 L.T.O.S. 108; 117 E.R. 586; 9 Digest (Repl.) 71, *277.*

(2) *Inland Revenue Comrs.* v. *Baddeley,* [1955] 1 All E.R. 525; [1955] A.C. 572; 35 Tax Cas. 661, 694; 3rd Digest Supp.

(3) *Stag Line, Ltd.* v. *Foscolo Mango & Co., Ltd.,* [1932] A.C. 328; 101 L.J.K.B. 165; 146 L.T. 305; Digest Supp.

(4) *R.* v. *Income Tax Special Comrs., Ex p. Shaftesbury Homes & Arethusa Training Ship*, [1922] 2 K.B. 729; *affd.* C.A., [1923] 1 K.B. 393; 92 L.J.K.B. 152; 128 L.T. 463; 8 Tax Cas. 367; 28 Digest 84, *480*.

(5) *A.-G.* v. *Seccombe*, [1911] 2 K.B. 688; 80 L.J.K.B. 913; 105 L.T. 18; 21 Digest 13, *59*.

(6) *Inland Revenue Comrs.* v. *Forrest*, (1890), 15 App. Cas. 334; 60 L.J.Q.B. 281; 63 L.T. 36; 54 J.P. 772; 3 Tax Cas. 117; 39 Digest 299, *780*.

Appeal.

This was an appeal by the ratepayers, the Trustees of the National Deposit Friendly Society, from a decision of the Divisional Court, dated Jan. 24, 1957, and reported [1957] 1 All E.R. 407.

The ratepayers appealed to the Lincoln (Parts of Lindsey) Quarter Sessions against a rate and a demand made by the rating authority, the Skegness Urban District Council, in respect of a convalescent home and premises at North Parade, Skegness, on the ground that the rating authority had failed to allow to the ratepayers the relief from liability provided by the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8. The friendly society was founded in 1868 and first registered under the Friendly Societies Acts on Aug. 27, 1872. The rules of the friendly society, which were effective at all material times, were contained in the National Deposit Friendly Society Rules, as revised 1949. The ratepayers carried on all the activities of their constitution and, inter alia, were the occupiers of the convalescent home and premises concerned. The home was open to members of the society whose subscriptions were not more than four months in arrear in accordance with the rules and without charge. The policy of the ratepayers in the investment of their accumulated funds was to choose investments which offered the highest return of income consistent with security of capital. No attempt was made to select investments with a view to capital accretion. The ratepayers' income was devoted to the payment of interest on the deposit accounts of members, the maintenance of sufficient funds to provide on an actuarial basis for the benefits to which their members were entitled in accordance with the rules, and the payment of expenses and management. No member received any dividend or share of income other than interest at 2½ per cent. on moneys standing to the credit of his deposit account and such sickness or other benefits as were provided by the rules. Quarter sessions found (i) that the ratepayers and the society were not established or conducted for profit, and (ii) that apart from the welfare of individuals who subscribed, there was absent any element of advancement of the good of the community because the benefits were not available to anyone who was not a member. Quarter sessions dismissed the appeal. The ratepayers appealed to the Divisional Court by way of Case Stated. The Divisional Court affirmed the decision of the justices on the ground that the main objects of the ratepayers were not the advancement of social welfare as the ratepayers conducted an assurance business and were concerned only with the provision of benefits for their own members. The ratepayers now appealed to the Court of Appeal and the rating authority served a counter-notice attacking the findings of the justices that the ratepayers were a non-profit making organisation.

John Pennycuick, Q.C., and *J. P. Widgery* for the ratepayers.

Sir Arthur Comyns Carr, Q.C., *C. E. Scholefield* and *J. D. James* for the Skegness Urban District Council, the rating authority.

Cur. adv. vult.

July 30. **HODSON, L.J.:** The judgment of the court will be read by PARKER, L.J.

PARKER, L.J.: This is an appeal from a decision of the Divisional Court dismissing an appeal by way of Case Stated from Lincoln (Parts of Lindsey) Quarter Sessions who held that the trustees of the National Deposit Friendly

Society (herein referred to as " the ratepayers ") were not entitled to the benefit of rating relief provided by s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The provision in question and the facts are fully set out in the report of the case in ([1957] 1 All E.R. 407), and we need not repeat them. The short question here is whether the ratepayers' convalescent home at North Parade, Skegness, is occupied for the purposes of an organisation which is not established or conducted for profit, and whose main objects are charitable or otherwise concerned with the advancement of social welfare. Only if these conditions are complied with will the ratepayers be entitled to partial relief against the rates in respect of those premises.

We will deal first with the question whether the ratepayers' organisation is established or conducted for profit. It conducts mutual insurance among its members and in carrying on that activity it has accumulated very considerable reserves in the form of investments in securities and in land. Indeed we think that if that activity is properly conducted, the accumulation of such reserves is not only inevitable, but a necessity. From time to time, when those investments are sold, profits are made and the income and rents obtained are also in the nature of profits. The organisation accordingly does earn profits from which the members benefit, but that as it seems to us is a very different thing from being established or conducted for profit. In our judgment the earning of profits is purely incidental, and it cannot be said that the organisation is established or conducted for profit. It carries on no " business " for the purpose of earning profits, cf. *R.* v. *Whitmarsh* (1) ((1850), 15 Q.B. 600). The appellants accordingly comply with the first condition.

Coming to the second condition, the meaning of " charitable " in the legal sense is clear though its application is often difficult. Except in the case of the relief of poverty, the object or purpose to be charitable must involve some benefit to the community or a section of the community as opposed to benefit to individuals by reason of some private qualification. That being so, it cannot be said that any object of the ratepayers' organisation is charitable. But are its main objects " or otherwise concerned with the advancement of . . . social welfare "? Quite obviously the words " or otherwise " extend the objects in respect of which relief is given to objects which are not charitable in the legal sense. The real question is how far that extension goes. The provision in question is an exemption from rates at the expense of the general body of ratepayers, and that being so, it would, we think, be right in the case of any doubt to give the words a restricted meaning.

What then is meant by " social welfare "? " Welfare ", we think, denotes a state of being well, whether in the physical, mental or material sense. What the word " social " adds is far from clear, but in this context we should have thought that prima facie it meant the well being of individuals as members of society. The expression " social welfare ", therefore, is very wide and very vague. As LORD TUCKER said in *Inland Revenue Comrs.* v. *Baddeley* (2) ([1955] 1 All E.R. 525) in considering the phrase " the promotion of social well being " (ibid., at p. 547):

> " This is an extremely vague phrase which may have different meanings to different minds, and may include things considered by some, but not by others, to be advantageous. It would appear to cover many of the activities of the so-called ' welfare state ', and to include material benefits and advantages which have little or no relation to social ethics or good citizenship, concepts which are themselves not easily definable. I find it impossible to construe these trusts, as the Court of Appeal have done, in such a way as to restrict the operation of this language to promoting or inculcating . . . ' those standards of secular conduct or behaviour expected of a good neighbour and a good citizen '."

Unless, therefore, some restriction can be implied from the context, we should have thought that the provision of benefits which tends directly to improve the health or conditions of life of individuals comes prima facie within the expression "social welfare."

The respondents, the rating authority, however, contend that notwithstanding the introductory words "or otherwise", the objects which follow must be restricted to objects in which an eleemosynary element is present and which are for the benefit of the community or a section of the community in the sense in which charitable objects must be. It is said that this is the effect of an application of the ejusdem generis rule or at any rate is to be derived from the maxim noscitur a sociis. In our judgment, however, it is impossible to give the objects this restricted meaning. There are clearly grave difficulties in applying the ejusdem generis rule in such a case as this where there is only one species available out of which to construe a genus, cf. *Stag Line, Ltd.* v. *Foscolo Mango & Co., Ltd.* (3) ([1932] A.C. 328, per Lord Russell of Killowen at p. 345), and *R.* v. *Income Tax Special Comrs., Ex p. Shaftesbury Homes & Arethusa Training Ship* (4) ([1922] 2 K.B. 729, per Bailhache, J., at pp. 740, 741). It is true that in the former case the House of Lords restricted a power in a bill of lading to call at any ports "for bunkering or other purposes" to purposes of the contract venture, but as a matter of business such a restriction was clearly necessary, and the power itself was expressly stated to be "as part of the contract voyage". Further, it is to be observed that in *A.-G.* v. *Seccombe* (5) ([1911] 2 K.B. 688) Hamilton, J., held that the words "or otherwise" following the words "by contract" must be read as denoting an arrangement ejusdem generis with contract, namely, an enforceable agreement. In the present case, however, the words to be construed are not "or otherwise" alone but "or otherwise" followed by specific objects. Moreover, two of the objects, the advancement of religion and the advancement of education are themselves charitable objects, and if they are to have any extended meaning they must, we think, be read as not being restricted to cases which are for the benefit of the community or a section of the community.

We think, however, that the restriction if any is to be found in the phrase "objects . . . concerned with the advancement of . . ." We omit for this purpose reference to "main objects" since this may well merely differentiate the test from cases where the word "exclusively" is used, cf. Scientific Societies Act, 1843. Are then the objects of the organisation in any particular case concerned with the advancement of social welfare? An organisation may in fact advance social welfare in the sense of affording benefits to its members, but nevertheless not have as its object the advancement of social welfare as an end in itself or for its own sake. On the other hand, the fact that an organisation affords benefits to its members would not necessarily prevent its object being concerned with the advancement of social welfare. Thus, in *Inland Revenue Comrs.* v. *Forrest* (6) ((1890), 15 App. Cas. 334) the question was whether the property of the Institution of Civil Engineers was "appropriated and applied for the promotion of science". Lord Macnaghten said (ibid., at p. 354):

> "Is the property of the Institution of Civil Engineers legally appropriated and applied for the promotion of the science of civil engineering, or is it legally appropriated and applied for the benefit of civil engineers in order to enable them to practise their profession to greater advantage? It cannot I think be doubted that the institution has raised the standard of the profession, and that to a civil engineer it is of advantage and probably of pecuniary advantage to be a member. But is that result the purpose of the society, or is it an incidental, though an important and perhaps a necessary consequence of the way in which the institution does its work in the pursuit of science?"

It is, we think, in considering this question that the persons to be benefited and the source of the benefits become pertinent considerations. Where the benefits are confined to the members, and where these benefits are derived entirely from their own contributions, it may well be difficult to say that the object is the advancement of social welfare for its own sake even though the benefits themselves may advance the well-being of the individual members. It is true that the question is whether the object is one " concerned " with the advancement of social welfare, but though " concerned " is a wide word, we do not think that it can be read as bringing in as an object something which is incidental.

Looked at in this way we find it impossible to say that the main objects of the ratepayers' organisation are concerned with the advancement of social welfare. The objects of the society as expressed in the rules and as found by quarter sessions to have been followed are to provide by means of mutual insurance for the payment of certain benefits to the individual members. Granted that the payment of the benefits may amount to social welfare, nevertheless such benefits are confined to the individual members themselves; they are exclusively derived from the members' contributions on an actuarial basis; and default in payment of contributions disentitles a member to those benefits.

Finally, we would like to adopt what LORD GODDARD, C.J., said in his opening observations in this case ([1957] 1 All E.R. at p. 408):

> " If the appellants are to be entitled to have the benefit of these provisions, so must many others of the great friendly societies which exist. Speaking for myself, I should think it was remarkable, if Parliament had intended that friendly societies which carry on the activities which the appellants carry on should have special treatment with regard to rates, that it would not have said so in plain terms, in just the same way as in some of the taxing statutes—and, after all, rating statutes are taxing statutes in one sense . . ."

The appeal is dismissed.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Woolley, Tyler & Bury* (for the ratepayers); *Wrentmore & Son,* agents for *Clerk to Skegness Urban District Council* (for the rating authority).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

BOSTON DEEP SEA FISHING & ICE CO., LTD. *v.* FARNHAM (INSPECTOR OF TAXES).

[CHANCERY DIVISION (Harman, J.), July 3, 4, 5, 31, 1957.]

Income Tax—Foreign company—British company using French company's ship in business during war—Purporting to act as agents of French company —Acts ratified by French company after war—Whether British company taxable—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5 *c.* 40), *Sch. D, para.* 1 (*a*) (iii), *All Schedules Rules, r.* 5, *r.* 6, *r.* 10*.

Agent—Ratification—Foreign principal becoming enemy alien by enemy occupation during war—Whether foreign company can ratify after war is ended acts done during occupation.

A trawler, owned by a French company, was at an English port when France became occupied by the enemy during the war of 1939 to 1945. While France was in enemy occupation the taxpayers, an English company, carried on a trade by using the trawler. The taxpayers had previously acted as agents of the French company in the ordinary course of their business. They held themselves out as managers acting with the authority of the French company, but in fact they had no such authority. They were never formally appointed as managers under the powers conferred by wartime emergency legislation. They kept accounts of the takings and expenses and after deducting a commission for themselves showed a considerable profit on the trading. At the end of the war their conduct, their accounts and the commission that they had reserved for themselves were approved by the French company. The taxpayers were assessed to tax under the Income Tax Act, 1918, Sch. D, para. 1 (a) (iii) and the All Schedules Rules*, r. 5, r. 6, in respect of the profits of the trade on the footing that the French company had carried on the trade through the taxpayers as its agents. By r. 10, however, of the All Schedules Rules*, the taxpayers were excepted from the charge to tax unless they were " an authorised person carrying on a regular agency " of the French company within r. 10. On appeal,

Held: the assessments must be discharged because—

(i) it was only by ratification after the war that the taxpayers could have been authorised by the French company to carry on the trawler's activities during the period of the occupation of France by the enemy, as during that period the taxpayers had not in fact any such authority; and

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* The relevant provisions of the Income Tax Act, 1918, were as follows:

Sch. D, para. 1. " Tax under this Schedule shall be charged in respect of—(a) The annual profits or gains arising or accruing— . . . (iii) to any person, whether a British subject or not, although not resident in the United Kingdom, from any property whatever in the United Kingdom, or from any trade, profession, employment, or vocation exercised within the United Kingdom . . ."

All Schedules Rules: " 5. A person not resident in the United Kingdom, whether a British subject or not, shall be assessable and chargeable in the name of any such trustee, guardian, tutor, curator, or committee, or of any factor, agent, receiver, branch, or manager whether such factor, agent, receiver, branch, or manager has the receipt of the profits or gains or not, in like manner and to the like amount as such non-resident person would be assessed and charged if he were resident in the United Kingdom and in the actual receipt of such profits or gains.

" 6. A non-resident person shall be assessable and chargeable in respect of any profits or gains arising, whether directly or indirectly, through or from any factorship, agency, receivership, branch, or management, and shall be so assessable and chargeable in the name of the factor, agent, receiver, branch, or manager.

" 10. Nothing in these rules shall render a non-resident person chargeable in the name of a broker or general commission agent, or in the name of an agent not being an authorised person carrying on the regular agency of the non-resident person or a person chargeable as if he were an agent in pursuance of these rules, in respect of profits or gains arising from sales or transactions carried out through such a broker or agent."

(ii) there could not be in law an effective ratification by the French company of the taxpayers' activities during the occupation of France by the enemy, since at that time the French company was an alien enemy and incompetent to be the principal of the taxpayers for it could not have done the acts itself.

Firth v. *Staines* ([1897] 2 Q.B. 70), and *Sovfracht* (*V/O*) v. *Van Udens Scheepvaart en Agentuur Maatschappij* (*N.V. Gebr.*) ([1943] 1 All E.R. 76) applied.

Quaere whether, assuming that the French company was capable of ratifying the agency in 1945, the taxpayers could be made taxable as agents in previous years when no such authority could be given.

Appeal allowed.

[As to chargeability of a non-resident person in the name of an agent, see 20 HALSBURY'S LAWS (3rd Edn.) 297, 298, para. 543, and for the exception from charge to tax unless the agent carries on a regular agency, see ibid., pp. 298, 299, para. 545; and for cases on the subject, see 28 DIGEST 95, *558-569*.

For the Income Tax Act, 1918, Sch. D, para. 1 (a) (iii) and All Schedules Rules, r. 5, r. 6 and r. 10, see 12 HALSBURY'S STATUTES (2nd Edn.) 151, 183, 184, 185.

For the corresponding provisions in the Income Tax Act, 1952, s. 122, para. 1, s. 369, s. 370 and s. 373 (1), see 31 ibid. 112, 354, 355, and 356, 357.]

Cases referred to:

(1) *Bell* v. *National Provincial Bank of England*, [1904] 1 K.B. 149; 73 L.J.K.B. 142; 90 L.T. 2; 68 J.P. 107; 5 Tax Cas. 1; 28 Digest 41, *211*.

(2) *Gavazzi* v. *Mace*, (1926), 10 Tax Cas. 698; 28 Digest 34, *179*.

(3) *Nielsen, Andersen & Co.* v. *Collins, Tarn* v. *Scanlon*, (1926), 13 Tax Cas. 91; 28 Digest 95, *567*.

(4) *Maclaine* v. *Eccott*, (1926), 10 Tax Cas. 481; 28 Digest 33, *172*.

(5) *Wilson* v. *Tumman* (*Tummon*), (1843), 6 Man. & G. 236; 12 L.J.C.P. 306; 1 L.T.O.S. 256, 314; 134 E.R. 879; 1 Digest 418, *1129*.

(6) *Koenigsblatt* v. *Sweet*, [1923] 2 Ch. 314; 92 L.J.Ch. 598; 129 L.T. 659; 12 Digest (Repl.) 170, *1097*.

(7) *Firth* v. *Staines*, [1897] 2 Q.B. 70; 66 L.J.Q.B. 510; 76 L.T. 496; 61 J.P. 452; 1 Digest 403, *1033*.

(8) *Stevenson & Sons, Ltd.* v. *Act. für Cartonnagen-Industrie*, [1918] A.C. 239; 87 L.J.K.B. 416; 118 L.T. 126; Digest Supp.

(9) *Sovfracht* (*V/O*) v. *Van Udens Scheepvaart en Agentuur Maatschappij* (*N.V. Gebr.*), [1943] 1 All E.R. 76; [1943] A.C. 203; 112 L.J.K.B. 32; 168 L.T. 323; 2nd Digest Supp.

(10) *Dodworth* v. *Dale*, [1936] 2 All E.R. 440; [1936] 2 K.B. 503; 105 L.J.K.B. 586; 155 L.T. 290; 20 Tax Cas. 285; Digest Supp.

(11) *Spence* v. *Inland Revenue Comrs.*, (1941), 24 Tax Cas. 311; 2nd Digest Supp.

Case Stated.

The taxpayers appealed to the Special Commissioners of Income Tax against assessments to income tax in the sum of £1,000 for each of the years 1940-41 to 1944-45 inclusive made on them as agents for a French company, Pêcheries de la Morinie, under r. 5 of the All Schedules Rules of the Income Tax Act, 1918. The profits intended to be brought into charge were profits arising from a trade alleged to have been carried on within the United Kingdom by the French company through the agency of the taxpayers in connexion with the operation of a steam trawler, S. Jean. The taxpayers contended that they were never constituted agents of the French company in relation to the S. Jean and that they were not an authorised person carrying on the regular agency of the French company in relation to the S. Jean within the meaning of r. 10 of the All Schedules Rules of the Income Tax Act, 1918. Alternatively they contended that, if and so far as they were such agents or such an authorised person, their transactions in relation to the S. Jean were carried out in the ordinary course of their business as general commission agents and accordingly the French company was not chargeable in the taxpayers' name by virtue of s. 17 of the Finance Act, 1925. The Crown contended that, in relation to the S. Jean, the taxpayers were agents of the French company within r. 5 and r. 6 of the All Schedules Rules and an authorised person carrying on the regular agency of the French company within r. 10, and that the taxpayers' transactions in relation to the S. Jean were not carried out in the ordinary course of their business as general commission agents within s. 17 of the Finance Act, 1925.

The commissioners found that in the fishing industry there was a well understood distinction between management and agency. Management of a vessel involved full control of the movement of the vessel and the engagement of a skipper and crew. A manager was in the same position as an owner, except as regarded his accountability to the owner. An agent was agent for turning round a vessel on a particular occasion when it visited a port other than its usual port; the agent landed the fish, sold it, refuelled and re-stored the vessel and saw that it got to sea again; he used his discretion regarding running repairs, but did not put major repairs in hand without consulting the owner or manager. He did not tell the skipper where to fish on his next voyage. The agency was for one particular turn-around, though it might be, and often was, repeated regularly by the agent on behalf of the same owner and vessel. For this the agent received a commission which varied between two per cent. and five per cent. of the gross sales of fish landed; during the war the usual commission was three per cent. Such an agency was called turn-around agency. The taxpayers frequently engaged in turn-around agency for vessels that they did not own or manage. In the period material to the present case the taxpayers acted as turn-around agent for many foreign and British vessels, and it was not disputed that in so doing they carried on business as a general commission agent within s. 17 of the Finance Act, 1925*.

The commissioners also found that the trading operations carried on by means of the S. Jean from July, 1940, to November, 1945, were not carried on by the French company as principal without the intervention of any agent, nor by the fisheries section of the Free French movement, which had assisted in the operations of the S. Jean, but were carried on by the taxpayers. They found that they were so carried on by the taxpayers not as principals but as agents for the French company, and that in so carrying them on the taxpayers were carrying on a regular agency for the company. They held that the taxpayers were acting as an authorised person carrying on the regular agency of the French company within the meaning of r. 10 of the All Schedules Rules, and further that the transactions in connexion with the S. Jean went beyond the scope of their ordinary turn-around agency business and were not carried out in the ordinary course of their business as a general commission agent. They held, therefore, that the assessments were correctly made. The taxpayers appealed.

John Senter, Q.C., and *D. C. Miller* for the taxpayers.

Sir Frank Soskice, Q.C., *Sir Reginald Hills* and *A. S. Orr* for the Crown.

Cur. adv. vult.

July 31. **HARMAN, J.**, read the following judgment: This case is a curious aftermath of the fall of France in 1940. When that lamentable event happened the French trawler, S. Jean, with whose earnings we are here concerned, happened to be in the port of Fleetwood whither she had repaired to land her catch. She was owned by a French limited company known as Pêcheries de la Morinie which had its commercial domicil in France, its head office being at Boulogne, but the S. Jean on the capture of that town had fled to Lorient, whence on the orders of her owners she had been fishing on the Great Sole Bank. The appellant taxpayers carry on at Fleetwood the business of trawler owners, and also that of managers and agents for both British and foreign vessels. The taxpayers are the proprietors of forty-nine per cent. of the shares in the French company, and in 1940 the managing director of the taxpayers, one Fred Parkes, was a member of the board of the French company. The taxpayers in the ordinary course of their business acted as agents in the sense described in para. 15 of the Case for the vessel, when she came into Fleetwood, manned by a French skipper and crew. When the news of the French capitulation arrived Mr. Parkes took it on himself to immobilise the vessel to prevent her falling into German hands. The skipper and two of the crew were repatriated to France, but the rest stayed in England. Thereafter Mr. Parkes, without, so far as appears, any authority, but doing the best he could in the circumstances and also regarding the fact that the French company was largely indebted to the taxpayers, sent the ship to sea with an English skipper chosen by himself and a crew mainly French. Thereafter a body known as the fisheries section of the French naval forces took an interest in the vessel and her crew, and eventually through the good offices of the Minister of War Transport prevailed on Mr. Parkes to allow the vessel to be manned as far as possible by French officers and crew. She was thus during the war controlled partly by the taxpayers and partly by the French fisheries section. The taxpayers were never formally appointed by the Minister to be managers because, I suppose, the existing arrangements seemed good enough. The taxpayers kept accounts of the ship's takings and expenses, and after deducting a commission for themselves a considerable profit was shown. The arrangement above described went on till the end of 1945, when the ship returned to France under the control of her owners, the French company, representatives of which had at the end of the war visited the taxpayers and approved their conduct and accounts and the commission they had reserved for themselves.

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* 12 HALSBURY'S STATUTES (2nd Edn.) 263. By s. 17 (4) of the Finance Act, 1925, r. 10 of the All Schedules Rules took effect subject to the provisions of s. 17.

In making the various applications required under the controls operating in wartime, the taxpayers held themselves out as being managers acting with the authority of the French owners, but they never had any such authority. Mr. Parkes, it is true, was a director of the French company until the spring of 1941, when he was removed from the board without his knowledge, but whether on or off the board he had no authority from the French company to manage or delegate the management of the vessel. There was no agreement on the subject between the two companies before the fall of France.

In these circumstances assessments to tax were made on the taxpayers for the years 1940-41 to 1944-45 inclusive under the Income Tax Act, 1918, Sch. D, para. 1 (a) (iii), and All Schedules Rules, r. 5, on the footing that the trade was carried on by the French company within the United Kingdom through the taxpayers as its agents so that the French company could be charged in the agents' name. At the hearing before the Special Commissioners they found that the trade was not carried on by the French company as principal, and no one is concerned to dispute this. The commissioners further found that the activities were carried on by the taxpayers and not by the fisheries section of the Free French movement, and this is not disputed. A controversial point was whether in carrying on the business the taxpayers were brokers or general commission agents within the exception provided by r. 10 of the All Schedules Rules, the material part of which is in these words:

> " Nothing in these rules shall render a non-resident person chargeable in the name of a broker or general commission agent . . . "

This was to some extent modified by s. 17 of the Finance Act, 1925. On this the commissioners found that the taxpayers did not come within the exception, and this point has not been contested before me. The dispute before me was whether, as the commissioners found, the taxpayers were in what they did " an authorised person carrying on the regular agency ". In considering this question and coming to a finding on it, it seems to me that the commissioners were construing r. 10 and that this, therefore, is a question of law—see *Bell* v. *National Provincial Bank of England* (1) ([1904] 1 K.B. 149). If this be wrong and the decision was one of fact, or rather an inference from the facts, I have to consider whether there were any facts to justify the commissioners in reaching this conclusion.

At the outset, on the facts as I have stated them, it seems to me clear that, subject to the question of ratification, the taxpayers were not authorised persons at all. It is true that they held themselves out as managers, but no one altered his position over the years on that account, so no question of estoppel arises. If, however, by reason of the doctrine of ratification they must be treated as authorised, the ratification dating back to the year 1940, then I think they would satisfy the words " carrying on the regular agency ". This awkward phrase is discussed by Rowlatt, J., in *Gavazzi* v. *Mace* (2) ((1926), 10 Tax Cas. 698) where, after reading r. 10 of the All Schedules Rules, which I have already read, he says this (ibid., at p. 744):

> " It is quite clear that it was assumed by those who drew that rule . . . that there would be no attempt to charge any agent otherwise than in respect of profits on sales and transactions carried out by him or through him. Then this provision says that ' a non-resident shall not be chargeable in the name of a broker or general commission agent, or in the name of an agent not being an authorised person,' and so on. I find great difficulty in quite understanding the fabric of this enactment. First of all, I do not quite see why you want the words ' broker or general commission agent ' at all, because a broker or general commission agent is an agent who is not an authorised person carrying on a regular agency of the non-resident person, and therefore they would be protected without being mentioned at all. But they are put in, I suppose, as a sort of indication of the line on which the draftsman's mind is travelling before he comes to the phrase which supersedes those words, and expresses a larger idea which includes them.
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> " Then I am bound to say I find great difficulty in understanding what is exactly meant by ' authorised person '. Anybody who carries on a regular agency must be an authorised person. One view is that an authorised person is meant to indicate that he is to be a person of a somewhat superior scale of importance in the agency, to which I rather incline; another view is that ' authorised person ' are merely colourless words for agent, merely serving, for the convenience of grammar, as a noun to which you can apply the words " carrying on the regular agency of the non-resident person '. The use of the word ' agent ', again, was what was sought to be avoided there by the draftsman, and so he used the non-committal words ' authorised person ' before he went on to say that he should not be carrying on a regular agency of a non-resident person."

In *Nielsen, Andersen & Co.* v. *Collins, Tarn* v. *Scanlon* (3) ((1926), 13 Tax Cas. 91) Scrutton, L.J., says this (ibid., at p. 121):

> " The next point that is taken is, as I follow it, that it is said that the person you are trying to tax is merely a broker; he is doing just what an ordinary ship broker does—that, of course, puts in ' ship ' for the first time; a ship broker is a very different thing from a broker—and consequently, under [the section] the non-resident person is not chargeable in the name of a broker or general commission agent. Now the language is [and the lord justice repeats the words from r. 10].
>
> " In my view the words ' not being an authorised person carrying on the non-resident's regular agency ' apply to the whole of the preceding descriptions, and the contrast intended to be drawn is between casual employment, temporary employment, for a transaction or few transactions, and regular appointment of a permanent agent who is there as representing the foreigner. Though it was not necessary for Lord Cave to say so, I think

> what LORD CAVE says in *Maclaine* v. *Eccott* (4) ((1926), 10 Tax Cas. 481 at p. 577) as to the meaning of sub-s. (6) expresses what I mean to express, and is correct: ' A non-resident instructing a broker or other casual agent in this country shall not be chargeable '. I think the distinction is between the casual agent and the authorised person carrying on the non-resident's regular agency. It is odd language, of course, because how you can carry on agency if you are not authorised, I do not quite understand, and what was the object of putting in the word ' authorised ' I do not follow. The emphasis I lay on the word ' regular '."

Judged by these tests, it seems to me that if the taxpayers were authorised persons they were carrying on the regular agency. The case seems to me to turn, therefore, on the question of ratification. There is no doubt that after the war the French company by its proper representatives approved of what had been done by the taxpayers. Ratification, as we all know, has a retroactive effect. It is well stated by TINDAL, C.J., in *Wilson* v. *Tumman* (*Tummon*) (5) ((1843), 6 Man. & G. 236) in these words (ibid., at p. 242):

> " That an act done, for another, by a person, not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority."

LORD STERNDALE, M.R., in *Koenigsblatt* v. *Sweet* (6) ([1923] 2 Ch. 314) has words to the same effect (ibid., at p. 324). The conditions precedent to a valid ratification are well stated by WRIGHT, J., in *Firth* v. *Staines* (7) ([1897] 2 Q.B. 70). The facts of that case I need not rehearse. The passage reads as follows (ibid., at p. 75):

> " I think the case must be decided upon the ordinary principles of the doctrine of ratification. To constitute a valid ratification three conditions must be satisfied: first, the agent whose act is sought to be ratified must have purported to act for the principal; secondly, at the time the act was done the agent must have had a competent principal; and, thirdly, at the time of the ratification the principal must be legally capable of doing the act himself."

The first condition is satisfied: the taxpayers did hold themselves out as agents for the French company; so is the third. At the time of the ratification the French company was capable of doing the kind of acts which they were purported to ratify. But I cannot think that the second condition is met. At the time the acts were done, the French company was an alien enemy at common law. It was therefore not a competent principal because it could not have done the act itself. Moreover, to have accepted the mandate would have been an offence on the part of the taxpayers constituting trading with the enemy within the mischief of the Trading with the Enemy Act, 1939. Counsel for the Crown suggested that no such offence would have been committed having regard to the proviso to s. 1 of that Act excepting from the mischief of the section acts done under the authority of a Secretary of State. I do not accept this. No doubt the Minister of War Transport licensed the ship, but he was not a Secretary of State, and for aught I know had no knowledge of the supposed agency. If he or some other authorised person had appointed the taxpayers to be managers of the ship, as was apparently the usual course, the matter might have been different, but the Case expressly states that this course was not taken. No doubt the taxpayers became accountable after the war to the French company for the profits made—see *Stevenson & Sons, Ltd.* v. *Act. für Cartonnagen-Industrie* (8) ([1918] A.C. 239) and Lord Atkinson's speech (ibid., at p. 256)—but that does not seem to me to affect the matter. In *Sovfracht (V/O)* v. *Van Udens Scheepvaart en Agentuur Maatschappij (N.V. Gebr.)* (9) ([1943] 1 All E.R. 76) it was made clear that the relation of principal and agent is determined by war and such a relationship cannot exist during the currency of hostilities—see Lord Porter's speech where his Lordship says this (ibid., at p. 102):

> " Ordinarily, when the principal becomes an enemy, the authority of the agent ceases on the ground that it is not permissible to have intercourse with an enemy alien, and the existence of the relationship of principal and agent necessitates such intercourse. That the representatives, legal or non-legal, of a litigant may require to have such intercourse with their principal in the litigation is, I imagine, clear, and I do not think it is an answer to say that in the event it may not be found necessary for the one to communicate with the other; at any moment the necessity may arise; the very relationship requires it even if it is desired only to terminate the mandate itself. If authority be required for the proposition that the relationship of principal and agent is determined when the parties to the agency agreement become enemies one to the other, it is to be found in *Stevenson & Sons, Ltd.* v. *Act. für Cartonnagen-Industrie* (8)."

If this be right, it is enough to conclude the case in the taxpayers' favour. I need not, therefore, consider the further point of counsel for the taxpayers that as income tax is a tax assessable year by year it is not legitimate to tax by reason of the events of a subsequent year. The argument was that, even though the principal was capable of ratifying in 1945, that did not make the agent taxable in previous years when no such authority could be given. I was referred in this connexion to *Dodworth* v. *Dale* (10) ([1936] 2 All E.R. 440) and *Spence* v. *Inland Revenue Comrs.* (11) ((1941), 24 Tax Cas. 311).

I should add that the Crown abandoned a suggested alternative that the taxpayers could be charged as trustees for the French company. This suggestion was never made to the commissioners nor were the assessments made on the taxpayers in that capacity. Further, I do not think that the French company was an " incapacitated person " within the All Schedules Rules, r. 4.

The result is that the appeal is allowed and the assessments are discharged.

Appeal allowed.

Solicitors: *Theodore Goddard & Co.*, agents for *Andrew M. Jackson & Co.*, Hull (for the taxpayers); *Solicitor of Inland Revenue*.

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

BROWNSEA HAVEN PROPERTIES, LTD. *v.* POOLE CORPORATION.

[CHANCERY DIVISION (Vaisey, J.), July 30, 31, 1957.]

Street Traffic—Regulation of traffic—Prevention of obstruction of streets—One-way traffic system for all vehicles in two streets—Order by local authority—Town Police Clauses Act, 1847 (10 & 11 *Vict. c.* 89), *s.* 21.

Public Authority—Statutory powers—Order made under statutory power—Subsequent statute conferring power to make similar order but subject to confirmation by Minister—Order made within scope of subsequent power but under previous statute and without confirmation—Whether order valid—Town Police Clauses Act, 1847 (10 & 11 *Vict. c.* 89), *s.* 21*—Road Traffic Act,* 1930 (20 & 21 *Geo.* 5 *c.* 43), *s.* 46 (1), (2)*—Road and Rail Traffic Act,* 1933 (23 & 24 *Geo.* 5 *c.* 53), *s.* 29 (4).

A local authority, purporting to act under powers conferred by s. 21* of the Town Police Clauses Act, 1847, made an order, dated Mar. 5, 1957, which in effect created a one-way traffic system in two adjoining streets within the district of the local authority for all vehicles for a period of six months from Apr. 19, 1957, to Oct. 19, 1957, inclusive. The purpose of making the order was to test the efficiency of the one-way traffic system in the two streets as a preliminary to an order establishing it under s. 46 (2)† of the Road Traffic Act, 1930, as amended by s. 29 (4) of the Road and Rail Traffic Act, 1933. An order made by a local authority under s. 46 (2) as amended would not be effective unless it were confirmed by the Minister of Transport and Civil Aviation, after holding, if he thought fit, a public inquiry; but an order under s. 21 of the Act of 1847 could be made without confirmation by the Minister and without the holding of a public inquiry. The plaintiff company, which owned a hotel in one of the two streets, sought a declaration that the order made under s. 21 of the Act of 1847 was ultra vires and void.

Held: the order of Mar. 5, 1957, was ultra vires and void, because, as s. 46 (2) of the Road Traffic Act, 1930, as amended, contemplated that one-way streets should be created only with the confirmation of the Minister, a temporary order under s. 21 of the Town Police Clauses Act, 1847, could not be validly made for the purpose of trying out a one-way traffic system as a preliminary before making and applying for confirmation of an order under s. 46 (2) of the Act of 1930.

[**Editorial Note.** Section 46 (1) of the Road Traffic Act, 1930, is subject to repeal by, and s. 46 (2) is affected by, s. 33 of the Road Traffic Act, 1956, which has not been brought into operation at the date of this report. By s. 33 (8) of the Act of 1956, s. 46 of the Act of 1930 will cease to apply as respects the London Traffic Area; and it may be observed that under s. 36 of the Act of 1956, which empowers the Commissioner of Police to establish experimental traffic schemes in London, the consent of the Minister to the regulations establishing such schemes is made requisite. Section 36 of the Act of 1956 was brought into operation on Mar. 1, 1957, by the Road Traffic Act, 1956 (Commencement No. 3) Order, 1957 (S.I. 1957 No. 3).

For the Town Police Clauses Act, 1847, s. 21, the Road Traffic Act, 1930, s. 46, and the Road and Rail Traffic Act, 1933, s. 29 (4), see 24 HALSBURY'S STATUTES (2nd Edn.) 521, 611, 702.

For the Road Traffic Act, 1956, s. 33 and s. 36, see 36 HALSBURY'S STATUTES (2nd Edn.) 834, 840.]

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* The terms of the section are printed at p. 213, letter E, post.

† The relevant terms of the sub-section are printed at p. 214, letter A, post.

A

Adjourned Summons.

The plaintiff company, Brownsea Haven Properties, Ltd., applied to the court by originating summons for a declaration that an order dated Mar. 5, 1957, made by the defendants, Poole Corporation, in purported exercise of the powers conferred on them by s. 21 of the Town Police Clauses Act, 1847, was ultra vires and void.

B

The order was in these terms:

> " Borough and County of the Town of Poole.
>
> The Town Police Clauses Act, 1847. Section 21.
>
> Order made by the Poole Borough Council for the routes to be observed by vehicles.
>
> Whereas the streets to which this order applies are during certain seasons of the year thronged and liable to be obstructed.
>
> Unless upon the direction or with permission of a police officer in uniform from Apr. 19, 1957, to Oct. 19, 1957 (both dates inclusive) the route to be observed by all vehicles in
>
> (i) Banks road between its junctions with Panorama road shall be towards their south western junction and
>
> (ii) Panorama road shall be towards its north east junction with Banks road.
>
> For the purposes of this order ' vehicle ' includes bicycles and similar machines whether mechanically propelled or not.
>
> All constables are hereby directed to enforce the provisions of this order.
>
> Signed C. W. Wells, Mayor
>
> Mar. 5, 1957 J. G. Hillier, Town Clerk"

C D E

The two roads referred to in the order were in the part of Poole known as the Sandbanks Peninsula. Panorama road formed, roughly, two sides of a triangle, with the greater part of Banks road forming the base of the triangle. Banks road continued for a short distance in each direction after its junctions with Panorama road, and, at its south-west end, led to a ferry. The effect of the order of Mar. 5, 1957, was to create a system of one-way traffic in a clock-wise direction in those two roads during the period of six months from Apr. 19, 1957, to Oct. 19, 1957. F

In January, 1956, the corporation asked for the observations of the Minister of Transport and Civil Aviation on a suggestion that a system of one-way traffic in a clock-wise direction, should be enforced in Banks road and Panorama road. G Having regard to objections which were put forward against a somewhat similar traffic regulation order which the corporation wished to make in 1953 and after considering the circumstances, the Minister suggested to the corporation that, as there appeared to be some doubt whether the one-way traffic scheme would provide the complete answer to the traffic problem experienced, it would perhaps be advisable to try it out under police powers for an experimental H period to ascertain the full effect on traffic and local inhabitants before making an order under the powers contained in s. 46 (2) of the Road Traffic Act, 1930.

The plaintiff company owned the Haven Hotel, situated in Banks road near the point of its south-western junction with Panorama road. The company had carried on the business of a hotelier at the hotel since 1927. The directors of the company feared that, by reason of the traffic restrictions, visitors would I be discouraged from coming to the hotel, and in April, 1957, the chairman of the directors wrote to the Minister in regard to the traffic restrictions. In a reply, dated May 1, 1957, on behalf of the Minister, the facts which are set out in the preceding paragraph were stated, and the letter went on to say:

> " Under the powers contained in s. 21 of the Town Police Clauses Act, 1847, a council, through the police, can institute any system of traffic regulation they may consider to be necessary for a trial period."

The chairman of the plaintiff company was advised by the Minister to forward any objections which he wished to make direct to the corporation, so that the corporation might be fully aware of any difficulties experienced as a result of the institution of the one-way traffic system.

G. D. Squibb, Q.C., and *J. L. Harman* for the plaintiff company.
J. L. Arnold for the defendants, Poole Corporation.

VAISEY, J., stated the facts and the terms of the order made by the defendants, Poole Corporation, on Mar. 5, 1957, and continued: The question is whether the order was properly made within the powers of the corporation. There are two sections which I have had to consider. One is s. 21 of the Town Police Clauses Act, 1847, and the other is s. 46 (2) of the Road Traffic Act, 1930. Those sections are in some respects overlapping sections, but they differ in rather important respects to which I must now refer.

The marginal note to s. 21 of the Act of 1847 is " Power to make orders for preventing obstructions in the streets during public processions, etc." That power, which is not very accurately summarised in the marginal note, is a power which can be exercised in the borough of Poole by the corporation. Originally the power was given to commissioners, but it is now exercisable by the local authority.* Substituting " corporation " for " commissioners ", s. 21 reads:

> " [The corporation] may from time to time make orders for the route to be observed by all carts, carriages, horses, and persons, and for preventing obstruction of the streets, within the limits of the special Act [that is, within the limits of the corporation's jurisdiction] in all times of public processions, rejoicings, or illuminations, and in any case when the streets are thronged or liable to be obstructed, and may also give directions to the constables for keeping order and preventing any obstruction of the streets in the neighbourhood of theatres and other places of public resort; and every wilful breach of any such order shall be deemed a separate offence against this Act, and every person committing any such offence shall be liable to a penalty . . ."

Between 1847 and 1930, when s. 46 of the Road Traffic Act, 1930, became part of the law, s. 21 of the Act of 1847 was considered by the courts on many occasions, and one of the things which was decided is that the reference to " processions, rejoicings, or illuminations " did not limit the operation of the section, and that it applied to all cases of crowding in the streets. I do not think that I need refer to the authorities which were cited to me, except to observe that throughout there has been a great tendency not to limit the operation of s. 21 and the courts have thought that, these being powers which were entrusted to local authorities, they ought to be given a wide construction†. No doubt in the year 1847, so far as counsel have been able to discover, the one-way street, as such, was not the familiar phenomenon which it has become today, but it may well be that to some extent the creation of a one-way route for particular purposes was within the powers of the local authority under s. 21.

I must now turn, by way of contrast, to s. 46 of the Act of 1930‡. Having regard to the one subsequent amendment to it, s. 46 (1) is to this effect: The corporation, subject to the confirmation of the Minister of Transport and Civil Aviation*,

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* Originally, this Act applied only to towns where it was incorporated in a local Act, but certain provisions including s. 21 were applied, with adaptations, to all boroughs and urban districts by the Public Health Act, 1875, ss. 171, 316 (19 HALSBURY'S STATUTES (2nd Edn.) 79, 109).

† See, for example, *Teale* v. *Williams*, [1914] 3 K.B. 395; 42 Digest 842, *3*; and *Etherington* v. *Carter*, [1937] 2 All E.R. 528.

‡ By the Road and Rail Traffic Act, 1933, s. 29 (4), councils are empowered to make orders restricting the use of vehicles on specified roads under s. 46 of the Act of 1930 without previous reference to the Minister, but his confirmation is necessary: for the text of s. 29 (4) of the Act of 1933, see 24 HALSBURY'S STATUTES (2nd Edn.) 702. See Editorial Note, p. 211, letter G, ante, regarding the repeal of s. 46 (1).

> ". . . may . . . after holding, if [the Minister] thinks fit, a public inquiry, by order prohibit or restrict, subject to [certain] exceptions . . . the driving of vehicles, or of any specified class or description of vehicles, on any specified road within the area of the council in any case in which [the council, subject to the confirmation of the Minister] is satisfied that any such vehicles cannot be used, or cannot without restriction be used, on that road without endangering the safety of the vehicles or the persons therein, or other persons using the road, or that the road is unsuitable for use or for unrestricted use by any such vehicles."

The opening words of s. 46 (2) are: " The Minister may on the application of a council to which this section applies . . ." Having regard to the amendment to s. 46, I think that those opening words can be read as meaning that the council may subject to the confirmation of the Minister:

> ". . . make an order for any of the following purposes:—(a) the specification of the routes to be followed by vehicles . . ."

Pausing there, the words that I have quoted seem to me to be exactly what s. 21 of the Act of 1847 has already said. The sub-section proceeds:

> " (b) the prohibition or restriction of the use of specified roads by vehicles of any specified class or description, either generally or during particular hours; (c) the prohibition of the driving of vehicles on any specified road otherwise than in a specified direction; (d) otherwise in relation to the regulation of traffic."

The substantial difference between s. 46 of the Act of 1930 and s. 21 of the Act of 1847 is this. Under s. 46 of the Act of 1930, the order must be one which the Minister has confirmed, and which, as I understand it, the Minister will frequently not confirm until he has held an inquiry or invited representations on the subject; whereas s. 21 of the Act of 1847, which, it will be noted, was passed some eighty-three years earlier, provides for something which could be done on the undivided and unrestricted authority of the local council. The order of Mar. 5, 1957, is an order which prohibits " the driving of vehicles on any specified road " that is to say, Banks road and Panorama road, " otherwise than in a specified direction ". Whatever can be done as a matter of urgency under s. 21 of the Act of 1847, there is no doubt at all that s. 46 of the Act of 1930 contemplates the creation of one-way streets by order made by the appropriate authority and confirmed by the Minister.

When the Minister was approached by the corporation and informed what they wanted to do, the Minister took a rather surprising line. I do not want to comment on it too much, because the Minister is not here. The Minister was not satisfied that the creation of a one-way street along this route was desirable, and, therefore, he was not prepared to make or authorise the making of an order under s. 46 of the Act of 1930, but he advised the corporation to try out the scheme for a trial period. He said, in effect, to the corporation: " Act on your own responsibility under s. 21 of the Act of 1847, and put this one-way street regulation into operation experimentally. See how it works ". In a letter written on behalf of the Minister to the chairman of the directors of the plaintiff company, it was said:

> " Under the powers contained in s. 21 of the Town Police Clauses Act, 1847, a council, through the police, can institute any system of traffic regulation they may consider to be necessary for a trial period."

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* By the Transfer of Functions (Ministry of Civil Aviation) Order, 1953 (S.I. 1953 No. 1204), the style and title of the Minister of Transport was changed to the " Minister of Transport and Civil Aviation ".

To assume that s. 21 of the Act of 1847 has been left on the statute book as an adjunct to the much more definite s. 46 of the Act of 1930, to say that the former section can properly be used by the corporation without any local inquiry, and with no restriction at all, as a sort of trying out ground for the question whether an order shall be made under s. 46 of the Act of 1930 is making a use of s. 21 which, looking at the two sections, I do not think that one ought, on the true construction of s. 21, to allow. I agree that it would be very useful to see how the order would work; but the plaintiff company, acting by Mr. Ruttle, the chairman of the directors of the company, very much object to the one-way traffic system along these roads. It may be that Mr. Ruttle's objections will be overridden when the matter has been considered after hearing his views; but to introduce the one-way traffic system under the unrestricted powers of s. 21 of the Act of 1847 seems to me to disregard to an unwarranted extent s. 46 of the Act of 1930 with all the safeguards which it contains and the entirely different procedure and different responsibilities which it creates. Under s. 46 the corporation can do nothing without the confirmation of the Minister: under s. 21 they can do what they like.

Under s. 46, the Minister, representing the public, would, I expect, say that, if there is any general objection to the introduction of the one-way traffic system, there would be a local inquiry, or, at any rate, that those affected should be invited to make their representations before the order takes effect. I think that it is going rather far to say that, whenever an order as to a one-way street under s. 46 is contemplated, it is permissible to try it out for six months without permission. I think that that would make rather a dangerous precedent. It would enable the corporation to create one-way streets all over Poole, which is a very thickly populated and very popular health resort, just to see how the system worked, with a view to an order being subsequently made under s. 46. If I were to decide that this method of procedure was desirable and permissible, it seems to me it would be allowable for any council to say: "We want an order under s. 46 of the Act of 1930, but, in order to pave the way and show what an excellent thing it is, we will put into operation a one-way street under s. 21 of the Act of 1847, and if we do that and if it works, then the Minister will not withhold his confirmation". I do not think that that procedure is one which the legislature, in the two sections to which I have referred, fairly construed, ever contemplated. I am unable to say that the order which was made by the corporation under s. 21 was within the corporation's powers.

I do not think that this is a permissible use of s. 21 of the Act of 1847, which is of a very much more limited character than s. 46 of the Act of 1930, and which gives power which is wholly unrestricted and uncontrolled. I do not think that it is the kind of use to which s. 21 ought to have been put. I arrive at this conclusion with some reluctance, expressing every possible hope that this is not going to cause any serious difficulty to the corporation. I must declare that the order of Mar. 5, 1957, is not within the powers of the corporation, and that it is ultra vires and void.

Declaration accordingly.

Solicitors: *Cripps, Harries, Hall & Co.* (for the plaintiff company); *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Poole (for the defendants).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

UNITED AFRICA CO., LTD. *v.* SAKA OWOADE.

[Privy Council (Lord Oaksey, Lord Keith of Avonholm and Mr. L. M. D. de Silva), November 1, 2, 3, December 13, 1954.]

Master and Servant—Liability of master—Criminal act of servant—Scope of employment—Carriage of goods by servants of transport contractor—Theft of goods.

A transport contractor sought from the appellants employment in carrying goods. He introduced to the appellants two men, representing them as his driver and clerk and stating that, when the appellants had goods to be carried, they should be given to the two men. Goods were given by the appellants to one of the two men for carriage. The goods were never delivered, and subsequently the two men were convicted of the theft of the goods. The appellants sued the contractor for the value of the goods.

Held: the contractor was liable because the sole question was whether the wrong was committed in the course of the servants' employment and the true inference from the facts was that the conversion of the goods was done within the course of the servants' employment.

Lloyd v. *Grace, Smith & Co.* ([1912] A.C. 716) applied.

Cheshire v. *Bailey* ([1905] 1 K.B. 237) distinguished.

Appeal allowed.

[**Editorial Note.** In *Lloyd* v. *Grace, Smith & Co.* ([1912] A.C. 716), the decision in *Cheshire* v. *Bailey* ([1905] 1 K.B. 237) was distinguished on the ground that the conduct in question was beyond the scope of the servant's employment; see, particularly, per Lord Shaw of Dunfermline ([1912] A.C. at p. 741). The same distinction is drawn in the present case, which shows that the only question is one of fact, viz., whether the wrong was committed in the course of the employment. Such a decision as *Mintz* v. *Silverton* ((1920), 36 T.L.R. 399) may, therefore, similarly be distinguished, more particularly as in that case the servant was not held out to have the authority of the master. In the present case the two men were held out as having authority to receive goods for carriage.

As to the liability of a master for the criminal acts of his servant, see 22 Halsbury's Laws (2nd Edn.) 222, para. 400; and for cases on the subject, see 34 Digest 132, 133, *1012-1017*.]

Cases referred to:

(1) *Cheshire* v. *Bailey*, [1905] 1 K.B. 237; 74 L.J.K.B. 176; 92 L.T. 142; 34 Digest 132, *1015*.

(2) *Lloyd* v. *Grace, Smith & Co.*, [1912] A.C. 716; 81 L.J.K.B. 1140; 107 L.T. 531; 34 Digest 129, *991*.

Appeal.

Appeal by special leave by the United Africa Co., Ltd., from a judgment of the West African Court of Appeal, dated May 15, 1951, allowing an appeal by the respondent, Saka Owoade, from a judgment of the Supreme Court of Nigeria (Judicial Division of Lagos) dated Mar. 30, 1950, in favour of the appellants for £4,732 13s. 4d.

The appellants were general merchants in Lagos and elsewhere in West Africa. The respondent owned lorries and was a transport contractor. In February, 1948, the respondent came to the appellants' premises and saw certain of their employees and solicited employment to carry goods from Lagos to the appellants' branches up country. He introduced to the appellants' employees two men whom he said were his driver and clerk, and stated that, when the appellants had goods for him to carry, they should give them to the driver and clerk. The clerk attended at the appellants' premises on two occasions in March and April, 1948, and on each occasion was given certain goods, viz., cigarettes and brandy, the total value of which was £4,777 9s. 4d. for carriage to two branches up country. The goods were never delivered to the two branches up country and the lorry driver and clerk were subsequently convicted of stealing the goods. The appellants issued their writ on Mar. 2, 1949, claiming £4,777 9s. 4d., the value of the goods. The case came on for hearing on Feb. 27, 1950. The trial judge reserved judgment, which he delivered on Mar. 30, 1950. He held that the goods had been delivered to the respondent's servants in the course of their employment and stolen by them in such capacity, and he gave judgment for the appellants for £4,732 13s. 4d. On appeal to the West African Court of Appeal, it was held that the form of the pleadings was such that the appellants were only entitled to rely on the non-delivery by a common carrier and that, as they had not proved that the respondent was a common carrier, their case must fail. Accordingly, the West African Court of Appeal gave judgment for the respondent. On the appeal to the Judicial Committee their Lordships agreed on the pleading points with the trial judge. They considered that the facts stated in the statement of claim were sufficient to raise the question of the respondent's liability apart from any liability as a common carrier. The case is reported only on the question of the respondent's liability for the wrong committed by the respondent's servants*.

T. G. Roche for the appellants.
Phineas Quass, Q.C., and *S. N. Bernstein* for the respondent.

LORD OAKSEY, after stating the facts and deciding the questions on the points of pleading, continued: On Oct. 28, 1954, the respondent amended his printed case and has argued before their Lordships' Board that a principal or master cannot be liable for his agent's or servant's fraud unless the principal or master has been himself negligent. This argument was based principally on *Cheshire* v. *Bailey* (1) ([1905] 1 K.B. 237).

In their Lordships' opinion, *Lloyd* v. *Grace, Smith & Co.* (2) ([1912] A.C. 716) establishes the principle that a master is liable for his servant's fraud perpetrated in the course of the master's business whether the fraud was committed for the master's benefit or not. The only question is whether the fraud was committed in the course of the servant's employment. In that case, it was clearly in the course of the servant's employment since it was the fraud of a solicitor's clerk in the solicitor's office on the business of the solicitor's client. In *Cheshire* v. *Bailey* (1), it was held that the criminal act of the servant had not occurred in the course of his employment. The contract was not a contract of carriage of goods but the hire of a brougham for the personal use of a jeweller's traveller in the course of his business. The servant drove the brougham away when the traveller was absent and, by arrangement with two thieves, participated in the theft of jewellery left by the traveller in the brougham. Their Lordships do not find it necessary to decide whether that case is distinguishable on its facts from *Lloyd* v. *Grace, Smith & Co.* (2) or has been overruled by the decision in *Lloyd* v. *Grace, Smith & Co.* (2).

In the present case, the fair inference from the facts proved is that the goods were committed expressly to the respondent's servants and that they converted the goods whilst they were on the journey which the respondent had undertaken to carry out, and the conversion, therefore, was, in their Lordships' view, in the course of the employment of the respondent's servants. There is, in their

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* The following cases were referred to, in addition to those mentioned in the judgment, on the point on which the present case is reported:—*Malcolm, Brunker & Co., Ltd.* v. *Waterhouse & Sons* ((1908), 24 T.L.R. 854); *Williams* v. *Curzon Syndicate, Ltd.* ((1919), 35 T.L.R. 475); *Rand* v. *Craig* ([1919] 1 Ch. 1), sub nom. *Joseph Rank, Ltd.* v. *Craig* ((1919), 88 L.J.Ch. 45; 119 L.T. 751); *Mintz* v. *Silverton* ((1920), 36 T.L.R. 399); *Central Motors (Glasgow), Ltd.* v. *Cessnock Garage and Motor Co.* (1925 S.C. 796).

Lordships' opinion, no difference in the liability of a master for wrong whether for fraud or any other wrong committed by a servant in the course of his employment. It is a question of fact in each case whether the wrong was committed in the course of the servant's employment and, in the present case, their Lordships are of opinion that, on the uncontradicted evidence, the conversion of the appellant's goods took place in the course of the employment of the respondent's servants.

Appeal allowed. Judgment for the appellants for £4,777 9s. 4d.

Solicitors: *Linklaters & Paines* (for the appellants); *A. L. Bryden & Williams* (for the respondent).

[*Reported by* G. A. Kidner, Esq., *Barrister-at-Law.*]

Re PHOENIX OIL AND TRANSPORT CO., LTD.

[Chancery Division (Roxburgh, J.), July 22, 25, 31, 1957.]

Company—Winding-up—Contributory—List of contributories—Whether " contributories" include holders of fully paid shares—Dispensing with list of contributories—Companies Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 38), *s.* 213, *s.* 257 (1).

The word " contributories " in s. 257* of the Companies Act, 1948 (which provides for the settling of a list of contributories in a winding-up) includes holders of fully paid shares, because the word refers to every person who may become liable to contribute in any possible event under the Act.

Dicta of Turner, L.J., in *Re National Savings Bank Assocn.* ((1866), 1 Ch.App. at p. 551) and in *Re Anglesea Colliery Co.* ((1866), 1 Ch.App. at p. 560) applied.

Observations on dispensing with the settlement of a list of contributories under the proviso to s. 257 of the Companies Act, 1948 (see p. 221, letters C to E, post).

[As to the settlement of lists of contributories, see 6 Halsbury's Laws (3rd Edn.) 638, para. 1256, et seq.; and for cases on the subject, see 10 Digest (Repl.) 958, 959, *6587-6595.*

As to who are " contributories ", see 6 Halsbury's Laws (3rd Edn.) 630, para. 1242; and for cases on the subject, see 10 Digest (Repl.) 954-956, *6560-6579.*

For the Companies Act, 1948, s. 213 and s. 257, see 3 Halsbury's Statutes (2nd Edn.) 633, 663.

For the Companies (Winding-Up) Rules, 1949, r. 81, r. 82, r. 83, r. 85, see 4 Halsbury's Statutory Instruments 152.]

Cases referred to:

(1) *Re Aidall, Ltd.*, [1933] Ch. 323; 102 L.J.Ch. 150; 148 L.T. 233; 18 Tax Cas. 617; 10 Digest (Repl.) 954, *6565.*

(2) *Re Anglesea Colliery Co.*, (1866), 1 Ch.App. 555; 35 L.J.Ch. 809; 15 L.T. 127; 30 J.P. 692; 10 Digest (Repl.) 954, *6562.*

(3) *Re Consolidated Gold Fields of New Zealand, Ltd.*, [1953] 1 All E.R. 791; [1953] Ch. 689; 10 Digest (Repl.) 1009, *6939.*

(4) *Re National Savings Bank Assocn.*. (1866), 1 Ch.App. 547; 35 L.J.Ch. 808; sub nom. *Re Anglesea Colliery Co., Ltd., Re National Savings Bank Assocn., Ltd.*, 15 L.T. 127; 10 Digest (Repl.) 876, *5792.*

Adjourned Summons.

By a summons dated June 20, 1957, the liquidator in the compulsory winding-up of Phoenix Oil and Transport Co., Ltd., applied for, among other things, an order that the settlement of a list of contributories be dispensed with.

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* The text of s. 257 (1) is printed at p. 219, letter H, post.

The company was incorporated on June 24, 1920, under the Companies Acts, 1908 to 1917, with a nominal capital of £1,050,000, divided into a million shares of £1 each and a million shares of 1s. each. The capital was increased from time to time and at the beginning of 1939 it was £4,500,000, divided into 4,450,000 shares of £1 each and a million shares of 1s. each, of which 3,737,588 of the £1 shares and all the 1s. shares were issued and credited as fully paid up.

As the result of a scheme of arrangement made between the company and its members on Feb. 22, 1939, and an order of the court dated July 3, 1939, the capital of the company was reduced to £2,150,680 by cancelling 13s. 4d. of the capital paid up on 3,523,980 of the issued shares of £1 each and reducing the nominal amount of each such share to 6s. 8d. The issued shares (namely, 213,608 shares of £1 each, 3,523,980 shares of 6s. 8d. each, and the million shares of 1s. each) were sub-divided and consolidated, and converted into £1,438,268 stock, in accordance with the terms of the scheme of arrangement. By a minute of the company, approved by the court, the capital was then increased to its former amount of £4,500,000, being divided into £1,438,268 stock and 3,061,732 shares of £1 each, none of which shares had been issued. The capital remained unaltered at the date of the commencement of the winding-up.

The scheme of arrangement involved the sale by the directors of all stock representing fractions of £1 to which members were entitled as a result of the reorganisation and the payment of the net proceeds of sale, in due proportions, to the members entitled to such fractions. At the date of the liquidation there were 1,220 members or former members entitled between them to the sum of £174 0s. 2d., being the proceeds of sale of the stock fractions which these members or former members had failed to claim. There were also sums totalling £1,255 3s. 11d. due to 639 members or former members in respect of unclaimed dividends. Except for these sums of £174 0s. 2d. and £1,255 3s. 11d., and two debts (of £35 and £250, respectively), to creditors who had not responded to notices sent to them requiring them to prove their respective debts, all the liabilities of the company had been settled in full, and the liquidator had in hand a surplus of approximately £640,000 available for distribution among the holders of the company's stock. There were approximately 9,100 members entitled to rank pari passu in the distribution of the surplus assets of the company, and the liquidator estimated that he would be able to make a return of 10s. on each £1 of stock held.

Arthur Bagnall for the applicant, the liquidator.
Denys B. Buckley as amicus curiae.

Cur. adv. vult.

July 31. **ROXBURGH, J.**, read the following judgment: Section 257 (1) of the Companies Act, 1948, provides:

> "As soon as may be after making a winding-up order, the court shall settle a list of contributories, with power to rectify the register of members in all cases where rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected, and applied in discharge of its liabilities: Provided that where it appears to the court that it will not be necessary to make calls on or adjust the rights of contributories, the court may dispense with the settlement of a list of contributories."

Section 213 defines a "contributory" as "every person liable to contribute to the assets of a company in the event of its being wound up . . ." Section 212 (1) (d) provides:

> "in the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member."

A Any reader guilty of assuming that these sections mean what they say would, I think, infer: (i) that the list of contributories had to be made out reasonably soon after the winding-up order—in the present case seven years have elapsed, and I understand that this imperative direction is seldom carried out within the time envisaged by the Act; (ii) that, as a holder of a fully paid share is not liable to contribute to the assets in the event of a winding-up, he is not a " contributory " within the meaning of the Act. Such a conclusion, however, would B be wrong. Although MAUGHAM, J., held in *Re Aidall, Ltd.* (1) ([1933] Ch. 323), affirmed by the Court of Appeal (ibid., at p. 334), that the holder of a fully paid share fell sometimes, but not always, within the definition of a " contributory ", the Court of Appeal in the earlier case, *Re Anglesea Colliery Co.* (2) ((1866), 1 Ch.App. 555), had held that he always did, and I followed the earlier decision in *Re Consolidated Gold Fields of New Zealand, Ltd.* (3) ([1953] 1 All E.R. 791). In C further support of my decision, I now cite the Court of Appeal in *Re National Savings Bank Assocn.* (4) ((1866), 1 Ch.App. 547).

It is clear, then, that a holder of fully paid shares is a " contributory "; but in the present case it is necessary to consider how that can be in the face of the definition, because there are two possible explanations. Section 265 provides:

D

> " The court shall adjust the rights of the contributories among themselves and distribute any surplus among the persons entitled thereto."

One view of this section which has been submitted to me is that, as the proportions in which the persons entitled to surplus assets are to share in the same have to be ascertained by reference to their shareholdings, the distribution E of the surplus assets of itself involves an adjustment of the rights of the contributories among themselves. In my judgment, however, this submission fails on several grounds. (i) The section, on the face of it, contemplates two processes and not one. (ii) The apportionment of the surplus could not reasonably be described as an adjustment of the rights of the contributories among themselves, whereas the words precisely fit an adjustment between holders of fully and partly F paid shares. (iii) This explanation cannot be fitted on to the statutory definition of a contributory as one liable to contribute to the assets. (iv) If correct, it would have been, but it was not, the ratio decidendi in the two cases in the Court of Appeal in 1866 (*Re Anglesea Colliery Co.* (2) and *Re National Savings Bank Assocn.* (4)). It may be noted that both had been heard before judgment was given in either.

G When TURNER, L.J., was considering the statutory definition of " contributory " in *Re National Savings Bank Assocn.* (4) (1 Ch.App. at p. 551), he said:

> " The section [s. 74* of the Companies Act, 1862] does not say ' contributory ' shall mean every person liable to contribute to the assets, but every person liable to contribute to the assets under this Act, which may well mean every person liable under this Act to contribute." H

By this I understand the lord justice to mean liable, not in the events which have happened, but in the events which might happen, in the same way in which a certain college porch is named " Jumbo " because the college would have to keep an elephant there if it had one. TURNER, L.J., makes his meaning even clearer in *Re Anglesea Colliery Co.* (2). He said (1 Ch.App. at p. 560): I

> " Now it seems to me to be clear, beyond all doubt, that the purpose of the Act [the Companies Act, 1862] is, inter alia, to adjust the rights of all the members of companies which should be wound up under it. Indeed, I do not see how the rights of those members who have not paid up in full could be adjusted without the rights of those members who have paid up in full being taken into account."

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* This section corresponded to s. 213 of the Act of 1948.

A By this line of reasoning the statutory definition is expanded to mean every person who would be liable to contribute in any possible event under the Act.

The importance of this analysis for the present purpose is that holders of fully paid shares do not become contributories because they are entitled to participate in surplus assets, but for another reason. Accordingly, there is no need to embark on further mental gymnastics in order to construe s. 257. "Contri-
B butories" includes holders of fully paid shares. If, however, it appears to the court that it will not be necessary to make calls on or adjust the rights of contributories, the court may dispense with the settlement of a list, even though there is a surplus for distribution among holders of fully paid shares. That is the present case.

Mr. Buckley, who as amicus curiae has greatly assisted the court, has rightly
C insisted that, if this dispensing power were exercised without due reflection, serious misfortunes might befall in certain cases. That is true enough, and each case must depend on its own facts. I cannot, however, resist pointing out the expensive absurdities which must result from a refusal to exercise the dispensing power in a simple case. There are in this case 9,100 members entitled to rank pari passu in the distribution of the surplus assets. First of all, under r. 81
D of the Companies (Winding-Up) Rules, 1949 (S.I. 1949 No. 330), the liquidator must give to each of them notice in writing of the time and place appointed for the settlement of the list. On the day appointed he has to hear any person who objects to being placed on the list [r. 82], although any shareholder who objected in the circumstances in which the dispensing power is exercisable would appear to be of doubtful sanity. Under r. 83, the liquidator has then to
E give 9,100 further notices, and under r. 85 the process may in certain circumstances have to be repeated all over again. Yet this expensive process seems to afford no safeguard at all against such dangers as may exist; for example, that a shareholder might be inadvertently excluded from the list by reference to which the notices are sent out and the distribution is to be made, or that a transfer of a share might have been effected which had not been registered. I dispense with a list of contributories in the present case.

Order accordingly.

Solicitors: *Herbert Smith & Co.* (for the applicant); *Solicitor, Board of Trade.*

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

MERIDEN RURAL DISTRICT COUNCIL *v.* STANDARD MOTOR CO., LTD.
PAVER (VALUATION OFFICER) *v.* STANDARD MOTOR CO., LTD.

[COURT OF APPEAL (Lord Evershed, M.R., Morris and Pearce, L.JJ.), July 11, 12, 16, 1957.]

Rates—De-rating—Industrial hereditament—Partly used as retail shop—Motor service depot—Work done to the order of insurance companies—Whether retail repair work—Rating and Valuation (Apportionment) Act, 1928 (18 *&* 19 *Geo.* 5 *c.* 44), *s.* 3 (1), (4).

A motor service depot, which was a factory within s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, was used for preparing cars for sale and for the repair and maintenance of cars. Accommodation for individual customers was provided at the depot and they were encouraged to resort to it. Thirty-three per cent. of the work was admittedly retail, thirty-two per cent. was admittedly not retail, and the remainder was work done mainly on the instructions of insurance companies. Thus the question whether the depot was primarily occupied and used for the purposes of a retail shop and therefore, by virtue of s. 3 (1) (b), (4) of the Act of 1928*, would not rank for rating relief as an industrial hereditament, depended on whether the business done for the insurance companies was retail business so that use of the depot for such business predominated. An insurance policy (a comprehensive private car policy) usually provided that the insurer (the underwriter or insurance company) might at his or its own option repair, reinstate or replace the motor car or might pay in cash the amount of the loss or damage. Insured car owners often took their own cars to the depot themselves for repairs of damage. The depot having been assessed for rating purposes as not being an industrial hereditament, the ratepayers appealed.

Held: the depot was not an industrial hereditament within the meaning of s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, because the work done for insurance companies was "retail trade or business" within the meaning of s. 3 (4) and the depot was therefore primarily occupied and used for the purposes of a retail shop.

Scottish Motor Traction Co. v. *Assessor for Edinburgh, Wylies, Ltd.* v. *Glasgow Assessor* (1931 S.C. 416) considered.

British Electrical Repairs, Ltd. v. *Glasgow Assessor* (1933 S.C. 321) distinguished; dictum of LORD HILL WATSON in *Perth Assessor* v. *Shields Motor Car Co., Ltd.* (1956 S.C. at p. 197) not followed.

Appeal dismissed.

[As to occupation and use of a factory primarily for the purposes of a retail shop, see 27 HALSBURY'S LAWS (2nd Edn.) 449-452, para. 882; and for cases on the subject, see DIGEST Supp.

For the Rating and Valuation (Apportionment) Act, 1928, s. 3 (1), (4), see 20 HALSBURY'S STATUTES (2nd Edn.) 176.]

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* The relevant terms of these enactments are as follows:—

"3 (1). In this Act the expression 'industrial hereditament' means a hereditament . . . . occupied and used . . . subject as hereinafter provided, as a factory or workshop:

"Provided that the expression industrial hereditament does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for the following purposes . . . (b) the purposes of a retail shop . . ."

"(4). 'Retail shop' includes any premises of a similar character where retail trade or business (including repair work) is carried on."

Cases referred to:

(1) *Turpin* v. *Middlesbrough Assessment Committee & Bailey*, [1931] A.C. 451; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; Digest Supp.

(2) *British Electrical Repairs, Ltd.* v. *Glasgow Assessor*, 1933 S.C. 321; Digest Supp.

(3) *Scottish Motor Traction Co.* v. *Assessor for Edinburgh, Wylies, Ltd.* v. *Glasgow Assessor*, 1931 S.C. 416; Digest Supp.

(4) *Perth Assessor* v. *Shields Motor Car Co., Ltd.*, 1956 S.C. 186.

(5) *Kaye* (*Barnsley Revenue Officer*) v. *Eyre Bros., Ltd.*, [1931] A.C. 451; 100 L.J.K.B. 1; 145 L.T. 73; 95 J.P. 115; Digest Supp.

(6) *Daimler Co., Ltd.* v. *Leeds Rating Authority*, (1933), 18 R. & I.T. 251; 4 D.R.A. 73.

(7) *Glasgow Assessor* v. *Henderson & Co.*, 1932 S.C. 337; Digest Supp.

(8) *M'Whirter & Sons* v. *Glasgow Assessor*, 1932 S.C. 407; Digest Supp.

(9) *Frawley* (*M. & F.*), *Ltd.* v. *Ve-Ri-Best Manufacturing Co., Ltd.*, [1953] 1 All E.R. 50; [1953] 1 Q.B. 318; 3rd Digest Supp.

(10) *Shell-Mex & B.P., Ltd.* v. *Clayton*, [1956] 3 All E.R. 185; 120 J.P. 529; 3rd Digest Supp.

Case Stated.

The ratepayers appealed by way of Case Stated against a decision of the Lands Tribunal given on Feb. 2, 1956 ((1956), 1 R.R.C. 1), allowing an appeal by the respondents against a decision of a local valuation court of the Warwickshire Local Valuation Panel given on Oct. 7, 1954. The local valuation court held that a hereditament owned and occupied by the ratepayers, described in Part I of the valuation list for Meriden Rural District as " Service depot, offices and premises ", and situated at Peerless Works, Birmingham Road, Allesley, ought to be treated as an industrial hereditament and transferred to Part II of the list.

The hereditament was situated beside the main Birmingham-Coventry-London road. The public were clearly invited to go to the hereditament to have their cars serviced. The greater part of the work done on the hereditament was repair work, including some maintenance work, and apart from certain experimental work (excluded from the figures of turnover) all similar to that done at any large garage which was an agent for the ratepayers' cars. A car brought to the hereditament by or on behalf of an owner was taken to the reception building where an official interviewed the driver and took a note of particulars of the vehicle and of the attention it required. It was then taken by an employee to the car park where it remained until there was accommodation for it in the appropriate workshop. Cars ready for collection were handed over to the drivers who came to collect them at the reception building.

An analysis of turnover showed the various categories of work carried out on the hereditament. It was conceded between the parties before the Court of Appeal that work falling into categories 1 and 5, " work done for sales division preparing cars for sale, and repair and maintenance of company's cars " (27.3 per cent. of the whole) and " work done for motor dealers, garages and other members of the motor trade acting as middlemen " (4.7 per cent.) was not retail trade or business and that the work falling into categories 2 and 4, " work done under company's guarantee " (10.6 per cent.) and " work done for the public " (22.7 per cent.) was retail trade or business. Work falling into category 3 was " work done under the instructions of dealers and insurance companies " (34.7 per cent.). A typical normal comprehensive private car policy of tariff companies and a typical Lloyd's policy in which the insured remained responsible for the first £5 of loss were exhibited to the Case, but there were also many varied policies of non-tariff companies.

Where a car had been involved in an accident, the chief receptionist of the ratepayers received from a garage, an insurance company or in many cases the car owner a telephone message, a letter or a personal visit asking if the car could be accepted for repair. The choice of the ratepayers to do the repair was often made by the car owner. On acceptance, a date for delivery was arranged on which most cars were driven to the hereditament by the owners, others being towed in or delivered by British Railways or British Road Services. The car was seen by the chief receptionist. The owner often gave instructions for repairs but confirmation was obtained from the insurance company before commencing work, and the engineer for the insurance company (sometimes its employee, more often an agent) was called in to inspect the car, agree a rough estimate and give instructions for the work to proceed (confirmed in writing by the company in ninety per cent. of the cases). The name appearing on the ratepayers' documents prepared for their internal use was that of the car owner. After the repairs had been carried out a final figure of cost was agreed between the ratepayers and the insurance company engineer. About sixty per cent. of the repaired cars were collected by the owners and the rest by dealers and delivery companies acting on the same basis as with deliveries to the hereditament. The owner was required to give a " satisfaction note " or " repairs discharge form " to send with the final invoice to the insurance company, who required it before paying. A " repairs release " form had also to be signed by the owner or his agents, constituting an authority to the gatekeeper to let the car out of the works.

The ratepayers regarded the car owner as the person who had to be satisfied with the work. Sometimes the owner ordered extra work not covered by the insurance to be done and paid for it (that work was included in category 4). In some cases the insurance company required the owner to pay half the cost of new replacements of half-worn parts. In a fair number of cases the policy required the insured to pay a portion, e.g., the first £5 or £10 or some figure from £2 10s. to £100, of the claim. The amount for which he was liable was collected from him in cash when he collected the car. Otherwise the insurance company paid the ratepayers direct for the work done on receipt of the final invoice and the " repairs discharge " form.

The valuation officer and the rating authority admitted that the hereditament was a factory or workshop for the purposes of s. 3 of the Rating and Valuation (Apportionment) Act, 1928, but contended that: (i) the hereditament was primarily occupied and used as a retail service depot for Standard and Triumph cars to which members of the public were invited to resort and did resort to obtain the goods and services available therein, and accommodation was provided for the public to resort; (ii) the hereditament was occupied and used for carrying out retail repair work, done mainly to the order of car owners or persons otherwise interested in the cars including insurance companies with which the owners were insured; and (iii) the hereditament was primarily occupied and used for the purposes of a retail shop, or alternatively for a combination of the purposes of a retail shop and the purposes of offices, which were not those of a factory or workshop, and was therefore not an industrial hereditament within the meaning of s. 3 of the Act of 1928. The ratepayers contended that: (i) the work done on behalf of insurance companies, not being the owners of the cars, was not retail trade or business; (ii) the hereditament was not primarily occupied and used for the purposes of a retail shop, for other purposes not those of a factory or workshop or for a combination of the purposes of a retail shop and other purposes not those of a factory or workshop; and (iii) the hereditament was an industrial hereditament within the meaning of s. 3 of the Act of 1928.

The Lands Tribunal held that insurance companies were not middlemen and therefore work falling into category 3 in the analysis of turnover, work done under instructions of insurance companies, was retail trade. That tipped the balance in favour of retail trade and the hereditament was therefore primarily occupied and used for the purposes of a retail shop within the meaning of the proviso to s. 3 of the Act and was not an industrial hereditament. The ratepayers appealed to the Court of Appeal.

Michael Rowe, Q.C., and *E. H. Blain* for the ratepayers.

The Solicitor-General (*Sir Harry Hylton-Foster, Q.C.*) and *P. R. E. Browne* for the valuation officer.

P. R. E. Browne for the rating authority.

Cur. adv. vult.

July 16. **LORD EVERSHED, M.R.:** The question in this appeal is whether a hereditament belonging to the Standard Motor Co., Ltd., the ratepayers, described as " Service depot, offices and premises " and situate at Peerless Works, Birmingham Road, Allesley, within the rating area of the Rural District Council of Meriden, is used primarily as a " retail shop " within the meaning of s. 3 (1), (4) of the Rating and Valuation (Apportionment) Act, 1928. From the photographs of the hereditament and the description given of the hereditament, one would at first sight say without much hesitation that nothing less like a retail shop could well be imagined. But at the end of s. 3 (4) the words " retail shop " are given an expanded significance:

> " ' Retail shop ' includes any premises of a similar character where retail trade or business (including repair work) is carried on."

Moreover, the question with which we are concerned is not greatly dissimilar from the subject-matter of several cases, including cases in the House of Lords, e.g., *Turpin* v. *Middlesbrough Assessment Committee & Bailey* (1) ([1931] A.C. 451), in which VISCOUNT DUNEDIN said (ibid., at p. 473):

> " My Lords, the matter seems to me simply a question of attributing an everyday meaning to the words used in the definition. Upon the facts found this hereditament is primarily occupied and used for the purposes of repair work, done to cars and other objects brought or sent there by the owners, without the intervention of any middleman."

In the present case, we have been supplied with a table in which the work done at this hereditament is divided under five heads. The relative importance of the work is indicated in the table by a percentage of the total turnover represented by each of the five heads. Although in some circumstances that method of evaluation might not be conclusive, for the purposes of this appeal and of this judgment it will admittedly suffice. The first category is described as follows:

> " Work done for sales division preparing cars for sale, and repair and maintenance of company's cars."

The sales division is that of the ratepayers. That, in terms of turnover, constitutes 27.3 per cent. of the total; and for the purposes of this appeal it is conceded that the work under that head could not be described as " retail " work or work appropriate to a " retail shop " within the meaning of the section. The second category is: " work done under company's guarantee ", i.e., the ratepayers' guarantee to the owners of their motor cars. That constitutes 10.6 per cent. in terms of turnover; and for the purposes of this appeal it is conceded that that, on the other hand, is of a nature properly attributable to a retail shop.

The third category (and it is the one with which we are mainly now concerned) is: " work done under instructions of dealers and insurance companies "; and that constitutes 34.7 per cent. in terms of turnover. The fourth category, " work done for the public " (which I understand to mean work done to motor cars brought there by members of the public who call in the ordinary way and whom one might call casual customers), 22.7 per cent., admittedly falls on the " retail shop " side of the line. The last category is:

> " 5. Work done for motor car dealers, garages and other members of the motor trade acting as middlemen and therefore subject to trade discount: 4.7 per cent."

That last category is on the non-retail side of the line.

If the non-retail and the retail categories are respectively added up, it appears that 32 per cent. of the work done can (for the purposes of this appeal) be treated as not retail—i.e., work not properly attributable to a retail shop; and 33.3 per cent. can be regarded as properly attributable to a retail shop. It follows, therefore, that the answer to the question, whether category 3, " work done under instructions of dealers and insurance companies ", is retail or not retail, will be decisive of the question whether this hereditament as a whole is used primarily as a retail shop or not. For the purposes of this appeal, moreover, we have confined our attention to work done in category 3, " under instructions of insurance companies "; for we are informed that that constitutes the bulk of the 34.7 per cent.

The Case Stated contains a full statement of what occurs when in the normal course a motor car which has suffered damage through accident covered by a policy of insurance is sent to this hereditament for repair. Certain files attached to the Case illustrate the course of business in the normal case where the work is being done under cover of an insurance policy. The insurance company responsible under the policy for indemnifying the assured for the damage suffered by his motor car deals in fact directly with the ratepayers, i.e., the work which has to be done on the damaged motor car and the price which will be charged by the ratepayers for doing it are agreed between the insurer and the ratepayers.

For the purposes of this appeal I am prepared to assume that (in the kind of case which I have regarded as typical) the ratepayers would regard themselves as bound to take directions only from the insurers and to do the work only as directed by the insurers. However, the ratepayers well know the position of the person or firm who give them directions on behalf of the insurers, viz., they know that they are dealing with insurers whose liability arises to the car owner under policies of insurance, and that they are not dealing with a trader in the motor trade in the ordinary sense of that phrase. Moreover, the Case itself shows that the owner of the motor car (who, of course, remains the owner throughout the whole proceeding) is required to sign instruments of discharge and satisfaction in favour both of the ratepayers and of the insurers before the motor car is delivered back to him after repair.

On these facts, the ratepayers say that the insurer is a " middleman ", as that word was used in the passage from LORD DUNEDIN's speech and, by way of definition, it is said that the word " middleman " covers anyone who stands in a separate legal relationship from the owner of the article, on the one hand, and the car manufacturer or repairer on the other. No doubt that is a fair definition of the word " middleman " at least in some contexts; and if the language of LORD DUNEDIN which I have cited had formed part of the statute to be construed it might well have been conclusive in favour of the ratepayers. But in my judgment LORD DUNEDIN was not intending to lay it down as a matter of construction of the Act that use for the purposes of a retail shop was excluded by the presence of any middleman, i.e., any middleman in the sense in which the word is used in the definition cited. I think that he was only saying, for the purposes of dealing with the case before the House, that no middleman was interposed between the owners of the motor cars and other objects, on the one hand, and, on the other, the garage which was doing repair work on them.

I have come to the conclusion that, however the legal position of the insurers ought to be expressed and defined, vis-à-vis both the car owner on the one hand and the ratepayers on the other, for the purposes in hand it differs essentially from that of a car dealer—the kind of trader whose work on motor cars constitutes, e.g., category 5 in the table (see p. 225, letter I, ante), for the car dealer is directly concerned in the motor trade, and, as such, is interposed between the car manufacturer or repairer (the ratepayers) and the consuming member of the public (the car owner); and is so interposed as a trader in the trade, having a distinct trade interest in the doing of the repair.

I think that the phrase " retail shop ", as expanded by the definition at the end of the section, must be construed in the ordinary common sense of those words. Lord Dunedin in his speech earlier cited said ([1931] A.C. at p. 473):

> " . . . the matter seems to me simply a question of attributing an everyday meaning to the words used . . ."

In an ordinary context, the words " retail shop ", with its expanded definition, import a distinction in a real sense from what is commonly called the wholesale trade and the wholesaler, i.e., from one who, trading in the ordinary sense in the relevant articles, is interposed as such and as an independent principal between the manufacturer or importer of the article at one end and the consuming public at the other.

Some examples in the argument illustrated the point. Thus, if several car owners combined to form a kind of co-operative agency to take over any of the owners' cars damaged and to see to their repair, that agency, sending a given motor car to the ratepayers, might well be a " middleman " in the sense of a wholesale dealer, or someone analogous thereto, who would break the link between the ratepayers and the consumer and have a distinct trade interest from both, and would exclude the work that was being done from being properly attributable to that of the retail trade. Another instance at the other end of the scale was that of a man taking his friend's watch to a watch repairer, making it clear that the watch belonged to the friend but stating also that he and not the owner was responsible for the repair and would pay the bill. In one sense the man so taking his friend's watch might be called a " middleman ", since he was " interposed " between the watch repairer and the watch owner; but the ratepayers conceded that, for present purposes, he would still be a member of the public and that his intervention would not prevent the work of the watch repairer from being that properly appropriate to a retail shop.

These instances indicate that a line cannot be drawn precisely by definition, and that each case must be looked at on its own facts and a decision reached (using Lord Dunedin's language) by applying an everyday meaning to the words in the light of those facts. Throughout the transaction of repair the motor car owner remains the owner of the car, and I apprehend that he could say that he made no claim on the insurers, requiring the motor car to be handed back to him before any work was done and, so far as I can see, if he did not wish to make a claim, the insurers could in no way prevent him from saying that he did not wish the motor car to be repaired. As business men, they would have no separate interest which would be affected by the cancellation of any repair order. Moreover (as was pointed out to the tribunal), although the case that I have tried to summarise may be taken as typical, the instances show a degree of variation. In some cases—numerically in more cases than not—the owner himself apparently takes the car to the ratepayers' works. Sometimes it is taken there by some third party—e.g., the vehicles of British Road Services. In other instances, the policies of insurance provide that the car owner himself pays for the first £5 (or some other figure) of any damage done.

In the light of these variations and other facts, it seems to me that there was great force in the contention of the Solicitor-General that, in the light of all the circumstances, the tribunal was entitled to find as a fact that this was a retail business. But, in any case, applying myself independently to the problem and to the nature of the facts proved or admitted, and construing the Act of Parliament* as best I can, I am satisfied that the business being done in regard to cars repaired on the instructions of insurers falls within the category which I have called " retail ", i.e., work properly attributable to use of the premises as a retail shop.

That concludes the matter; but our attention was called to certain Scottish cases and the ratepayers contended with force that, since this Act was equally applicable in Scotland and England, it was desirable that the law as expounded A by the courts of Scotland and England should be the same. The foundation for that argument is *British Electrical Repairs, Ltd.* v. *Glasgow Assessor* (2) (1933 S.C. 321). The case came before the Lands Valuation Appeal Court in Scotland, consisting of three members of the Court of Session, LORD HUNTER, LORD SANDS and LORD FLEMING. The headnote reads:

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* Rating and Valuation (Apportionment) Act, 1928, particularly s. 3 (4).

> "A company, whose principal business was the repair of electrical machines, B occupied premises consisting of a large engineering shop and the ordinary adjuncts. The premises bore no resemblance, either internally or externally, to a retail shop. No provision was made for the reception of customers, and the bulk of the company's business was done to the orders of an insurance company, one of the conditions of whose policies was that, in the event of the breakdown of machinery insured, the insurance company could either C repair the machinery or pay for its repair at their option."

The view of the Lands Valuation Appeal Court was

> "that the insurance company occupied a position analogous to that of a middleman, and that, in the whole circumstances, the subjects did not fall within the exception of a 'retail shop', but fell to be entered in the roll as D 'industrial lands and heritages'."

For present purposes, the form of the policy recited in the headnote was not distinguishable from that of the policies with which we are concerned. It was therefore contended that this authority showed that in Scotland the ratepayers' hereditament would be held to be an industrial hereditament and not a retail shop. If I were satisfied that that were so, then, although myself inclined to E form a different view, I should be strongly inclined to follow the Scottish courts, on the principle that it was desirable that the law arising from the same section of this Act should be the same both in Scotland and in England. But on the whole I am not satisfied that, if this case were now before the Lands Valuation Appeal Court in Scotland, it would be held to be other than primarily used for the purposes of a retail shop. F

It seems to me that the vital facts in the *British Electrical Repairs Co.* case (2) are summarised in the sentence that I have already read—"No provision was made for the reception of customers". That sentence is expanded at p. 328 of the report, where I find the following paragraph in LORD HUNTER's opinion (1933 S.C. at p. 328):

> "Points to which I would draw attention are that the premises themselves G have no features which make them like a retail shop; that the proprietors and occupiers do not invite the public to go to the premises; that they provide no accommodation for individual customers who might happen to go to the premises; that, in fact, the people whose goods are repaired on the premises are not able to go to the premises, and, indeed, are not entitled to trade directly with the appellants at all." H

Except for the initial sentence (that the premises themselves do not look like a retail shop) all the rest of what LORD HUNTER states is quite inapplicable to the present case. There is no prohibition against the ordinary member of the public going to the ratepayers' hereditament. On the contrary, considerable numbers of the public do so. Moreover, the ratepayers provide accommodation I for individual customers, and, as I follow it, encourage them to resort to the hereditament. It may be true that those facts which I have recited from the *British Electrical Repairs Co.* case (2) emanate from the terms of the policies themselves; but in that respect none the less the present case differs essentially from the *British Electrical Repairs Co.* case (2). Although, having regard to the terms of the policy, the car owner is bound to allow the insurers to deal with his motor car in the way they do, there is nothing in the policies or in the other facts as found which so prevents the customer resorting to the ratepayers' hereditament as to deprive it of all the essential characteristics of a retail shop. However, the last sentence of Lord Fleming's opinion reads (1933 S.C. at p. 329):

> "The fact that the insurance company is not a member of the trade does not seem to me to affect the principle."

I do not find in the speeches either of Lord Hunter or of Lord Sands any comparable generalisation. I do not think, therefore, that Lord Fleming's final sentence should be regarded as constituting the ratio of the decision; and, with all respect, I do not agree that the fact that the insurance company is not a member of the trade is irrelevant—if that is what Lord Fleming meant.

That case was decided in 1933. In 1931, in *Scottish Motor Traction Co.* v. *Assessor for Edinburgh* (3) (1931 S.C. 416; the report comprises the arguments and judgments in several similar cases) in the case of A. & D. Fraser the work being done at the repair establishment on private motor cars included work done for insurance companies in the same way as in the present case. There was no special exclusion of the public, as in the *British Electrical Repairs Co.* case (2) and the same members of the court (Lord Hunter, Lord Sands and Lord Fleming) did not take the view that the interposition of the motor insurers produced the result that the business was not that of a retail shop. However that may be, in *Perth Assessor* v. *Shields Motor Car Co., Ltd.* (4) (1956 S.C. 186) the Lands Valuation Appeal Court dealt with the case of a garage which was open to the general public but which had a contract with the Ministry of Supply for overhauling and repairing service vehicles belonging to government departments. The conclusion of the court was that the premises were there being used for the purposes of a retail shop; and the case was distinguished from the *British Electrical Repairs Co.* case (2) on the ground (which formed the main ratio of the decision) that the Ministry of Supply, or its officers, were mere agents for the Crown and therefore could not in any case be regarded as middlemen. The members of the court then consisted of Lord Patrick, Lord Sorn and Lord Hill Watson. It is true that (as counsel for the ratepayers observed) Lord Hill Watson said (1956 S.C. at p. 197):

> "To prevent the work of repair being 'retail business' there must be interposed between the person who intends to make use of the vehicle when repaired and the company executing the repairs someone who has an independent interest in the work being done, which interest is separate and distinct from the interest of the person who will make use of the vehicle after the repairs have been executed. An example of such a person is one who is in the trade and with whom the person who desires the car to be repaired has contracted, or an insurance company which under the terms of the policy is entitled to instruct the repairs."

On the basis of that passage in Lord Hill Watson's opinion, it was urged that the Scottish courts should now be taken as ready to lay down the law in a case such as the present in favour of the view for which the ratepayers contend. With all respect to Lord Hill Watson, however, I am unable to agree. There is no comparable statement of principle in Lord Patrick's opinion. The highest Lord Patrick puts it is thus (ibid., at p. 193):

> "A 'middleman' is a person intervening between supplier and consumer with an interest independent of both, be it only to secure a commission on the formation or carrying out of the contract between them";

and with that statement I do not in any way find myself at variance. Lord Sorn refers to the *British Electrical Repairs Co.* case (2) (ibid., at p. 195), and seems to indicate his own doubt whether the principle in that case would apply to the case of repairs of motor cars on instructions of insurance companies. I venture to express my own dissent from the view of Lord Hill Watson (if he intended so to express it) that an insurance company is to be treated, in such a case as the present, as in pari materia with a person who is in the trade and who has a separate trade interest in the work of repair that is being done. With all respect to LORD HILL WATSON, I do not think it true that the insurer has an interest separate and distinct from that of his assured for the purposes under consideration.

I have taken time to examine the Scottish cases in order to state my conclusion: which is that I am not satisfied that if the present case came before the Lands Valuation Appeal Court in Scotland, by an application of the *British Electrical Repairs Co.* case (2), it would hold the work with which we are concerned to be work not appropriate to a retail shop.

In *Kaye* (*Barnsley Revenue Officer*) v. *Eyre Bros., Ltd.* (5) ([1931] A.C. 451) which was before the House of Lords at the same time as the *Turpin* case (1) certain repair work was done on the instructions of the insurers (as in the present case); but the speech of LORD DUNEDIN takes no note of any apparent distinction based on that fact. No doubt the point was not then taken; but still, nothing in LORD DUNEDIN's speech in *Kaye's* case (5), or in the *Turpin* case (1), in any way qualifies my conclusion in the present case, that, on the facts, the tribunal rightly held that what I call the category 3 ought to fall on the retail side of the line—in other words, that the work of doing these repairs was work appropriate to the use of the premises for a retail shop within the meaning of the section.

For those reasons, I would dismiss the appeal.

MORRIS, L.J.: It is not in dispute that the hereditament which is in question is occupied and used as a factory. But it will not rank as an industrial hereditament if by reason of the facts which have been found it can be said to be primarily occupied and used for the purposes of a retail shop. By definition, " retail shop " includes any premises of a similar character where retail trade or business (including repair work) is carried on. It is not disputed that the hereditament is in part used for the purposes of a retail shop. Having regard to the authoritative guidance given by LORD DUNEDIN in his speech in *Turpin* v. *Middlesbrough Assessment Committee* (1) ([1931] A.C. 451 at pp. 473 and 474) this could not be disputed. The public are invited to the hereditament: accommodation for them is provided, and arrangements to receive them are made. Work of repair which is done for and on the instructions of members of the public and which is done in the hereditament is admitted to have the stamp and the features of retail trade or business. The question which arises is whether the hereditament is or is not primarily occupied and used for the purposes of a retail shop or for a combination of such a purpose and some other purpose which is not that of a factory or workshop. In his speech both in the *Turpin* case (1) and in *Kaye* v. *Eyre Bros., Ltd.* (5) ([1931] A.C. 451 at p. 477) LORD DUNEDIN said that " retail " repair work was repair work done to the order of the owner of an object repaired and without the intervention of a middleman. In the present case, if repair work done on the instructions of insurers can be regarded as " retail " repair work then it is clear that the hereditament is primarily occupied and used for the purposes of a retail shop.

The point of law raised in the Case Stated is expressed as being whether the Lands Tribunal came to a correct decision in law; but, as the Case Stated records, the issue raised is in effect whether the part played by insurers in the transactions described in the case should be regarded as being the intervention of middlemen.

The notion of trade or business being retail suggests to my mind that it takes place with members of the public who may have direct approach and direct dealings. In the case of goods manufactured for sale, there may first be a sale by the manufacturers to someone who is called a wholesaler, who in turn deals with retailers who will sell to members of the public. There may be infinite varieties of situations, but those persons who may be called middlemen do not have direct dealing with purchasing members of the public. But there is no one in between the retailer and the purchasing member of the public. Similarly, the notion of retail business suggests business which takes place directly with members of the public. As repair work is by statutory definition included in the phrase "retail trade or business", it follows that there may be "retail" repair work. That denotes, as LORD DUNEDIN pointed out, work done to the order of the owner of an object which is repaired without the intervention of a middleman. Thus the owner of a car may take it to a dealer with whom he contracts for repair work to be done on it: if the contract is one which entitles the dealer to send the car to a repairer so that the latter will actually do the repairs, then the latter will not be doing "retail" repair work. Between him and the owner of the car there will be someone else in the middle.

In my judgment, an insurer is not in this sense interposed between the owner of a damaged car and the repairer. The provisions of insurance policies may vary infinitely. A clause in a typical comprehensive private car policy, which was made an exhibit to the Case, provides that the insurer may at his own option repair, reinstate or replace the motor car or may pay in cash the amount of the loss or damage. It might be, therefore, that the owner would be left to make his own contract with a repairer and would be paid the amount of the damage by the insurer. The repair work would in such case be "retail". If the insurer at his option decided to repair the car the insurer would then make a contract with a repairer. In such a case the repair work would still be "retail". There would be no intervention of the insurer "between" the repairer and the owner. The insurer would merely take the place of the owner. The insurer would be in the position of a member of the public making a contract with a repairer. Under the terms of a policy, the insurer might be entitled to decide as to where a car should be repaired and might in some cases be entitled to have possession of the car in order to get it repaired: the insurer would be free just as any member of the public to go to any repairer who undertakes "retail" repair work.

In some cases, under his insurance policy, an owner must bear a part of the cost of repairs: in some cases he may wish to have additional work done at his own expense while repair work is being done at the expense of his insurers. In such cases the owner and the insurer may both have direct contractual relationship with the repairer. The insurer is not then in the middle between the repairer and the owner: he and the owner stand side by side. By reason of the terms of insurance policies, contractual arrangements are made between insurer and insured concerning the cost of repairing damaged motor cars: if as a result of such arrangements an insurer contracts directly with a repairer in regard to the insured's car, the position of the insurer does not, in my judgment, possess the features of the position of a middleman.

It is with diffidence that I express a view which does not coincide with some views expressed in certain Scottish cases which were cited to us, but, as I have formed the conclusion that insurers are not middlemen within the meaning of what was said by LORD DUNEDIN, I consider that the decision of the Lands Tribunal was correct in law.

PEARCE, L.J.: I agree.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Collyer-Bristow & Co.*, agents for *Band, Hatton & Co.*, Coventry (for the ratepayers); *Solicitor of Inland Revenue* (for the valuation officer); *E. N. Liggins*, Coventry (for the rating authority).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

Re MOSES AND COHEN, LTD.

[CHANCERY DIVISION (Roxburgh, J.), June 24, July 1, 8, 15, 31, 1957.]

Company—Registration—Restoration to register—Imposition of condition by way of penalty—Jurisdiction—Companies Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 38), *s.* 353 (6).

A company formed in 1955 failed to give notice to the registrar of the situation of its registered office within the time prescribed by the Companies Act, 1948, s. 107 (2), failed to send a return to the registrar relating to its directors and secretary as required by s. 200 of that Act, and failed to make the annual return as required by s. 124 (1) of the Act. No action was taken to recover default fines which might thus have been incurred, but in May, 1957, the company was struck off the register. Application was made to have the company restored to the register, and in making the order which was asked for,

Held: section 353 (6) gave the court jurisdiction only to restore or to refuse to restore the company to the register, and the court had no jurisdiction, under s. 353 or otherwise, to impose a penalty (beyond costs) as a condition for the company's restoration to the register.

Re Brown Bayley's Steel Works, Ltd. ((1905), 21 T.L.R. 374) considered.

[As to the procedure on the restoration of a company to the register, see 6 HALSBURY'S LAWS (3rd Edn.) 789, para. 1591; and for cases on the subject, see 10 DIGEST (Repl.) 1140, *7935-7937.*

For the Companies Act, 1948, s. 353 (6), see 3 HALSBURY'S STATUTES (2nd Edn.) 727.]

Case referred to:

(1) *Re Brown Bayley's Steel Works, Ltd.*, (1905), 21 T.L.R. 374; 10 Digest (Repl.) 1140, *7935.*

Petition.

Application for the restoration of the name of Moses and Cohen, Ltd., to the register of companies.

M. Finer for the petitioner.

Denys B. Buckley for the respondent, the registrar of companies.

Cur. adv. vult.

July 31. **ROXBURGH, J.,** read the following judgment: On June 3, 1955, Messrs. Alan, Edmunds & Phillips, solicitors, instructed Mr. T. A. Herbert, a barrister, to form a company of estate agents and mortgage brokers under the name of Moses and Cohen, Ltd. The instructions, which were in writing, were received by Mr. Herbert " at approximately 4.30 p.m. by hand personally " and stated the address of the proposed registered office and the names of the proposed directors (Moses and Cohen) and of the proposed secretary (Mr. Herbert, that is to say, himself). Mr. Herbert (who is not, I understand, a practising barrister) and his wife are directors of Business Economy Products, Ltd., which carry on business as (inter alia) specialists in company formation. They are both active in that business and that company claims to have incorporated more than four thousand companies.

Moses and Cohen, Ltd., was incorporated on June 18, 1955, by Mr. Herbert or his company. His wife and he (described as " barrister-at-law ") subscribed the memorandum and articles of association in which Moses and Cohen were named as the first directors and he was named as first secretary.

The Companies Act, 1948, s. 107, provides:

> " (2) Notice of the situation of the registered office, and of any change therein, shall be given within fourteen days after the date of the incorporation of the company or of the change, as the case may be, to the registrar

> of companies, who shall record the same . . . (3) If default is made in complying with this section, the company and every officer of the company who is in default shall be liable to a default fine."

A " default fine " means a fine not exceeding £5 a day during default. This, on the face of it, looks formidable enough; but s. 440 (2) contains a drastic limitation of the meaning of the phrase " in default " to an officer who " knowingly and wilfully authorises or permits the default ". So much for the registered office. Neither the company, nor its directors, nor its promoter-secretary complied with that section within the period prescribed or at all.

Section 200 provides that a company shall within fourteen days from the appointment of its first directors send a return to the registrar of companies containing prescribed information regarding its directors and secretary; penalty as before; non-compliance as before. On July 13, 1955, Mr. Herbert resigned, and Mr. Nelson took his place. Mr. Nelson is a young solicitors' clerk. He has never been called on to perform any duties in the day-to-day affairs of the company and was under the impression that all matters concerning the company would be attended to by its directors who would bring to his attention any formalities requiring his signature.

Section 124 provides:

> " (1) Every company having a share capital shall, once at least in every year, make a return containing with respect to the registered office of the company, registers of members and debenture holders, shares and debentures, indebtedness, past and present members and directors and secretary, the matters specified in Part 1 of Sch. 6 to this Act . . . (3) If a company fails to comply with this section, the company and every officer of the company who is in default shall be liable to a default fine."

This return was due before the end of 1956; non-compliance as before; " default " and " default fine " mean the same as before.

On May 21, 1957, the company was struck off the register. Before doing this, the registrar sent notices to Mr. Herbert and his wife at the address of their company. They (as I find) completely ignored them. Moses and Cohen, Ltd. now seek to be restored to the register: and such an order must be made, because to keep them off for ever would be too great a penalty for the shortcomings of their directors and their promoter-secretary. But am I bound to allow these three breaches of the Act to pass without further notice? Unfortunately, I believe that I am.

Counsel has informed me that the Board of Trade do not contemplate any proceedings for " default ". I can well understand that decision, because it might be difficult to satisfy a criminal court that even Mr. Herbert acted " knowingly and wilfully ", though I must not be taken to accept the explanation which he has given. Moreover, a criminal prosecution might seem like a sledge-hammer to crack a nut of incompetence and inattention to duty, and this might result in reluctance to convict. But, in the event, these important statutory provisions can, in general, be disregarded with impunity; and statutes only enforceable with difficulty, if at all, tend to debase the currency of the law. There seems to be a case for allowing the court in such circumstances as these to impose some penalty (beyond costs) on the company, as a term of its restoration to the register. I should have thought fit to do so, but I find that I have no jurisdiction. I must impose either the extreme penalty (which would be unjust) or none at all.

Section 353 (6) of the Companies Act, 1948, provides that

> ". . . the court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off."

In 1905 BUCKLEY, J., in *Re Brown Bayley's Steel Works, Ltd.* (1) ((1905), 21 T.L.R. 374), having remarked on the frequency of these applications, said that if he had jurisdiction to do so, he should mark his disapproval by ordering some penalty to be paid as a condition of making a restoration order, but he found that he had no power to do this. He concluded his observations by saying that he hoped that those who had the control of the amendment of company law would consider whether the law on this subject did not require alteration. I agree that the restricted discretion conferred by s. 353 (6) does not extend to any effective action. But perhaps after fifty years it may not seem premature to draw attention once more to the frequency of these applications and to the underlying cause. A B

Order accordingly.

Solicitors: *Alan, Edmunds & Phillips* (for the petitioner); *Solicitor, Board of Trade.* C

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

UNIVERSAL CARGO CARRIERS CORPORATION *v.* CITATI. D

[COURT OF APPEAL (Hodson, Parker and Ormerod, L.JJ.), July 22, 23, 24, 25, 1957.]

Arbitration—Special Case—Remission to arbitrator—Point taken but not argued—Discretion of judge—Arbitration Act, 1950 (14 *Geo.* 6 *c.* 27), *s.* 22 (1).

Arbitration—Award—Remission—Award in form of Special Case—Extension of time—Grounds—Sufficiency—Strong case on merits and explanation of delay—R.S.C., Ord. 64, *r.* 14. E

After their vessel had waited six days at the buoys for the charterer's cargo to become available, shipowners threw up the charterparty and re-chartered the vessel to other charterers at a lower rate of freight. They subsequently granted an option to the original charterer to charter a substitute vessel on the original terms but no cargo became available and the option was never exercised. In arbitration proceedings they claimed as their loss the difference in the freight, and the charterer claimed repayment of the advance freight he had paid. The issue was whether the shipowners had been entitled to throw up the charterparty. The arbitrator stated his award in the form of a Special Case for the opinion of the court and found that the charterer had evinced an intention not to perform the charterparty and had committed an anticipatory breach of it which the shipowners were entitled to treat as a repudiation. The judge expressed the opinion that on the findings the shipowners had not shown that the charterers had evinced an intention not to perform the charterparty; but the shipowners took the further point that when they threw up the charterparty the charterer had not been ready and willing to perform the charterparty. That point had been included though obscurely in the pleadings under a late amendment but had not been specifically argued or made the subject of a finding by the arbitrator although the parties had agreed on many matters of fact to be found by him. The judge having expressed the view that on the Case as it stood the shipowners failed to establish this point, they applied for the Case to be sent back to the arbitrator, and for time to be extended for this purpose, so that he should make findings of fact on the further point, though they also contended that the findings in the existing Case were sufficient. The judge extended time and remitted the Case on the further point. On appeal against his decision to remit the Case, F G H I

Held: it had been proper to extend time and remit the Case because (i) it was sufficient that the further point had been raised and not abandoned, how far it became a live issue being irrelevant;

(ii) the extension of time was justified, since the shipowners had shown a strong case on the merits and given an acceptable explanation of why the application to remit was made only on the argument on the Special Case (dictum of Scott, L.J., in *Temple Steamship Co., Ltd.* v. *V/O Sovfracht*, (1943), 76 Lloyd's Rep. at p. 36, applied); and

(iii) the award being in the form of a Special Case (not a final award) the judge had an unfettered discretion to remit it on the application of one party not confined to the four grounds laid down in *Montgomery, Jones & Co.* v. *Liebenthal & Co.* ((1898), 78 L.T. 406) (dictum of Moulton, L.J., in *Re Baxters & Midland Ry. Co.*, (1906), 95 L.T. at p. 23, applied) since these were a guide only to the exercise of the discretion, and that discretion had been properly applied.

Decision of Devlin, J. ([1957] 2 All E.R. 70) affirmed.

[As to grounds for remission of award of an arbitrator, see 2 Halsbury's Laws (3rd Edn.) 55-57, paras. 119, 121; and for cases on the subject, see 2 Digest 561-565, *1938-1959*.

For extension of time for application to remit an award, see 2 Halsbury's Laws (3rd Edn.) 55, para. 120.

For the Arbitration Act, 1950, s. 22 (1), see 29 Halsbury's Statutes (2nd Edn.) 107.

For R.S.C., Ord. 64, r. 14, see the Annual Practice.]

Cases referred to:

(1) *Hudson Bay Co.* v. *Dominga*, (1922), 10 Lloyd's Rep. 476.
(2) *Nello Simoni* v. *A/S &c. Straum*, (1949), 83 Lloyd's Rep. 157.
(3) *Sinason-Teicher Inter-American Grain Corpn.* v. *Oilcakes & Oilseeds Trading Co., Ltd.*, [1954] 2 All E.R. 497; *affd.* C.A., [1954] 3 All E.R. 468; 3rd Digest Supp.
(4) *Ben Line Steamers, Ltd.* v. *Compagnie Optorg of Saigon*, (1937), 42 Com. Cas. 295; Digest Supp.
(5) *Re Coles & Ravenshear*, [1907] 1 K.B. 1; 76 L.J.K.B. 27; 95 L.T. 750; 2 Digest 561, *1937*.
(6) *Gatti* v. *Shoosmith*, [1939] 3 All E.R. 916; [1939] Ch. 841; 161 L.T. 208; Digest Supp.
(7) *Temple Steamship Co., Ltd.* v. *V/O Sovfracht*, (1943), 76 Lloyd's Rep. 35.
(8) *Montgomery, Jones & Co.* v. *Liebenthal & Co.*, (1898), 78 L.T. 406; 2 Digest 458, *1047*.
(9) *Re Baxters & Midland Ry. Co.*, (1906), 95 L.T. 20; 70 J.P. 445; 2 Digest 525, *1624*.
(10) *Kent* v. *Elstob*, (1802), 3 East 18; 102 E.R. 502; 2 Digest 522, *1601*.
(11) *R.* v. *Northumberland Compensation Appeal Tribunal, Ex p. Shaw*, [1951] 1 All E.R. 268; [1951] 1 K.B. 711; 115 J.P. 79; *affd.* C.A., [1952] 1 All E.R. 122; [1952] 1 K.B. 338; 116 J.P. 54; 3rd Digest Supp.

Appeal.

The charterer appealed against an order of Devlin, J., made on Feb. 22, 1957, and reported [1957] 2 All E.R. 70, remitting a Case Stated by an arbitrator to the arbitrator to answer the question whether on July 18, 1951, the charterer was willing and able to perform the charterparty which he had entered into with the shipowners within such time as would not have frustrated the commercial object of the adventure, and to reconsider if he should think fit so much of his award as related to costs. The charterer contended that the judge ought not to have remitted the case to the arbitrator since the point had not been sufficiently taken before him and he had not been asked to make the necessary findings of fact in respect of it, that the case was not a proper one for the exercise of the judge's discretion and that the extension of time in which to make the application ought not to have been granted. The shipowners contended that the point had been sufficiently raised before the arbitrator and that the application was made to safeguard their position when the judge expressed his opinion against them on the main point (that the charterer had evinced an intention not to perform the charterparty) and on this further point, the findings in their view being sufficient. A

A. A. Mocatta, Q.C., and *M. R. E. Kerr* for the charterer.
Ashton Roskill, Q.C., and *H. V. Brandon* for the shipowners.

HODSON, L.J.: I will ask PARKER, L.J., to deliver the first judgment. B

PARKER, L.J.: This is the respondent's appeal from an order of DEVLIN, J., who, in the course of hearing argument on a Special Case stated by an arbitrator, acceded to an application made on behalf of the claimants, the shipowners, and remitted the case for the finding of a particular fact.

The appeal raises a short though somewhat difficult point whether the learned judge exercised his discretion properly in all the circumstances of the case. C The claimants are shipowners who, by a charterparty dated June 30, 1951, chartered a vessel to the respondent charterer. The vessel was to proceed to Basrah and there load a cargo of six thousand tons of scrap iron for carriage to Buenos Aires at U.S. $28 per ton freight. The vessel arrived at Basrah on July 12, and, there being no cargo ready, she remained at the buoys. The lay days presumably began to run from that date and would have expired on July 21. D

On July 17, after the vessel had been at the buoys for some five days, the cargo was still not available; and on the next day (July 18) the shipowners threw up the charter and re-chartered the vessel to other charterers at a lower rate of freight. On July 23 the vessel sailed for Bombay to load under the new charter. On July 24 the charterer obtained an injunction in New York against the shipowners, but on July 27 that was discharged by consent; and, without prejudice E to their rights, the shipowners granted the charterer an option (to be exercised before midnight on Aug. 15/16, 1951) to charter a substitute vessel from the shipowners on the same terms. No cargo became available, however, and the option was never exercised.

Thereafter arbitration proceedings commenced, the shipowners claiming F their loss, represented by the difference in freight, and the charterer counterclaiming for repayment of the advance freight which he had paid. The point in issue, of course, was whether the shipowners were entitled on July 18 to throw up the charter as they did.

On Mar. 22, 1956, the arbitrator stated an interim award (questions of liability only being dealt with) in the form of a Special Case. In para. 35 the arbitrator said this: G

> "In so far as it be a question of fact I find and in so far as it be a question of law I hold that the [charterer] evinced an intention not to perform the charterparty and committed an anticipatory breach of the charterparty which the [shipowners] were entitled to treat and accept and did treat and accept as a repudiation of the charterparty by re-chartering the vessel on July 18, 1951." H

I need not read the rest of the paragraph.

In para. 36 of the award the arbitrator left the question of law to the court in this form:

> "The question of law which the [shipowners] requested me to state for the decision of this honourable court, and which I accordingly hereby state I for such decision, is whether upon the facts found and upon the true construction of the charterparty the [shipowners] were entitled on July 18, 1951, to treat the charterparty as discharged by the [charterer's] breach and to claim damages accordingly."

The Special Case was duly set down for argument, and was heard by DEVLIN, J., in February of this year. The hearing lasted seven days, and many difficult and interesting questions were debated. For reasons into which it is unnecessary to go on this appeal, the learned judge expressed the opinion that on the findings of the arbitrator the shipowners had not shown that by July 18, 1951, the charterer had by his conduct evinced an intention not to perform the charterparty.

The shipowners, however, took a further point, namely, that on July 18 the charterer was not ready and willing to perform the charterparty within such time as would not frustrate the venture. This point, be it observed, had nothing to do with evincing an intention, but was directed to impossibility in fact. This, of course, depended on the actual position as it existed before, on or after July 18 whether known to the charterer or not. Questions thereupon arose whether there were sufficient findings by the arbitrator on this point, and as to the power of the court to draw inferences.

The shipowners contended that the findings as a whole—whether express findings, or findings in the course of the narrative—amounted to a finding in their favour, or, at any rate, were such as to lead to an irresistible inference in their favour. The learned judge, however, took a view against them, expressing the opinion that on the case as it stood the shipowners had failed to make out their case. Accordingly, while not abandoning his contentions, but only to safeguard his position, counsel for the shipowners applied on the sixth day of the argument for the case to be remitted for a further finding on this point.

This, of course, involved an application to extend the time, since the six weeks allowed by R.S.C., Ord. 64, r. 14, had long since expired. The application was strongly resisted, but ultimately the learned judge remitted the case, giving the charterer all the costs to date, and, unless otherwise directed, any further costs in the arbitration incurred by either party by reason of the order for remission. The order was made orally on Feb. 22, 1957. It was perfected on Mar. 13 and for this purpose the relevant part of the order is as follows:

> " And it is further ordered that the said award be remitted to the arbitrator for him firstly to answer the following question namely whether the [charterer] was on July 18, 1951, willing and able to perform the charterparty within such time as would not have frustrated the commercial object of the adventure and secondly to reconsider if he should think fit so much of the said award as relates to costs."

On Mar. 12, 1957, the learned judge delivered a reserved opinion on his view of the law and its application to the case. I say that he delivered an " opinion " since, except in relation to the application to remit, it could not be a judgment until the further finding had been made. So far as this appeal is concerned, both parties proceeded on the assumption that the views expressed by the judge in his reserved opinion were right, and I think that we should do the same. Important questions will arise for determination if and when there is a substantive appeal—questions whether the facts are sufficiently found in the shipowners' favour; whether the court has power to draw inferences of fact; and whether the scope of the decision in *Hudson Bay Co.* v. *Dominga* (1) ((1922), 10 Lloyd's Rep. 476) has the restricted application put on it by the learned judge, and many other matters. I refrain from expressing any view on them. The sole question here is whether, on the assumption that the judge's views are correct, it was a proper exercise of his discretion to remit the case.

In deciding whether to remit a case, as I see it, the court is faced with two conflicting principles. On the one hand an award in the form of a Special Case is intended to be and should be regarded as final subject only to the point of law raised. So far as the facts are concerned, it should be regarded as entirely final. It is for the parties before the arbitrator to state the question or questions of law which they desire to be left to the court; and, while it is for the arbitrator to state the facts, it is for the parties to ensure that, so far as possible, the relevant facts are found. In this connexion I need refer only to the two cases decided by the same learned judge referred to in RUSSELL ON ARBITRATION (16th Edn.) at p. 183, viz., *Nello Simoni* v. *A/S &c. Straum* (2) ((1949), 83 Lloyd's Rep. 157), A and *Sinason-Teicher Inter-American Grain Corpn.* v. *Oilcakes & Oilseeds Trading Co., Ltd.* (3) ([1954] 2 All E.R. 497 at p. 503). The parties can state to the arbitrator, of course, the facts on which they desire findings; and if he fails to make them they have the six weeks under the order in which to peruse the award, and to apply for remission if they think it necessary. Once the relevant facts are found, the parties can argue such of the points of law left to the decision of the court as are open to them on those findings. A rigid application of this B principle, however, would involve that in no case would it be open for the court on the hearing of the Special Case to remit the case for further finding, either of its own volition or on the application of a party.

On the other hand, there is the principle that the court before which the case comes for argument must be able to do justice between the parties, and should not be hampered by findings which in its view of the law are insufficient. Bearing C in mind the impossibility of drawing a hard and fast line between fact and law, the court may often find itself faced with difficulty. In this connexion I would refer to a passage in the judgment of LORD WRIGHT, M.R., in *Ben Line Steamers, Ltd.* v. *Compagnie Optorg of Saigon* (4) ((1937), 42 Com. Cas. 295 at p. 300). I refer to this for the general statement of the position, and not in regard to the actual question which arose for decision in that case, namely, the calling of D fresh evidence. LORD WRIGHT, M.R., said this (ibid., at p. 300):

> "It has constantly happened in my experience, both at the bar and on the bench, that when cases so stated have come before the court—a judge or the Court of Appeal—the court has found that the statement of facts given by the arbitrator, on which the court was required to decide the question E of law, appeared to the court to be inadequate for that purpose; and in those circumstances, as I understand it, the practice of the court has been to treat itself as having a discretionary jurisdiction to remit the case."

LORD WRIGHT then refers to the power under s. 10 (1) of the Arbitration Act, 1899, and goes on (ibid.):

> F "That is not limited to questions of this sort, but it does, I think, apply to give a general power of remitting, which, among other things, is applicable to this special difficulty which has very often been experienced by the courts in attempting to deal with the problem of law submitted, or intended to be submitted, by a Special Case; and it has happened from time to time that the court in remitting an award in those circumstances has found it necessary, G in order that, as it appears to the court, the relevant facts should be properly elucidated, to require the arbitrator to hear further evidence. This is not a matter done to oblige the parties, or either of them; it is a course taken by the judge or the Court of Appeal in the interests of justice and in order to enable the judge, or the Court of Appeal, to carry out the duty which is imposed upon them when an award in the form of a Special Case comes up for their decision." H

It is in deciding to which of these two principles to give effect in any particular case that the learned judge has a discretion. It is a statutory discretion provided now by s. 22 (1) of the Arbitration Act, 1950. On the face of the provision, the exercise of the discretion is wholly unfettered, and must depend on the exact facts in each case. Thus in a case in which a party is seeking to raise for the I first time an argument which, though open to him on the question of law left to the court, was never taken before the arbitrator, and in which the arbitrator was never asked to find the relevant facts, the court would almost certainly refuse to remit the case, more especially when the six weeks had expired.

Counsel for the charterer indeed argued that this was really such a case. Whilst conceding that the point was taken before the arbitrator, he claims that it was only obscurely taken, and that, as he puts it, the point never became a live issue in the arbitration. If it did, he asks with some force how comes it that the

A shipowners never suggested a finding on the point or asked for remission before? He points out, what is true, that the parties agreed on a large number of matters of fact which the arbitrator was asked to find. Yet this matter was not specifically argued.

On the other hand, counsel for the shipowners states that the point was certainly taken before the arbitrator; and, though he agrees that there is no express B finding in his favour, he says that it has always been his contention (and he will in future contend the same if necessary) that the findings taken as a whole are sufficient, and that it is only in order to safeguard his position (if he is wrong) that he desired the case to be remitted.

In these circumstances I think that it is necessary to look at the position strictly. The point is open on the pleadings by an amendment made shortly C before the hearing of the arbitration. It was pleaded in para. 6A:

> " Further or alternatively the [charterer] was unable and by his conduct made it clear that he was unable at any material time or at all to perform the said charterparty and thereby repudiated the same which said repudiation was accepted by the [shipowners] as hereinbefore set out."

D The plea is a little obscured by the words " and by his conduct made it clear that he was unable ", but even so I think that strictly the point is there, and was open on the pleadings. As counsel for the charterer now concedes, it was raised, albeit obscurely. How far it was persisted in and how far it became a live issue is, I think, irrelevant. It is enough to say that the point was never abandoned.

That being so, are there any grounds on which it can be said that the learned E judge wrongly exercised his discretion? It is said that the judge should not have extended the time, and a reference is made to RUSSELL ON ARBITRATION (16th Edn.) at p. 325 and to the illustrations given, in particular to *Re Coles & Ravenshear* (5) ([1907] 1 K.B. 1). That latter case, however, must be read in the light of the decision of this court in *Gatti* v. *Shoosmith* (6) ([1939] 3 All E.R. 916).

In my judgment, provided an applicant can show a strong case on the merits F indicating a really definite issue for consideration—see per SCOTT, L.J., in *Temple Steamship Co., Ltd.* v. *V/O Sovfracht* (7) ((1943), 76 Lloyd's Rep. 35 at p. 36) —and also can explain the delay, there is no reason why the time should not be extended. The applicant is at mercy, of course, and stringent terms as to costs can be imposed, as they were in this case. Here, I think, the shipowners fulfil both conditions. They showed a strong case on the merits, and I am prepared G to accept the explanation why an application to remit was made only on the argument of the Special Case.

It is also said that the court can only remit on one or other of the four grounds set out in RUSSELL ON ARBITRATION (16th Edn.) at p. 285, which grounds were approved in *Montgomery, Jones & Co.* v. *Liebenthal & Co.* (8) ((1898), 78 L.T. 406). The grounds there stated are: (1) Where the award is bad on the face of it; H (2) where there has been an admitted mistake, and the arbitrator himself asks that the matter may be remitted; (3) where there has been misconduct on the part of the arbitrator; and (4) where additional evidence has been discovered after the making of the award.

The only relevant category for the purpose of the present case is the third, viz., where there has been misconduct on the part of the arbitrator. It is said I that only if the point was properly taken before the arbitrator could it be said that failure to make an express finding was misconduct on his part. As I have already said, I have come to the conclusion that the point was taken before the arbitrator, and therefore if necessary I would be prepared to say that this case fell within that third category. It is, however, highly artificial to say that in all the circumstances there was even technical misconduct on the part of the arbitrator. I prefer to treat those four grounds merely as guides to the exercise of discretion, and not as forming exhaustive grounds, at any rate, when the award is in the form of a Special Case.

A As Moulton, L.J., said in *Re Baxters & Midland Ry. Co.* (9) ((1906), 95 L.T. 20 at p. 23):

> "The jurisdiction of the court is statutory, and cannot be increased or cut down in that way. The reported decisions of the court only show the principles which have guided the court from time to time in exercising its jurisdiction, and, though they may afford a valuable guidance they do not B restrict either the jurisdiction of the court in deciding other cases or the duty of the court to look at the facts in each particular case. When the facts of any particular case before the court are the same as the facts in the cases cited no doubt the court will follow those cases. But it must not be supposed that reported decisions prevent the court from deciding whether in the interests of justice it ought to send the matter back to the arbitrator."

C Moreover, I think that different considerations arise according to whether an award is strictly a final award, or is an award in the form of a Special Case. In the former case, remission usually arises as an alternative to setting aside. Prima facie, if parties agree on an arbitrator, they must accept his award as final for good or ill. Indeed, that was the settled law of this country down to D 1802, when, for the first time, in *Kent* v. *Elstob* (10) ((1802), 3 East 18) it was held that an award could be set aside for an error on its face. In this connexion I would refer to the history of the remedy fully dealt with by Lord Goddard, C.J., in *R.* v. *Northumberland Compensation Appeal Tribunal, Ex p. Shaw* (11) ([1951] 1 All E.R. 268, particularly at pp. 274, 275). In those cases the discretion will not be readily exercised; and indeed it may well be that its exercise should be strictly confined to specific grounds.

E As it seems to me, different considerations arise when there is a Special Case. The award is not strictly final then, since the question of law is left to the court, and, as I said earlier, in such a case the court must have power to remit of its own volition if justice cannot otherwise be done. I think that in those cases the discretion of the court is wholly unfettered.

F Finally, it is said that, even if the court has an unfettered discretion to remit of its own volition, yet, where as here the remission was on the application of a party, the principles referred to in *Montgomery, Jones & Co.* v. *Liebenthal & Co.* (8) apply. I cannot see any reason for such a distinction. If in any case it would be right and proper for a judge to remit of his own volition, how can it be said that he exercises his discretion wrongly when he accedes to an application by one of the parties?

G I would dismiss this appeal.

ORMEROD, L.J.: I agree.

HODSON, L.J.: I also agree.

Appeal dismissed. Order of Devlin J., of Feb. 22, 1957, affirmed.

Solicitors: *Holman, Fenwick & Willan* (for the charterer); *Constant & Constant* (for the shipowners).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

REALISATIONS INDUSTRIELLES ET COMMERCIALES S.A. *v.* LOESCHER AND PARTNERS.

[QUEEN'S BENCH DIVISION (Lynskey, J.), October 3, 1957.]

Bankruptcy—Stay of action—Action pending against bankrupt at time of adjudication—Whether action automatically stayed by his adjudication—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5 *c.* 59), *s.* 9 (1).

Practice—Stay of proceedings—Bankruptcy—Action pending against bankrupt—Whether action stayed by his adjudication—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5 *c.* 59), *s.* 9 (1).

On the day before the hearing of an action in the High Court for breach of contract, the defendant was adjudged bankrupt, on his own petition, in a county court. When the action came on for hearing the defendant did not appear, and the question arose whether the adjudication order operated as a stay of the action.

Held: the proceedings against the defendant were not stayed automatically as a result of the adjudication order made against him, because, by s. 9 (1)* of the Bankruptcy Act, 1914, a discretion to stay proceedings against a bankrupt at any time after the presentation of a bankruptcy petition was given both to the Bankruptcy Court and to the court in which the proceedings were pending, and, therefore, the proceedings continued until an order was made staying them.

[As to the stay of legal process against the property or person of a debtor, see 2 HALSBURY'S LAWS (3rd Edn.) 322, para. 616; as to liability for breach of contract being provable in bankruptcy, see ibid., p. 464, para. 913.

For the Bankruptcy Act, 1914, s. 9, see 2 HALSBURY'S STATUTES (2nd Edn.) 337.]

Preliminary Issue.

This was a preliminary issue in an action for £4,000 damages for breach of a contract whereby the defendant agreed to purchase from the plaintiffs one thousand tons of aluminium ingots. On Oct. 2, 1957, the day before the action was to be heard, the defendant filed his own petition in bankruptcy and an order of adjudication was made by the registrar of the Croydon County Court. When the action came on for hearing the defendant did not appear, but the court was informed of the position by counsel instructed by the defendant's former solicitors. The question was raised whether the action was automatically stayed as a result of the adjudication order. It was agreed that proceedings would be stayed if an adjudication order were made against a plaintiff, but that there was no authority as to the position where an adjudication order was made against a defendant.

R. S. S. Lane Mitchell for the plaintiffs.

The defendant was not represented.

LYNSKEY, J.: In this case there is a claim by the plaintiffs, Realisations Industrielles et Commerciales Société Anonyme, against Messrs. Loescher and Partners, who are sued as a firm. Although they are sued as a firm, an individual named Helmuth Otto Loescher carries on the business under the style of a partnership, and, therefore, the action is really against an individual and not a firm. The action was due for hearing, and came on for hearing, today; but yesterday the defendant, Mr. Loescher, filed his own petition in bankruptcy. The matter came before the registrar yesterday in a summary way, and the registrar made an order of adjudication. The result is that the defendant has not appeared here today, and the question arises what the present position is.

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* The terms of the sub-section are printed at p. 242, letter E, post.

Counsel for the plaintiffs asks me to hear the case and to give judgment for the plaintiffs; also, I suppose, he will ask for costs. The question which I have to consider is whether the making of an order of adjudication in bankruptcy operates as a stay of proceedings so as to prevent my hearing the action, as the plaintiffs desire. If a plaintiff is adjudged bankrupt, the adjudication operates of necessity as a stay of proceedings, because on the property which the plaintiff has in his claim passing to the official receiver or the trustee in bankruptcy there is nothing left in the plaintiff which he can enforce; and in those circumstances, of course, it is necessary to have the official receiver or the trustee in bankruptcy brought in as a plaintiff in whom the property vests immediately on the bankruptcy. That is a matter which I have not to consider directly. One has to bear in mind the provisions of R.S.C., Ord. 17, r. 1, which provides that an action is not abated by death or bankruptcy; but I think that in those circumstances the court would not be able to continue to hear the action without at any rate having the official receiver or the trustee before it.

In the case of the bankruptcy of a defendant, however, there is nothing in the Bankruptcy Act, 1914, which deals with the effect of an adjudication order, or suggests or says that an adjudication of itself operates as a stay of proceedings. In fact, the effect of an order of adjudication in bankruptcy on an action has not been dealt with as such in the Bankruptcy Act, 1914, nor has it been dealt with in the Bankruptcy Rules, 1952. The matter is left under the provisions of s. 9 (1) of the Bankruptcy Act, 1914, which reads:

> " The court may, at any time after the presentation of a bankruptcy petition, stay any action, execution, or other legal process against the property or person of the debtor, and any court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just."

The effect of that sub-section is that the power to stay proceedings is given both to the Bankruptcy Court and also to the court in which the proceedings are pending; but nothing operates to restrict the words " at any time after the presentation of a bankruptcy petition ", which seem to be the operative words. These powers continue not only after the presentation of the petition but even after adjudication, and in those circumstances it seems to me that, until an order is made by the Bankruptcy Court, or the court in which the proceedings are pending, staying the proceedings in the High Court, the proceedings continue and are not stayed automatically.

I imagine that in the ordinary case the creditor plaintiff is not desirous of proceeding with his claim against the defendant bankrupt, because his hope of getting anything out of him after judgment is somewhat remote. I have, however, to deal with the present case because of the difficulty in which the plaintiffs are placed. They are ready for trial, and they have brought over from Paris a witness who unfortunately is ill, and it is desirable that his evidence should be taken. I cannot bind the Bankruptcy Court, but it may be that the effect of my hearing the case today—if I am satisfied that the plaintiffs have established their case and I give judgment for them—will be that the official receiver or trustee in bankruptcy will accept that judgment as being some proof of the debt when it comes to be proved in bankruptcy, and that he will not require the presence of this witness a second time. That, however, is a matter with regard to which I cannot bind the Bankruptcy Court. As the plaintiffs have asked that the matter should be dealt with in this way, and as there is no stay of proceedings by the Bankruptcy Court, I propose to hear the case.

[HIS LORDSHIP then proceeded to hear the action. The defendant did not appear and was not represented.]

Solicitors: *Rowe & Maw* (for the plaintiffs); *Lieberman, Leigh & Co.*

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

R. B. BURDEN, LTD. *v.* SWANSEA CORPORATION.

[HOUSE OF LORDS (Viscount Simonds, Lord Radcliffe, Lord Tucker, Lord Cohen and Lord Somervell of Harrow), March 12, 13, 14, 18, May 29, 1957.]

Building Contract—Architect's certificate—Certificate issued on inadequate valuation or estimate of building owner's quantity surveyor—Certificate issued by architect for smaller sum than that claimed by contractors—Whether interference with, or obstruction of, issue of certificate by building owner.

The appellants contracted with the respondents to build a school. Under the contract, which was dated Dec. 20, 1949, interim payments were to be made to the appellants on interim certificates of the architect. By cl. 20 of the contract the appellants were empowered by written notice to determine their employment if the respondents interfered with or obstructed the issue of any such certificates. The architect, who was the respondents' borough architect, acted originally under the contract both as architect and quantity surveyor, but after twenty interim certificates had been issued and paid he ceased to act as quantity surveyor and a firm of quantity surveyors was appointed to act as surveyors in his place. H., a partner in the firm and an experienced quantity surveyor, thereafter acted as quantity surveyor. The respondents left him and the architect free to act as surveyor and architect respectively. The appellants having applied for an interim certificate (No. 21) in the sum of £5,785, H. valued the total work done and materials delivered and, taking into consideration payments already made, advised payment of £1,287. H.'s valuation was not a proper valuation. When subsequently he became aware of certain omissions, he did not inform the architect or the respondents of these matters. The architect issued his certificate for £1,287 and intimated to the appellants that a sum of £672 out of the £1,287 was payable by them to sub-contractors; this sum was not in fact due to sub-contractors and was not paid by the appellants. The appellants claimed to be entitled to a certificate for an amount exceeding £1,287, but the respondents, relying on H.'s valuation, did not accede to the claim. The appellants gave notice under cl. 20 terminating their employment. It was not established at the hearing whether on a proper valuation they would in fact have been entitled to more than £1,287 at the time relevant to certificate No. 21.

Held (LORD SOMERVELL OF HARROW dissenting): the appellants were not entitled to determine their employment under cl. 20 of the contract because, although certificate No. 21 was the consequence of an improper valuation, the appellants had not established that the respondents had interfered with or obstructed the issue of any certificate within the meaning of cl. 20.

Per LORD RADCLIFFE: a mistake in a direction as to the payment of amounts to sub-contractors does not affect the issue of a certificate . . . It is concerned solely with what is to happen after the issue of the certificate (see p. 250, letter I, to p. 251, letter A, post). A

Appeal dismissed.

[**Editorial Note.** The present case turned on the effect of cl. 20 of the contract, which was a clause following a form in common use. LORD RADCLIFFE restricts his opinion, with which VISCOUNT SIMONDS and LORD COHEN concur, to the position when the contract contains a clause in this form (see p. 251, letter F, post). B

For cl. 20 of the R.I.B.A. standard form of contract, see 2 ENCY. FORMS & PRECEDENTS (3rd Edn.) 574.] C

Case referred to:

(1) *Chambers* v. *Goldthorpe, Restell* v. *Nye*, [1901] 1 K.B. 624; 70 L.J.K.B. 482; 84 L.T. 444; 7 Digest 439, *425*.

Appeal.

Appeal by building contractors, R. B. Burden, Ltd., from an order of the Court of Appeal (DENNING, MORRIS and PARKER, L.JJ.), dated Jan. 18, 1956, reversing in part an order of His Honour J. D. CASSWELL, Q.C., one of the official referees of the Supreme Court, dated July 22, 1955. The facts appear in the opinion of LORD RADCLIFFE, p. 245, letter E, post. D

F. W. Beney, Q.C., *E. J. Rimmer, Q.C.*, and *J. S. Daniel* for the appellants. E

Elwyn Jones, Q.C., *E. H. Blain* and *M. Mann* for the respondents.

The House took time for consideration.

May 29. The following opinions were read.

VISCOUNT SIMONDS: My Lords, in this unfortunately protracted litigation between the appellants, a firm of building contractors, and the respondents, the Swansea Corporation, the short point for your Lordships' consideration arises on the construction of a few words in a building contract into which the parties entered in December, 1949. I have had the advantage of reading the opinions which my noble and learned friends, LORD RADCLIFFE and LORD TUCKER, will deliver, and will not occupy your Lordships' time by a statement of the facts and history of the case which are there fully set out. F G

The relevant clause, which we were told is one that is commonly found in such contracts, authorises the contractor to determine his employment under the contract

> " If the employer within the period which is named in the appendix to these conditions and thereafter for seven clear days after written notice from the contractor does not pay to the contractor the amount due on any certificate, or if the employer interferes with or obstructs the issue of any such certificate." H

The appellants, alleging that the employer had interfered with or obstructed the issue of a certificate, exercised their right of determining their employment. The official referee upheld their contention in proceedings in which this, and many other issues, were referred to him. The Court of Appeal were unanimous in holding that he was wrong. I agree with them. I do not in any way question the findings of fact by the official referee. I am not entitled to do so. But I do not think that, on those findings, there was within the meaning of the clause any obstruction or interference by the respondents with the issue of a certificate. No doubt it is the duty of the architect to issue at the right time an interim certificate for the right amount, and I do not pause to ask whether, in giving I such an interim certificate, he is acting merely as agent for the employer, the building owner, or is acting in a judicial or quasi-judicial character. For the question is not what was his duty nor whether he performed it properly. Rather it is whether the respondents interfered with, or obstructed, his performance, and on this question I agree so fully with what my noble and learned friends, LORD RADCLIFFE and LORD TUCKER, will say that I do not think it necessary to add any words of my own.

Not the least of the anomalies of this case is that even now after the expense of litigation up to this House it has not been determined whether the architect had, or had not, at the date when the appellants purported to exercise their rights under cl. 20 issued certificates for payment of the full amount to which the appellants were then entitled. This was a matter which could easily have been settled under the arbitration clause in the agreement, and this part at least of the dispute between the parties would have been avoided.

In my opinion, this appeal should be dismissed with costs and I move your Lordships accordingly.

LORD RADCLIFFE: My Lords, the trial of this case before the official referee lasted for fifty-three days. From that hearing only one question has filtered through on appeal to the Court of Appeal and, ultimately, to your Lordships' House. That is the question whether the appellants, who were building contractors under a building contract dated Dec. 20, 1949, and made between themselves and the respondents, the Swansea Corporation, were entitled by that contract to determine their obligations under it by a notice which they delivered to the respondents on Oct. 30, 1951.

At this stage of the litigation it is possible to indicate the relevant facts and considerations more briefly than was possible when the matter was before the official referee and the Court of Appeal. I will make my statement as succinct as I can. The appellants had undertaken by this contract to build a primary school for the respondents ("the employer") for a contract sum of £102,760. This sum was capable of being increased in accordance with the conditions of the contract. The contract was governed by, inter alia, a set of twenty-seven clauses, styled "the conditions", and for the purposes of those conditions the architect was Mr. H. T. Wykes, the Swansea borough architect,

> "or in the event of his death or ceasing to be the architect for the purpose of this contract such other person as shall be nominated for the purpose by the employer",

and the surveyor was to be the same Mr. Wykes

> "or in the event of his death or ceasing to be the surveyor for the purpose of this contract such other person as shall be nominated for the purpose by the employer."

It was a dispute about the provisions for financing the contract that led to the giving of the notice of determination. It can be taken for granted that these provisions and their observance were of importance to the contractors, who would not be expected to finance a contract of this size out of their own resources. Clause 24 of the conditions, therefore, dealt with the issue of interim certificates by the architect. Shortly, the arrangements were that (i) there should be interim certificates each month; (ii) subject to cl. 21, which is not here material, the architect was to issue such certificates stating the amount due to the contractors from the employer, and payment due on them was to be promptly met; (iii) the amount so certified was to be the total value of the work properly executed and of the materials and goods delivered on the site for use in the works up to and including a date not more than seven days before the date of the issue of the certificate, less retention moneys as agreed and any instalments previously paid on earlier certificates; and (iv) at the time of issuing any interim certificate, the architect was entitled to require an interim valuation, whenever he thought it necessary. A

Consistently with this scheme for financing the cost of the works cl. 20 made special provision for a right in the contractors to give summary notice to the employer determining the employment of the contractors in certain events, of which the first two were expressed as follows: B

> " If the employer within the period which is named in the appendix to these conditions and thereafter for seven clear days after written notice from the contractor does not pay to the contractor the amount due on any certificate, or if the employer interferes with or obstructs the issue of any such certificate . . ." C

The notice which was given by the contractors on Oct. 30, 1951, was given on the ground that the employer had interfered with, or obstructed, the issue of such a certificate. Whether that was so is the issue which your Lordships have to decide. The learned referee came to the conclusion that there had been such obstruction, and made a declaration accordingly that the contractors had properly determined the contract. D The Court of Appeal, on the other hand, decided unanimously that there had not been any such obstruction on the part of the employer, and reversed so much of the official referee's judgment as related to that issue.

There are two points bearing on the scope of this appeal which it is convenient to mention at this stage. The first is that the implication of the respondents in E the obstruction alleged against them depends entirely on the measure of responsibility to be attributed to them for the actions of a Mr. Hawkins, a partner in the firm of Messrs. Oswald Parratt, chartered quantity surveyors, and on the interpretation of his actions in the light of cl. 20 of the conditions. As I read the amended particulars of para. 29 of the statement of claim, the appellants' allegations of obstruction on the part of the respondents were founded on a combination F of acts or defaults attributed to persons in the regular service of the respondents, in particular Mr. Williams, a quantity surveyor, and the town clerk, as well as to Mr. Hawkins. In view of the findings of the learned referee, who exonerated these persons from having committed any act which amounted to interference or obstruction, I think that we are bound to take it, since his findings were not G challenged before us, that whatever obstruction can be brought home to the employer must be founded on the acts or defaults of Mr. Hawkins alone and of no one else.

Secondly, I do not think we should address ourselves to this appeal on the footing that the case was tried by the official referee on the basis that Mr. Hawkins was the agent of the employer in all that he did, and that the only H question in dispute was whether what he did amounted to obstruction for the purposes of the contract. Had that been the case, it might well have been improper for the Court of Appeal, and now for this House, to open the question whether the true meaning of cl. 20 is such that the acts of Mr. Hawkins that are complained of can be attributed to the employer at all. But it was not the case. Indeed, I consider that the appellants have nothing to complain of in being I required to meet this point. I have read with care the statement of claim and amended particulars, and I remain at the end uncertain whether they amount to an allegation that Mr. Hawkins was acting as agent for the employer, or whether he was a person, not himself an agent of the employer, whose actions or derelictions were known to, and condoned by, persons who were such agents. Certainly the statement of claim contains no positive allegation of his agency. There is merely the general statement in para. 29: " In or about the month of

October, 1951, the [respondents] by their servants or agents wrongfully interfered with or obstructed ", etc. There was, therefore, no allegation for the respondents to admit or deny that bore explicitly on the status of Mr. Hawkins. Their general answer (para. 21 of the defence):

> " It is denied that the [respondents] by themselves or their servants or agents ever interfered with or obstructed wrongfully or as alleged or at all the issue of any certificate to which the [appellants] were entitled or any certificate ",

cannot in the circumstances amount to a confession and avoidance. It appears that the amended particulars of para. 29 were not delivered until the close of the hearing. The form of them could not, therefore, have influenced the course of the trial or the range of evidence called. I conclude, therefore, that there was nothing amounting to agreement between the parties as to Mr. Hawkins' position in relation to the respondents, and the onus of establishing that his actions amounted to obstruction by the employer remained with the appellants.

Before I trace as much as I believe to be relevant in Mr. Hawkins' connexion with the matter, I must say something about the position of architect and surveyor respectively in relation to the building owner under a contract of this kind. To take the architect first, it is obvious that his general function is to act on behalf of the owner, and he is the owner's agent to give the required instructions to the contractor. He is placed in office to protect the owner's interests. But in those parts of his duties which relate to the giving of certificates for payment I think that he stands apart from the owner and enjoys to some extent an independent authority of his own. The terms of the contract itself involve that he should have an irrevocable authority from the owner to issue certificates for payment to the contractor up to the amount and according to the terms which the contract prescribes. Hence, under this contract, if the owner even attempts to prevent him doing so by interfering with, or obstructing, their issue, the contractors are entitled to call off the whole transaction by summary notice. No doubt, when the contract goes the architect's authority goes with it. But I take this power of determination to be a clear recognition of the fact that in matters of certification the architect is not simply the agent of the employer but has duties of his own to perform under the contract, duties which he assumes by accepting his appointment as architect.

It is an established principle of law that, in granting a final certificate under a building contract, the architect acts in an arbitral capacity and is not " merely in the position of an agent for the building owner ": *Chambers* v. *Goldthorpe*, *Restell* v. *Nye* (1) ([1901] 1 K.B. 624). The effect of that decision is that, in granting his certificate, the architect has a duty towards each party to hold the scales even. The considerations which give him this arbitral position with regard to a final certificate are not necessarily applicable so as to place him in the same position with regard to each interim certificate. But I do not think that there is any need to decide that point for the purpose of this case. One need go no further than to accept that, under the contract in suit, the architect is treated for some purposes as a person distinct from the employer and that, in the exercise of his right and duty to issue interim certificates for payment, he is so far distinct that any act of the employer which interferes with, or obstructs him in, that duty is a breach of contract which goes to the root of the whole engagement.

The duties and position of the surveyor do not appear clearly from the terms of the contract. He, too, is appointed by the employer in the first place and, if the post falls vacant, it is the employer who names his successor. No doubt he is to be paid by the employer. The only specific references to him in the conditions are in cl. 9, where he is given the duty of measuring and valuing all variations sanctioned by the architect, and in cl. 22, where the architect is directed to inform the surveyor of any expenses incurred by the contractor for special packing and special carriage and the surveyor is to allow for the same as contractor's payments for the purposes of prime cost. Generally speaking, I regard the surveyor as the person charged with the duty of valuing the contractors' work and advising the architect as to the allowance of his claims for payment, interim and final. But I do not see anything in the contract which suggests that the architect is bound to accept the surveyor's opinions or valuations when he exercises his own function of certifying sums for payment. At that point the architect remains master in his own field.

So long as Mr. Wykes held both appointments no problem could arise as to the respective functions of architect and surveyor. During this period as many as twenty interim certificates were issued by him. There is no evidence recorded by the official referee as to how much Mr. Wykes himself did in the work of checking. The procedure adopted varied. It is evident that, having the call on the respondents' quantity surveying section, which was part of the office run by him as borough architect, he used surveyors from the section to get the checking done. At one time a surveyor from the section met on the site a surveyor representing the contractors, and quantities were agreed. Quantities, after all, are primarily a surveyor's question. Later, there were no site meetings; the appellants' representative measured the work and materials and discussed his figures at the town hall with a Mr. Howells, who was himself employed in the section. At one time a Mr. Tee was employed to check these claims, but after he left the service of the respondents in August, 1950, the contractors' claims were passed more or less automatically through the surveying section to the architect for signature. The reason of this unsatisfactory procedure was shortage of surveying staff at the architect's disposal. By May, 1951, Mr. Williams, the head of the section, began to have misgivings that the somewhat casual acceptance of the respondents' figures had led to considerable overpayment on the interim certificates. Whether he was right or wrong, something which, as I shall mention later, we are left without the means of knowing, the upshot of it was that the architect decided that he must have outside assistance in checking the appellants' claims and quantities. Accordingly, he retired from his position as surveyor under the contract and, acting on his recommendation, the respondents appointed in his place Messrs. Oswald Parratt & Co., the firm responsible for the preparation of the original bills of quantities.

Mr. Wykes informed the appellants of the change on Aug. 27, 1951. I think it plain that everyone concerned knew that Messrs. Parratt or the partner, Mr. Hawkins, who was to deal with the matter, was expected to make an interim valuation of the work done to date in order to reassure the architect as to his future certificates. As the appellants say, in sub-para. (c) of their amended particulars of para. 29 of the statement of claim, " the architect requested Messrs. Oswald Parratt to make a valuation and recommend the sum which should be paid " on certificate No. 21. The resulting valuation was treated by the official referee as " made on the instructions of the architect " and as an " assessment of value for which the architect was responsible ". Indeed, it is his finding that in the case of certificate No. 21 " the architect decided that an interim valuation should be made and instructed Messrs. Parratt to make it ".

I am very anxious not to depart at this point from the series of findings made by the learned referee. One of the difficulties which I have found in appreciating the full effect of those findings is that, although he was forced to come to the conclusion that he could not place any reliance on the evidence of Mr. Hawkins, he was, nevertheless, under the necessity of arriving at some conclusions as to what had been done, or not done, by Mr. Hawkins himself in the course of making the valuation that was required of him. As I read the judgment the material facts as found can be set out in the following order:—(i) On Sept. 27, 1951, the appellants sent in to the architect a written application for certificate No. 21 in the sum of £5,785 (I have not reconciled this figure with the figure of £9,636 which appears in the letter), together with supporting documents. (ii) By a letter dated Oct. 11, 1951, Mr. Hawkins recommended the architect to issue certificate No. 21 for the sum of £1,287 only. He enclosed with his letter a brief analysis showing a total valuation of work and materials ranking for payment, allowing £5,000 for retention, at the sum of £72,333. Against this sums amounting to £71,046 had already been paid on certificates. The balance was the sum of £1,287. (iii) This figure of £72,333 represented Mr. Hawkins' true view of the value at the relevant date, Sept. 30, 1951. But he had made no proper valuation which was capable of supporting that figure and had acted with insufficient attention to the matter and in too great a hurry. (iv) The architect accepted Mr. Hawkins' recommendation, and on Oct. 12, 1951, he did in fact issue and sign interim certificate No. 21 for the amount of £1,287. (v) Although the amount recommended by Mr. Hawkins was what he thought was due to the appellants at the time, he became aware at a later date during the same month of certain deficiencies in his calculations, in that he had omitted to allow for a considerable amount of hard core delivered on the site and for certain price variations. He did not report these matters to the architect when he became aware of them, although it was his duty to do so. (vi) The appellants were indignant that their claim for £5,785 current payment should thus be reduced to £1,287. They protested by letter both to the architect and to the town clerk on behalf of the respondents. The architect took no action, being apparently content to stand by Mr. Hawkins' recommendation. The town clerk replied in a short letter that Mr. Hawkins' valuation was a proper valuation made strictly in accordance with the contract. (vii) The appellants thereupon gave notice determining their employment under cl. 20 of the conditions.

My Lords, if at this point I turn back to the words of that clause, I find it very difficult to see in what way the employer had been guilty of interfering with, or obstructing the architect in, the issue of a certificate. The respondents had given no instructions, direct or indirect, which impeded the architect in the performance of his duty of certification. They had left him alone, as it was right that they should. More than that, when he found that he could not adequately discharge his double duty of acting as architect and surveyor, they met without delay his request that he should be allowed to engage outside assistance. The firm chosen was chosen at his suggestion, not theirs. It was the firm who had been responsible for the original bills of quantities; and Mr. Hawkins, as the referee finds, was a very experienced quantity surveyor. In fact, the architect did issue his certificate for £1,287 within the permitted time. What went wrong, as is now established, is that the work which Mr. Hawkins had been engaged to do and on which that certificate was based had not been properly done. No doubt we must suppose that the architect would not have accepted the recommendation if he had known at the time the facts as they were later ascertained at the trial. But he did accept it. In my opinion, it is a misuse of language to say that in those circumstances and in that setting the employer had interfered with or obstructed the issue of a certificate.

I think that the learned referee arrived at his findings by a transposition of the language of cl. 20 which is not permissible. Throughout he treats Mr. Hawkins' action as the equivalent of the employer's actions for this purpose; and I have already indicated why I do not think that this treatment is adequate for the situation with which cl. 20 is concerned. But, even so, his first finding is that Mr. Hawkins " obstructed the issue of the sort of certificate to which the [appellants] were entitled ". By this he means that Mr. Hawkins, by not basing his recommendation on a proper valuation, led the architect to issue a certificate on unsatisfactory measurements. But I cannot read cl. 20 as directed to the issue of one " sort " of certificate rather than another, or to the methods of computation employed before the issue of a certificate. If those methods are deficient, they may be expected to lead to the certification of a wrong sum. If it is too small—the error may be either way—the appellants are entitled to claim an immediate arbitration under cl. 27 of the contract and to get the matter put right. But I do not think that they are entitled to call the whole thing off under cl. 20 on the ground that proper methods of valuation have not been applied.

I think it of some importance to point out that even by the conclusion of the hearing it had not been established whether the appellants were, at the relevant date, entitled to more than £1,287 or to much more than, or to as much as, that sum. Yet the whole point of making a condition about the employer obstructing the architect's issue of a certificate must lie in the prejudice to the appellants in being kept out of money due to them. In spite of this, the learned referee took the view that the question what was the true state of the account was immaterial to the validity of the appellants' notice. In that view he was acceding to the argument of their counsel that it was immaterial whether Mr. Hawkins' recommendation was too high or too low and that, even if it should turn out in the end that it was too high, the appellants' rights under cl. 20 would have been just the same. This contention was thus part of the appellants' case: it does not appear to have been advanced or conceded by the respondents. If it was necessary to the appellants' case to establish that more than £1,287 was then due, they did not do so. I do not express any final opinion on this, since I think that Mr. Hawkins' defective procedure does not in any event amount to obstruction by the employer. But I must say that it would take a good deal to persuade me that it was not relevant for this purpose to know whether the appellants were entitled to anything more than the money that they got. Can one be guilty of obstructing something unless it has a right to start?

The learned referee's next finding is that Mr. Hawkins, by failing to report to the architect some of the reasons why the sum recommended was lower than the sum applied for, " obstructed the issue of a supplementary certificate to which the [appellants] were entitled ". But then the contract does not provide for supplementary certificates; so cl. 20 cannot have such a contingency in mind. If an interim certificate allows too small a sum, the remedy is by arbitration. To say that there was obstruction of the issue of a supplementary certificate seems to me no more than an indirect finding that the appellants were, in fact, entitled to be paid more than £1,287 in October, 1951. But how can such a finding stand in the face of the learned referee's previous statement that it was both impossible and immaterial to decide whether the appellants had been overpaid before the issue of certificate No. 21?

There are two remaining points which I have left for separate mention. The learned referee found a third head of interference and obstruction on the part of the respondents. This arose out of the fact that when Mr. Hawkins sent the architect his recommendation for £1,287 he left in blank the statement of sums due to nominated sub-contractors which, under the contract, the architect had power to direct the appellants to pay over. The architect obtained from the surveying section a statement of sums amounting to £672 in all, and passed these on to the appellants in his letter of Oct. 12, 1951, which notified them of the issue of certificate No. 21. The statement that these sums were due to sub-contractors was an error; there had been a miscalculation in the surveying section and nothing was due. The point that this amounted to interference or obstruction in the issue of a certificate was not much pressed in argument before your Lordships; I think wisely. I do not read the letter dated Oct. 17, 1951, from the appellants' solicitors as resting the notice of determination on this ground at all. As I see it, a mistake in a direction as to the payment of amounts to sub-contractors does not affect the issue of a certificate one way or the other. It is concerned solely with what is to happen after the issue of the certificate and relates to the question what the contractors are to do with the money which, ex hypothesi, has been paid to them. It does not seem to me a possible use of words to say that an erroneous direction obstructs the issue. It is true that the mistake originated in the respondents' office and was made by the officials of the surveying section; but the responsibility for accepting it, and giving any direction in respect of it, was the architect's, and the officials were for this purpose no more than his advisers or instruments.

Lastly, it was suggested that, by the town clerk's letter of Oct. 29, in which he rejected all assertions of misconduct on the part of Mr. Hawkins, described his valuation as a proper one and by implication denied that the appellants were entitled to a certificate for a larger sum, the respondents had adopted Mr. Hawkins' actions and, albeit retrospectively, obstructed the issue of a certificate within the meaning of cl. 20. I do not, myself, find the necessary substance in this argument. The letter is not put forward as a ratification; it could not be, considering that Mr. Hawkins had not made any claim to any status of agency other than that which was involved in his firm's appointment as surveyors under the contract, and it results, too, from the learned referee's findings that the officials of the respondents did not, at the date of the letter, have any sufficient knowledge of Mr. Hawkins' proceedings to be in a position to ratify them. But, if there was no ratification, what does the " adoption " amount to? It seems to me to amount to no more than saying that the respondents were going to stick to the view that Mr. Hawkins had done all that he should, and that the appellants were not entitled to make his disputed valuation a ground of determination under cl. 20. Their confidence in the surveyor proved to have been misplaced, but I do not think that, in saying what they did, they made his actions any more their own for the purpose of that clause than they were before.

For these reasons, I am of opinion that this appeal ought to be dismissed. The reasons which I have given do not differ in substance, I think, from the grounds that commended themselves to Denning, L.J., and Parker, L.J., in the Court of Appeal. But it is, perhaps, worth while to say that, in my view, the answer that ought to be returned to the question raised depends essentially on the special position between employer and architect envisaged by a clause in the form of the present cl. 20. I should find it very much more difficult to resolve it by any general propositions as to the relations of building owner, architect and surveyor under a building contract.

LORD TUCKER: My Lords, the short point for decision in this appeal is whether, on the findings of the learned official referee, the respondent corporation " interfered with or obstructed the issue of a certificate " within the meaning of cl. 20 in a building contract made between the appellants as contractors and the respondents as employer, dated Dec. 20, 1949, for the construction of a primary school at Swansea. Under the contract, the borough architect, Mr. Wykes, was appointed architect and surveyor for the purposes of the contract. He was subsequently replaced as surveyor by the firm of Messrs. Oswald Parratt, who were appointed in his place by the respondents as they had power to do under the contract. Mr. Hawkins was the representative of the firm who acted pursuant to this appointment.

Clause 24 (a) of the contract provides that, at the period of interim certificates (i.e., monthly), interim valuations shall be made whenever the architect considers them necessary and that, subject to cl. 21 (which deals with sub-contractors), the architect shall issue a certificate stating the amount due to the contractor from the employer, and the contractor shall be entitled to payment therefor within the period named in the appendix. Clause 24 (b) provides that the amount so due shall, subject to cl. 21 (a) and to any agreement between the parties as to stage payments, be the total value of the work properly executed and of the materials and goods delivered on the site for use in the works up to, and including, a date not more than seven days before the date of the said certificate, less the amount to be retained by the employer and less any instalments previously paid. Clause 27 provides for arbitration in case of any dispute or difference between the employer or the architect on his behalf and the contractor, either during the progress or after completion or abandonment of the works, as to the construction of the contract, or arising thereunder, or in connexion therewith (including any matter or thing left to the discretion of the architect), or the withholding by the architect of any certificate to which the contractor may claim to be entitled or the measurement and valuation mentioned in cl. 19 (which deals with variations) or the rights and liabilities of the parties under cl. 19, cl. 20 or cl. 25. Clause 20 (1), which is the clause directly in question, reads, so far as relevant, as follows:

> "If the employer within the period which is named in the appendix to these conditions and thereafter for seven clear days after written notice from the contractor does not pay to the contractor the amount due on any certificate, or if the employer interferes with or obstructs the issue of any such certificate . . . the contractor may, without prejudice to any other rights or remedies, thereupon by notice by registered post to the employer or architect determine the employment of the contractor under this contract."

It has been found that, in the early stages of the contract, it was the practice for persons in the respondents' surveyor's department from time to time to meet a representative of the appellants to agree figures and valuations for the purpose of the issue by the architect of interim certificates. As time went on, owing to pressure of work it was found impossible for anyone to attend the site on behalf of the respondents, and the appellants' figures were checked by the office staff so far as was practicable. When the work was nearing completion, some of the respondents' officials suspected that this practice had resulted in considerable overpayments, and this was one of the reasons for the appointment, shortly before No. 21 interim certificate was due, of Mr. Hawkins of the independent firm of Messrs. Oswald Parratt, who had prepared the original bills of quantities. It is, I think, clear that Mr. Hawkins was appointed not only to act as surveyor for the limited purposes expressly laid down in the contract but also to carry out the valuations and measurements which had previously been done, with the architect's consent, by members of the respondents' permanent staff with a view to assisting the architect to obtain the necessary materials for the issue of his certificates.

The official referee has found as a fact that "in the case of certificate 21 the architect decided that an interim valuation should be made and instructed Messrs. Parratt to make it". Mr. Hawkins accordingly made what he claimed to be a valuation, as a result of which the architect issued a certificate for £1,287 as against £5,785 claimed by the appellants. The official referee has found that this valuation was not properly made, and the question for decision is whether the defects and errors found constitute obstruction or interference by the employer with the issue of a certificate.

The official referee considered Mr. Hawkins an unsatisfactory and unreliable witness, but your Lordships are only concerned with his actual ultimate findings as to what was done, or left undone, by Mr. Hawkins. He found that the amount of £1,287 recommended by Mr. Hawkins was what he then thought was due to the appellants under cl. 24 (b), that his valuation had been made in too great a hurry without visual valuation on the site, that it omitted to include approximately £1,500 for hard core, which had been bought and used by the appellants, and that he failed to inform the architect of this omission when it was brought to his notice after he had made his recommendation. He further found that Mr. Hawkins had not included certain excess payments made by the appellants during the certificate period, consequent on price variations, and had made certain miscalculations with regard to preliminaries. Finally he found that, as a result of a mistake in the respondents' surveyor's department, the certificate as issued provided for payment to sub-contractors of a sum of £650 or thereabouts out of the total certified. This sum was not, in fact, payable and the appellants never paid it but retained the full sum. It is unnecessary to refer further to this last finding, since counsel for the appellants did not contend that this mistake would, by itself, have justified determination under cl. 20.

By reason of these matters, the official referee stated he had come to the conclusion, not without some hesitation, that, by producing that so-called valuation, Mr. Hawkins obstructed the issue of the "sort of certificate" the appellants were entitled to and, consequently, they could determine their employment under cl. 20.

The Court of Appeal allowed the respondents' appeal. Denning, L.J., I think, assumed without deciding that Mr. Hawkins' acts and omissions amounted to obstruction or interference, but held that the respondents were not liable for the acts of the surveyor within the sphere of duties assigned to him under the contract. Morris, L.J., considered the respondents not liable because Mr. Hawkins was employed as an independent consultant not subject to their control. He refers to him "conducting himself erroneously", but expresses no view whether such erroneous conduct constituted obstruction or interference with the issue of a certificate. Parker, L.J., said he was prepared to accept that Mr. Hawkins was guilty of interference or obstruction, but absolved the respondents from responsibility on grounds similar to those expressed by Denning, L.J.

My Lords, I agree with the conclusion reached by the Court of Appeal, but I would base my decision rather on the ground that the findings of the official referee do not constitute interfering with, or obstructing the issue of, a certificate within the meaning of cl. 20. I think, without attempting an exhaustive enumeration of the acts of the employer which can amount to obstruction or interference, that the clause is designed to meet such conduct of the employer as refusing to allow the architect to go on to the site for the purpose of giving his certificate, or directing the architect as to the amount for which he is to give his certificate or as to the decision which he should arrive at on some matter within the sphere of his independent duty. I do not think that negligence or errors or omissions by someone who, at the request, or with the consent, of the architect is appointed to assist him in arriving at the correct figure to insert in his certificate can amount to interference. Interference, to my mind, connotes intermeddling with something which is not one's business, rather than acting negligently in the performance of some duty properly undertaken. Nor do I think that the conduct found against Mr. Hawkins obstructed the issue of a certificate; it may have resulted in the issue of a certificate for a smaller sum than that which was due, but that is, in my view, a matter for arbitration under cl. 27 and not a ground for repudiation under cl. 20. I think the use by the learned official referee of the words "the sort of certificate" to which the appellants were entitled shows the difference between the interpretation which he put on these words and that which I have endeavoured to suggest as correct.

My Lords, one of the difficulties of this case as it has come to this House is that your Lordships do not yet know whether or not there had been over-payments on previous certificates, and whether, in fact, any sum was due when certificate No. 21 was issued. An interlocutory order was made, by consent, postponing the ascertainment of these figures until after the decision on obstruction. It would be a curious result if your Lordships were to hold that the issue of "the sort of certificate" to which the appellants were entitled has been

obstructed or interfered with so as to justify their determining the contract, if it A
should eventually be found that they were not at the date of the certificate entitled to any payment.

These considerations tend to confirm me in the view that errors due to negligent valuation were never intended to give rise to the remedy afforded to the appellants by cl. 20, but fall to be dealt with only by arbitration under cl. 27. Holding B
as I do that the acts and omissions found against Mr. Hawkins do not amount to obstruction or interference within cl. 20, it follows that the letter from the town clerk of Oct. 29, 1951, in which he asserted that a proper valuation executed strictly in accordance with the contract had been made, cannot of itself constitute obstruction although, in fact, the valuation was not correct or properly made.

For these reasons I would dismiss the appeal. C

LORD COHEN: My Lords, I agree and have nothing to add.

LORD SOMERVELL OF HARROW: My Lords, I agree that the words " interferes " or " obstructs " are not apt to describe omissions which are negligent and not wilful. I would myself, however, have thought that there was evidence on which the learned referee could find as he did that the activities of D
Mr. Hawkins amounted to obstruction. I would also have thought that the " obstruction " by Mr. Hawkins was obstruction by the employer within the meaning of cl. 20 (1). The majority of your Lordships think otherwise, and I only record the points on which I disagree in the hope that those concerned with the drafting of this printed form of contract may be led to try to substitute E
words which will indicate with less obscurity to the contractor when he is entitled to exercise the rights conferred by the clause.

I would have allowed the appeal.

Appeal dismissed.

Solicitors: *Thomas V. Edwards & Co.* (for the appellants); *Kenneth Brown, Baker, Baker,* agents for *T. B. Bowen,* Swansea (for the respondents).

[*Reported by* G. A. Kidner, Esq., *Barrister-at-Law.*]

O'NEILL *v.* S. J. SMITH & CO. (BIDFORD), LTD. AND ANOTHER.

[NOTTINGHAM ASSIZES (Hallett, J.) July 2, 1957.]

Fatal Accident—Damages—Deductions from damages—" Contract of assurance or insurance "—" Sum . . . payable on the death of the deceased "—Miner killed in road accident—Weekly benefits payable to dependants under mineworkers' contributory pension scheme—Fatal Accidents (Damages) Act, 1908 (8 *Edw.* 7 *c.* 7), *s.* 1.

A miner was killed in a road accident caused by the negligence of the defendants. On his death his widow and two infant children became entitled to certain weekly payments under a mineworkers contributory pension scheme. In an action by the widow against the defendants for damages under the Fatal Accidents Acts, 1846 to 1908,

Held: the sums payable to the widow and the children under the pension scheme were to be taken into account in assessing the damages, because these sums were not payable " under any contract of assurance or insurance " within s. 1* of the Fatal Accidents (Damages) Act, 1908, and thus were not excepted by that section from being taken into account in assessing damages.

Bowskill v. *Dawson* ([1954] 2 All E.R. 649) distinguished.

Smith v. *British European Airways Corpn.* ([1951] 2 All E.R. 737) applied.

Semble: the weekly payments were not sums " paid or payable on the death of the deceased ", within the meaning of the section.

[Editorial Note. For the position apart from the statutory enactments of the Fatal Accidents Acts, 1846 to 1908, and where the accident is not fatal, reference may be made to, e.g., *Payne* v. *Railway Executive*, [1951] 2 All E.R. 910.

As to what deductions are permissible in assessing damages under the Fatal Accidents Acts, 1846 to 1908, see 23 HALSBURY'S LAWS (2nd Edn.) 698, para. 986; and for cases on the subject, see 36 DIGEST (Repl.) 221-223, *1179-1193*.

For a summary of the Coal Industry Nationalisation (Superannuation) Regulations, 1950, see 14 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 136.**]**

Cases referred to:

(1) *Bowskill* v. *Dawson*, [1954] 2 All E.R. 649; [1955] 1 Q.B. 13; 3rd Digest Supp.

(2) *Smith* v. *British European Airways Corpn.*, [1951] 2 All E.R. 737; [1951] 2 K.B. 893; 2nd Digest Supp.

(3) *Lory* v. *Great Western Ry. Co.*, [1942] 1 All E.R. 230; 2nd Digest Supp.

Action.

The plaintiff, Hannah Stevenson O'Neill, as administratrix of the estate of her deceased husband, George O'Neill, claimed damages from the defendants, S. J. Smith & Co. (Bidford), Ltd. and Geoffrey Woodhouse, under the Fatal Accidents Acts, 1846 to 1908, for the benefit of herself and her two infant children, and under the Law Reform (Miscellaneous Provisions) Act, 1934, for the benefit of the deceased's estate.

On Aug. 17, 1955, the deceased, who was a miner, was walking along a pavement in a public road when he was killed by a vehicle in circumstances in which the defendants admitted liability. The only matter before the court was the assessment of the damages.

The deceased was thirty-four years old at the time of his death. Immediately before his death his average net wages were £15 10s. 6d. a week. He left £32 6s. 4d. in a savings bank and cash, amounting to £150, in the house. On his death weekly benefits became payable to the plaintiff and the two children (then aged six and five years, respectively) under a mineworkers' pension scheme established with the approval of the Minister of Fuel and Power* under the Coal Industry Nationalisation (Superannuation) Regulations, 1950 (S.I. 1950 No. 376). The report deals only with the question whether these benefits were to be taken into account in assessing the damages payable under the Fatal Accidents Act, 1846, or were excluded by s. 1 of the Fatal Accidents (Damages) Act, 1908.

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* The relevant terms of the section are printed at p. 257, letter C, post.

D. M. Cowley for the plaintiff.
A. J. Flint for the defendants.

HALLETT, J., stated the facts and, dealing with the pecuniary benefits accruing to the deceased man's dependants in consequence of his death, said: A question of some difficulty arises by reason of the existence of the Mineworkers' Pension Scheme. The scheme, which was approved with amendments by the Minister of Fuel and Power*, was established† by virtue of the Coal Industry Nationalisation (Superannuation) Regulations, 1950, which were made by the Minister under s. 37 of the Coal Industry Nationalisation Act, 1946, as amended by s. 4 of the Coal Industry Act, 1949. Clause 3 (a) of the scheme says that the employer, that is, the National Coal Board‡, shall pay a standard contribution of a specified amount. Under cl. 3 (b) the National Coal Board are to contribute a deficiency contribution on Jan. 1, 1952 (that is, the first day of the scheme), of £2,000,000. They are also to contribute certain monthly payments and they have to make up deficiencies. Under cl. 4 every member is to contribute such sums as may from time to time be appropriate under the rules. I do not know what was the contribution of the deceased man as a member of the pension scheme, as it was not in evidence before me. I do not think that it is a vital defect.

Under the scheme certain benefits become payable to the widow and to the children. Having regard to a recent increase, the benefit which is now being paid is 10s. a week to the widow and 5s. a week for each of the two children. Before the increase, the total benefits payable were, I am told, 13s. 6d. a week; but I think that it is not really possible to go into the matter with meticulous accuracy so as to take into account 13s. 6d. for a certain period and 20s. for another period. If these payments follow the rule of all other payments to workmen, it may be they will go up still further. I think that I must take the figures as I have them and do the best I can.

The point of difficulty is this. The defendants contend that the benefits derived from the pension scheme should be taken into account as counterbalancing the pro tanto pecuniary loss caused to the dependants by the death. Counsel for the plaintiff, on the other hand, contends that those benefits ought not to be taken into account, because of the provision contained in s. 1 of the Fatal Accidents (Damages) Act, 1908. Up to a point there seems to me to be no doubt about the legal position. In *Bowskill* v. *Dawson* (1) ([1954] 2 All E.R. 649), to which I was referred, MORRIS, L.J., reviewed this aspect of fatal accident cases and pointed out, by reference to earlier authorities, that until the Act of 1908 a sum received by the claimant under an accident insurance policy fell to be deducted just as any other sum which was received by reason of the death of the deceased and which conferred a pecuniary advantage on the dependants had to be set off against the probable loss to the dependants occasioned by the death. Section 1 of the Act of 1908 created an exception. There have been other statutory provisions which have created further exceptions. For instance, the Widows', Orphans' and Old Age Contributory Pensions Act, 1925, s. 22*, created an exception in respect of pensions paid under that Act. It is now provided by s. 2 (5) and (6) of the Law Reform (Personal Injuries) Act, 1948, that benefits under the National Insurance Acts, 1946†, are not to be taken into account, and this applies to an action commenced before July 5, 1948‡. Apart from these statutory exceptions, however, it seems to me to be quite clear law that from the assessed loss must be deducted any pecuniary advantage received by the dependants in consequence of the death. It is not suggested that any other exceptions here apply, and, therefore, the point which arises is: Does the exception contained in the Act of 1908 avail the dependants in this case?

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* The style and title of the Minister of Fuel and Power was changed subsequently to "the Minister of Power" by the Minister of Fuel and Power (Change of Style and Title) Order, 1957 (S.I. 1957 No. 48).

† The Mineworkers' Pension Scheme was established pursuant to a resolution passed at a meeting of the National Coal Board on Oct. 12, 1951, and, save as provided in the scheme, came into operation on Jan. 1, 1952.

‡ By cl. 42 (a) of the scheme (the definition clause), "employer" in relation to any member employed by the National Coal Board means the Board.

One must look then at the actual language of s. 1 of the Act of 1908. The section reads:

> "In assessing damages in any action . . . there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after the passing of this Act."

The question then is whether the sums which are being paid to the widow and the children week by week and have been since the death of the deceased, and will be paid as long as the scheme allows, are sums "paid or payable on the death of the deceased under any contract of assurance or insurance". There have been several cases which throw some light on one of the two conditions, which are, first, that they must be sums paid or payable on the death of the deceased, and, secondly, that they must be sums paid under any contract of assurance or insurance.

Counsel for the defendants has taken two points. First, he says that the sums with which I am now concerned are not sums "paid or payable on the death of the deceased", because there is no lump sum payable to the widow or children on the death of the deceased in the events which happened: what are payable are weekly payments. (I shall refer to the relevant terms of the scheme in a moment.) Secondly, says counsel, the sums are not paid "under any contract of assurance or insurance". In regard to the second point, there are certain authorities. In regard to the first point neither side has been able to refer me to any authority.

On the second point there are two authorities to which I was expressly referred. One is *Smith* v. *British European Airways Corpn.* (2) ([1951] 2 All E.R. 737). That was a decision of HILBERY, J., which was apparently not taken to appeal; but he was basing himself to a considerable extent on *Lory* v. *Great Western Ry. Co.* (3) ([1942] 1 All E.R. 230), which was a decision of ASQUITH, J. In *Smith* v. *British European Airways Corpn.* (2) HILBERY, J., held, as ASQUITH, J., had held in the earlier case, that the benefits received by way of pensions had to be taken into account, and that the total amount of the benefits had to be capitalised and corresponding allowance made against a sum which would otherwise have been awarded in respect of pecuniary loss.

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* This was repealed by the Widows', Orphans' and Old Age Contributory Pensions Act, 1936, s. 45 and Sch. 5, and the Act of 1936 was repealed by the National Insurance Act, 1946, s. 65 and Sch. 9.

† These Acts are defined by the National Insurance Act, 1946, s. 80 (1), as that Act and the National Insurance (Industrial Injuries) Act, 1946. These Acts have subsequently been amended and new collective titles enacted; for these see the title National Insurance and Social Security, 16 HALSBURY'S STATUTES (2nd Edn.) 641 and Supplement.

‡ By s. 6 (2) of the Law Reform (Personal Injuries) Act, 1948. July 5, 1948, was the date on which the National Insurance Acts, 1946, came into effect.

The other case to which I was referred on this point is *Bowskill* v. *Dawson* (1). On the very special circumstances of that case, the Court of Appeal decided that the sum there paid should not be taken into account in the assessment of damages. In that case there was an unquestionable policy of insurance taken out. It was what was called a policy of group life assurance, and it was taken out under a trust deed between the deceased man's employers and trustees for the benefit of the employers' employees, the trustees agreeing to carry into effect the policy and to pay the benefits thereby provided. The deceased man was actually, I think, named as one of the persons assured, one of the employees who were the lives insured. I have had occasion to consider the judgments in that case on previous occasions, and it is sufficient to say that it was held that Dawson " had a right enforceable in equity to life assurance benefits under the scheme ", and, therefore, the sum paid, which in that case was a lump sum, was paid or payable on his death under a contract of assurance or insurance within the meaning of s. 1 of the Act of 1908.

The question, therefore, is whether that authority governs the present case and whether the sums received as benefits by the widow and children in the present case are not to be regarded as counterbalancing the disadvantages which they have otherwise suffered through the loss of the deceased. In the first place, it seems to me that the facts here are very substantially and relevantly different from those in *Bowskill* v. *Dawson* (1). In the present case there is no question of any contract of insurance or assurance whatever between any persons which gives rise to the payments in favour of the widow and children. The scheme provides as follows. Under r. 21 there is a provision for widows' benefits. Rule 21 (b) reads: " Subject as hereinafter provided, the benefit payable under this rule shall be . . .", and there is then a provision for certain weekly payments to a widow. Rule 22 deals with children's benefits. Rule 22 (a) reads: " The benefits payable to the dependent children of a deceased member shall be . . .", and then it lays down what they are to be. It is to be observed that, as far as those two rules are concerned, there is no provision for a payment on death in the shape of a lump sum. There is a provision for payment of pensions commencing when death has occurred. Rule 23, which deals with death benefits, makes it, if anything, plainer still. Rule 23 reads:

> " The benefit payable to the estate of a deceased member on his death if he leaves no person to whom benefit is payable under r. 21 and no dependent children shall be . . ."

The rule goes on to say what the benefit is. Thus a contrast is drawn between a death benefit payable to the deceased man and the benefits payable under the two preceding rules to the widow and children of a deceased man after his death.

Throughout these rules there are certain discretionary powers, to which I am not going to refer in detail, but which I mention because they seem to me to support the view which I had reached without hesitation, that there is here no question of a contract of insurance at all between any persons giving rise to these payments. They are payments under a contributory pension scheme. I have come to the conclusion that the prima facie obligation to give credit for benefits received after a death, which prima facie obligation is displaced by s. 1 of the Act of 1908, has not been displaced in the present case. If one wishes to make use of the exception created by that section, one must show that one is clearly within the terms of the exception. In the present case it seems to me that the plaintiff is clearly outside the terms of the exception.

The other point raised by counsel for the defendants is certainly an interesting point. On the whole, I am inclined to think that it is also sound by way of a second string. That point is this. Counsel points out that s. 1 of the Act of 1908 relates to sums " paid or payable on the death of the deceased ", and he

A submits that the section contemplates a lump sum then payable and not the commencement of payment of weekly or monthly sums. It is a rather difficult point, because the words " on the death " might perhaps be regarded as equivalent to " by reason of the death ", and that is what counsel for the plaintiff contends. He says that the sums payable under the mineworkers pension scheme are payable by reason of the death and, therefore, they are payable on B the death of the deceased within the meaning of s. 1. Counsel for the defendants, on the other hand, contends that that is not so and that " payable on the death " relates to the time of payment and not merely to the cause of payment, and that, where nothing is payable on the death and there are merely payments which are to commence as from the death and because of the death, that is not sufficient to bring the payments within the exception created by the section. At first C I was inclined to think that that was rather too fine a reading of the words; but, on the whole, I am inclined to think that the contention of counsel for the defendants is right on that point also, although, having regard to the view which I take on the other point, the view which I have just expressed is not essential to my decision. I have been somewhat reinforced in my favourable attitude towards the contention of counsel for the defendants by the considera- D tion of the rules to which I have referred, because it seems to me that in the rules themselves a distinction is drawn between death benefits, in the sense of a lump sum which is payable on the death, and continuing benefits, such as are paid to the widow and children under r. 21 and r. 22. For these reasons, I think that I must take into account the benefits received by the dependants under the mineworkers pension scheme.

E [Taking into account the estate of £182 left by the deceased, HIS LORDSHIP assessed the gross damages payable by the defendants at £7,357 10s., which was made up as follows: £6,657 10s. (including £39 10s. for funeral expenses) to the widow and £175 to each of the two children, under the Fatal Accidents Act, 1846; and £350 under the Law Reform (Miscellaneous Provisions) Act, 1934.]

Judgment for the plaintiff for £7,357 10s.

Solicitors: *German & Soar*, Beeston (for the plaintiff); *Browne, Jacobson & Roose*, Nottingham (for the defendants).

[*Reported by* GWYNEDD LEWIS, *Barrister-at-Law.*]

COCKBURN v. COCKBURN.

[COURT OF APPEAL (Hodson, Parker and Ormerod, L.JJ.), July 30, 1957.]

Infant—Maintenance—Order for maintenance of child of marriage—Arrears—Judgment summons—No application by husband for variation of maintenance order—Order for payment of arrears by instalments and for suspension of maintenance order—Whether county court judge had jurisdiction to suspend maintenance order—Debtors Act, 1869 (32 *&* 33 *Vict. c.* 62), *s.* 5, *proviso* (2) *—Matrimonial Causes (Judgment Summons) Rules,* 1952 (*S.I.* 1952 *No.* 2209), *r.* 6 (1), (2).

A wife who had been granted a decree of divorce against her husband took out a judgment summons under the Debtors Act, 1869, to enforce an order for arrears of maintenance due to her under an order dated Nov. 22, 1955. Maintenance under the order was at the rate of £78 a year, and the arrears amounted to £33 7s. 6d. The husband, a miner whose average weekly income was about £10, had re-married and had two children to support as well as a child of the first marriage, but he had made no application for the variation or discharge of the maintenance order under s. 28 (1)* of the Matrimonial Causes Act, 1950. On the hearing of the judgment summons the county court judge made an order directing the husband to pay the arrears in instalments of £1 each month, commencing in June, 1957, and he further ordered the operation of the maintenance order to be suspended until the amount of the debt had been paid. On an appeal by the wife from the latter part of the county court judge's order,

Held: the order of the county court judge should be discharged since it was wrong to have suspended the maintenance order, and neither s. 5 of the Debtors Act, 1869†, nor the Matrimonial Causes (Judgment Summons) Rules, 1952, conferred jurisdiction on him to suspend the maintenance order; the proper course was for the husband to be given an opportunity to apply under s. 28 (1) of the Matrimonial Causes Act, 1950, for a variation of the maintenance order, and for the instalment order for the arrears to be considered in the light of any variation made on that application.

Appeal allowed.

[As to the procedure in regard to a judgment summons, see 12 HALSBURY'S LAWS (3rd Edn.) 472, para. 1057.

For the Debtors Act, 1869, s. 5, see 2 HALSBURY'S STATUTES (2nd Edn.) 294.

For the Matrimonial Causes Act, 1950, s. 28, see 29 HALSBURY'S STATUTES (2nd Edn.) 414.

For the Matrimonial Causes Rules, 1950, r. 3 (3) (i) and r. 50, see 10 HALSBURY'S STATUTORY INSTRUMENTS 198, 220.

For the Matrimonial Causes (Judgment Summons) Rules, 1952, r. 6, see 3 HALSBURY'S STATUTORY INSTRUMENTS 273.]

Cases referred to:

(1) *R.* v. *Brompton County Court Judge*, (1886), 18 Q.B.D. 213; 51 J.P. 547; sub nom. *Reeves* v. *Fowle*, 56 L.J.Q.B. 49; 55 L.T. 663; *revsd. on other grounds*, sub nom. *Stonor* v. *Fowle*, (1887), 13 App. Cas. 20; 5 Digest 1038, *8484*.

(2) *Re A Judgment Debtor*, [1935] W.N. 128; Digest Supp.

Appeal.

This was an appeal by the judgment creditor, who was the former wife of the debtor (and is referred to hereinafter as "the wife"), from an order made by His Honour JUDGE OULD, sitting as a Special Commissioner of Divorce at Doncaster, on May 20, 1957, on a judgment summons taken out by the wife to enforce an order for arrears of maintenance due to her under a maintenance order made by the Doncaster District Registrar on Nov. 22, 1955. By the maintenance order, which was to take effect from Dec. 3, 1955, the husband was ordered to pay maintenance at the rate of £78 a year. The amount claimed by the wife on the judgment summons was £37 2s., being £33 7s. 6d. in respect of arrears and £3 14s. 6d. for costs. The county court judge made an order directing the husband to pay the arrears by monthly instalments of £1, and suspending the operation of the maintenance order until the amount of the debt had been paid. The wife appealed on the ground that the county court judge had no jurisdiction to suspend the operation of the maintenance order.

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* The terms of the sub-section are printed at p. 262, letter H, post.

† The relevant terms of the section are printed at p. 262, letter B, post.

J. F. S. Cobb for the wife, the judgment creditor.

C. P. Heptonstall for the husband, the debtor.

HODSON, L.J.: This is an appeal from an order of His Honour Judge Ould sitting at Doncaster on May 20, 1957. The order appealed from is an order made on a judgment summons under the Debtors Act, 1869. The summons was taken out by the wife, who is the present appellant, to enforce an order for arrears of maintenance due under a maintenance order which had been made in her favour to take effect from Dec. 3, 1955, at the rate of £78 a year. The amount claimed was £33 7s. 6d., in respect of the arrears, plus the costs, making a total of £37 2s.

The Debtors Act, 1869, which is the governing statute, was considered by Lord Esher, M.R., in 1886 in *R.* v. *Brompton County Court Judge* (1) ((1886), 18 Q.B.D. 213). The quotation which I am about to read is from the judgment of Luxmoore, J., in *Re A Judgment Debtor* (2) ([1935] W.N. 128):

> " It is the fact however that, as Lord Esher, M.R., states in *R.* v. *Brompton County Court Judge* (1) (18 Q.B.D. at p. 217), the section [s. 5 of the Debtors Act, 1869] does not enable the judgment creditor to ask merely for an instalment order. Before the judge can make an instalment order, he must have before him an application for committal. It is accordingly the practice of the court, always to require evidence of means to be filed on a judgment summons, and not to make a committal order on the first application, save in the most exceptional cases . . ."

In the present case an instalment order was made by the learned judge for payment of £1 every calendar month, the first payment to be made on June 20, 1957, and a similar payment on the twentieth day of each month thereafter, but he added to the instalment order a provision that the original order dated Nov. 22, 1955, be suspended until the amount of the debt had been cleared off. The appeal is based on the proposition that the learned judge had no jurisdiction to suspend the original order, and I think it is clear that there is no such provision in the Debtors Act, 1869. The rules applicable to matrimonial cases where the Debtors Act, 1869, is operated, are the Matrimonial Causes (Judgment Summons) Rules, 1952. Rule 6 (1) reads:

> " On the hearing of a judgment summons the judge may make an order of commitment or may—(a) where the judgment is for damages or costs; or (b) where the judgment is for alimony, maintenance or other periodical payment and it appears to the judge that the judgment would have been varied or suspended if an application had been made by the debtor for that purpose, make an order for payment, either at a specified time or by instalments, of the amount due under the judgment and the costs of the judgment summons."

Rule 6 (2) provides:

> " If an order of commitment is made, the judge may direct execution of the order to be suspended on terms that the debtor pays the amount due, together with the costs of the judgment summons, either at a specified time

> or by instalments, in addition to any sums from time to time accruing due under the judgment." A

There is no provision in those rules for the suspension of the original maintenance order and I think that there is no justification for it in the language of s. 5 of the Debtors Act, 1869, which provides [in proviso (2)]:

> "For the purposes of this section any court may direct any debt due from any person in pursuance of any order or judgment of that or any other competent court to be paid by instalments, and may from time to time rescind or vary such order." B

That, I think, must refer to a variation of any directions for payment by instalments. C

The question of payment by instalments in these cases is naturally involved closely with the liability for maintenance which is concurrently running. In this case the order was for £78 a year, and, if that order were running and were to be envisaged as being fulfilled in the future, the learned judge would naturally have that in mind in making an instalment order, and it is, of course, convenient that the two matters should be dealt with together. There are, however, D considerations of justice involved here which are important. If anyone requires or desires the modification, discharge or suspension of an order for alimony or maintenance, provision is made in the rules for that to be dealt with; see r. 3 (3) (i) of the Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), which apply to the proceedings in this case which were instituted before the Matrimonial Causes Rules, 1957 (S.I. 1957 No. 619), came into operation. It is E provided by r. 50 of the Matrimonial Causes Rules, 1950:

> "(1) An application for a modification order shall be supported by an affidavit by the applicant setting out full particulars of his property and income and the grounds on which the application is made. (2) The respondent to the application may, within fourteen days after delivery of the affidavit, and (unless he is the petitioner in the cause) after entering an F appearance, file an affidavit in answer, but no further evidence shall be filed by any party without leave."

In the present case no steps were taken by the debtor (referred to hereinafter as "the husband") to get his obligations under the order removed or suspended or in any way varied and the learned county court judge, no doubt with the G object of saving time and expense to the parties, did his best in the difficult circumstances of the case, to which I shall refer, to deal with the situation because he formed the view, I must assume, that this was a case where the husband could not, in the circumstances in which he then was, pay the arrears under the existing order so long as the existing order was running.

The jurisdiction to modify or discharge orders of this kind is dealt with by a H statutory provision, s. 28 of the Matrimonial Causes Act, 1950. Section 28 (1) reads:

> "Where the court has made an order under s. 19, s. 20, s. 22, s. 23 or s. 24 (2) of this Act, the court shall have power to discharge or vary the order or to suspend any provision thereof temporarily and to revive the operation of any provisions so suspended . . ." I

That section includes under its operation maintenance orders. It is quite true that there is no reference therein to the Rules of Court as such, but the Rules, having been made under statutory powers, are intra vires and, in my opinion, are to be followed in the working of s. 28 (1).

Those Rules have not been complied with in this case, and if they are not complied with an injustice may well be inflicted on one party or the other. In this case, this being a judgment summons, the wife was not, and need not be, present on the hearing of the application, which is dealt with merely on proof of the husband's means and his cross-examination on that matter, in this case supplemented by a statement by his employers as to his earnings. Part of his case was that he was in a measure incapacitated from earning full wages by the state of his health, and that was a matter on which the judgment creditor, his former wife, might have been able to give relevant evidence, having lived with him and having known of the state of his health in earlier years.

Therefore, I think that it is clear that in the interests of justice it would not be right, quite apart from the imperative obligation imposed by the Rules, to allow the application to reduce or suspend maintenance to be short-circuited. After the conclusion of the argument in this case I made such inquiries as I was able to make, and I was informed that the common practice followed in these cases, although it may have been departed from on occasions, is for a debtor who appears on the hearing of a judgment summons, and who reveals himself as being in difficulties in complying with the obligations of the maintenance order, to be given an opportunity of making an application to the court, which first comes before the learned registrar who deals with these matters, and for the judgment summons to be adjourned accordingly. That, I think, is the correct practice which ought to be followed.

The facts of this particular case are very simple and of a kind which must, in these days, unhappily be very common. The husband is a miner and earns about £10 a week. No exact calculation has been made of the cash value to him of the rent-free house which he occupies and the concessionary coal which he receives but, roughly speaking, his average weekly income is about £10. He was divorced by the wife, who has a child, and he was ordered by the justices to pay 30s. a week for the maintenance of this child. After he was divorced, he married again. His second wife had a child already and he has undertaken the moral obligation of supporting that child and the legal obligation of supporting the second wife. He and the second wife now have a child, and he is under the legal obligation of supporting that child. The learned judge recognised the position as being one of great difficulty. It is a situation with which the courts nowadays are trying to deal very frequently. Divorce and the right to re-marry have been with us for a very long time, but it is only in comparatively recent times that it has been a common thing for people to re-marry who have not the means to keep more than one wife, and the odd situation has now come on us in which a man of large means who pays surtax is able to have several wives and deduct the maintenance from his income and be very little worse off than he was; whereas a man in the position of a working man who pays neither surtax nor any considerable amount of income tax finds it quite impossible to comply with the law, which still in this country enables divorced wives, or wives who have obtained divorces, to obtain maintenance from their former husbands, who have to provide for a number of wives in excess of one. This is such a case. The law being as it is, it is quite impossible for the courts to ignore the just claims of the first wife because the man has taken on himself other obligations, although the courts have to take into account those obligations as involving a reduction in the capacity of the man to pay for the upkeep of his first wife. In the present case the first wife has a young child of two years of age and is unable to go out to work; she has got nothing and, if this suspension of the existing order stands, she will be getting nothing for some time to come. Meanwhile she is dependent on the generosity of her own parents.

In my judgment, the learned judge was wrong in suspending the operation of the maintenance order, and the matter must be dealt with by an application by the husband for a reduction of the maintenance order before that situation can come about. The first step should in justice be taken by him and he should

not be able, when he is brought up on a judgment summons, to get the benefit of a A
situation which he has done nothing to obtain. On the facts of this case, which
I think ought to be sent back to the learned judge for reconsideration, it seems
to me that there is no ground for saying that the order ought wholly to be
suspended. The first wife's means have not increased in any sense; the husband's means have decreased in the sense in which I have described, but unless
we are to pay no attention to the statutory provisions which enable women B
who have divorced their husbands to obtain maintenance, it is quite impossible,
I think, to argue that the first wife ought to have nothing. That means that
the husband ought to be given an opportunity by the learned judge of putting
forward the case that there ought to be a reduction in the existing order, and the
wife will be entitled to argue and to prove, if she can, that the fact that his
earnings are relatively low for a miner working at the coal face is due to his own C
volition rather than to the ill health of which he complains. In other words,
the amount of the variation of the existing order is a matter for further consideration and there ought not to be any suspension of that order on the material now
available. I recognise, however, that these two things, the maintenance order
and the instalment order, are bound up together and it is very unsatisfactory to
leave the instalment order standing if the order for suspension of the maintenance D
order goes. Therefore, the whole order of the learned county court judge should,
I think, be discharged and the matter should be sent back to him for further
consideration with a direction that he should give the husband an opportunity
of applying for a variation of the existing maintenance order in order that the
instalment order, if the learned county court judge thinks fit to make it, should
be made in the light of that variation. For these reasons, in my opinion, this E
appeal should be allowed.

PARKER, L.J.: I entirely agree and have nothing to add.

ORMEROD, L.J.: I also agree and have nothing to add.

Appeal allowed. Case remitted to the county court judge for reconsideration.

Solicitors: *Jaques & Co.*, agents for *Oxley & Coward*, Rotherham (for the wife); *Peacock & Goddard*, agents for *Silvester & Sons*, Goole (for the husband).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

TIMMINS *v.* MORELAND STREET PROPERTY CO., LTD.

[COURT OF APPEAL (Jenkins, Romer and Sellers, L.JJ.), July 24, 25, 26, 29, 30, 1957.]

Sale of Land—Contract—Memorandum—Deficiency in document signed by party to be charged—No reference in document so signed to second document or to other transaction than that effected by first document—Cheque for deposit on sale signed by purchaser and receipt for cheque prepared and signed by vendor on same occasion but subsequently to the signing of the cheque—Cheque drawn in favour of vendor's solicitors, not vendor—Whether cheque and receipt sufficient to satisfy Law of Property Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 20), *s.* 40.

At a meeting on July 20, 1955, between the plaintiff and C., a director of the defendant company, the plaintiff agreed to sell and the defendant company agreed to buy the freehold property Nos. 6, 8 and 41, Boundary Street in the county of London for £39,000. The property was then let, as the defendant company knew, by lease for a term of forty-two years from Dec. 25, 1949. At the meeting C. gave to the plaintiff a cheque, signed by C. on behalf of the defendant company and drawn in favour of the plaintiff's solicitors, on which cheque the plaintiff at C.'s request wrote in the amount, viz., the amount of the deposit, £3,900. The plaintiff then prepared, signed and gave to C. a receipt, dated July 20, 1955, in the following terms "Received of [the defendant company] the sum of £3,900 as a deposit for the purchase of 6, 8 and 41, Boundary Street, Shoreditch (freehold) which I agree to sell at £39,000". In an action brought on the contract of sale the defendant company pleaded s. 40 of the Law of Property Act, 1925.

Held: (i) there was no sufficient memorandum in writing, signed on behalf of the party to be charged (the defendant company), to satisfy s. 40 of the Law of Property Act, 1925, because the cheque, which was the only document signed on behalf of the defendant company, contained no reference to any other document or to any transaction other than the order for payment which the cheque itself constituted and which was not an order for payment to the plaintiff; the cheque could not, therefore, be read with the receipt so as to constitute a memorandum, and the plaintiff's claim failed (see p. 276, letters G and H, p. 279, letter I, and p. 280, letter E, post).

Principle in *Long* v. *Millar* ((1879), 4 C.P.D. 450) as explained in *Stokes* v. *Whicher* ([1920] 1 Ch. 411) preferred to that stated in *Peirce* v. *Corf* ((1874), L.R. 9 Q.B. 210) and *Rishton* v. *Whatmore* ((1878), 8 Ch.D. 467).

Observations of KEKEWICH, J., in *Oliver* v. *Hunting* ((1890), 44 Ch.D. 205) criticised.

(ii) assuming that the cheque and receipt could be read together, the absence of any statement in the memorandum so constituted that the sale was subject to and with the benefit of the lease would not have vitiated the memorandum, since the subject of the sale was the freehold and, as the defendant company knew of the lease, the defendant company would be bound to accept a conveyance subject to the lease (see p. 268, letter I, to p. 269, letter C, p. 277, letters G and H, and p. 280, letter C, post).

(iii) although a document signed by a party to be charged cannot, for the purpose of constituting a memorandum within s. 40 of the Law of Property Act, 1925, be treated as referring to another document not then in existence, yet where two documents were signed and exchanged on the same occasion and substantially contemporaneously as were the cheque and receipt in the present case, they should not, merely because one is subsequent in time to the other, be treated as incapable of referring to each other for the purposes of constituting a memorandum within s. 40 (see p. 272, letters C and D, and p. 278, letters C and D, post).

Dictum of Coleridge, J., in *Turnley* v. *Hartley* ((1848), 3 New Pract. Cas. at p. 97) approved and applied.

Appeal dismissed.

[**Editorial Note.** Although it is not necessary, in order to constitute a memorandum for the purposes of s. 40 of the Law of Property Act, 1925, that the documents constituting the memorandum should state that the property was sold subject to and with the benefit of a lease, yet if this is in fact made a term of a sale it should be mentioned in the memorandum of such a contract (consider per Romer, L.J., at p. 277, letter D, post). Moreover it does not follow from the present case that if the plaintiff had been the payee named on the cheque the contract for sale would have been unenforceable by him for want of a memorandum (see per Romer, L.J., at p. 279, letter A, post).

As to connecting documents so as to form a memorandum of a contract, see 8 Halsbury's Laws (3rd Edn.) 96, para. 167; and for cases on the subject, see 40 Digest 23-26, *91-110*.

As to the effect of a purchaser's having at the time of a contract for sale of freehold land notice of an incumbrance which the vendor cannot remove, see 29 Halsbury's Laws (2nd Edn.) 257, para. 341, text and note (y); and for cases on the subject, see 40 Digest 154, *1226-1228*.

For the Law of Property Act, 1925, s. 40, see 20 Halsbury's Statutes (2nd Edn.) 500.]

Cases referred to:

(1) *Johnson* v. *Humphrey*, [1946] 1 All E.R. 460; 174 L.T. 324; 2nd Digest Supp.

(2) *Hawkins* v. *Price*, [1947] 1 All E.R. 689; [1947] Ch. 645; [1947] L.J.R. 887; 177 L.T. 108; 2nd Digest Supp.

(3) *Bower* v. *Cooper*, (1843), as reported in 2 Hare, 408; 67 E.R. 168; 40 Digest 274, *2391*.

(4) *Cox* v. *Middleton*, (1854), 2 Drew. 209; 23 L.J.Ch. 618; 23 L.T.O.S. 6; 61 E.R. 699; 40 Digest 31, *163*.

(5) *Re Gloag & Miller's Contract*, (1883), 23 Ch.D. 320; 52 L.J.Ch. 654; 48 L.T. 629; 40 Digest 154, *1228*.

(6) *Ellis* v. *Rogers*, (1884), 29 Ch.D. 661; 50 L.T. 660; *on appeal*, C.A., (1885), 29 Ch.D. 668; 40 Digest 259, *2250*.

(7) *Cato* v. *Thompson*, (1882), 9 Q.B.D. 616; 47 L.T. 491; 40 Digest 234, *2034*.

(8) *McGrory* v. *Alderdale Estate Co.*, [1918] A.C. 503; 87 L.J.Ch. 435; 119 L.T. 1; 42 Digest 556, *1196*.

(9) *Turnley* v. *Hartley*, (1848), 3 New Pract. Cas. 96; 11 L.T.O.S. 102; 12 Digest (Repl.) 161, *1035*.

(10) *Peirce* v. *Corf*, (1874), L.R. 9 Q.B. 210; 43 L.J.Q.B. 52; sub nom. *Pierce* v. *Corf*, 29 L.T. 919; 38 J.P. 214; 12 Digest (Repl.) 156, *994*.

(11) *Dobell* v. *Hutchinson*, (1835), 3 Ad. & El. 355; 4 L.J.K.B. 201; 111 E.R. 448; 40 Digest 252, *2200*.

(12) *Rishton* v. *Whatmore*, (1878), 8 Ch.D. 467; 47 L.J.Ch. 629; 40 Digest 24, *94*.

(13) *Long* v. *Millar*, (1879), 4 C.P.D. 450; 48 L.J.Q.B. 596; 41 L.T. 306; 43 J.P. 797; 40 Digest 25, *104*.

(14) *Ridgway* v. *Wharton*, (1857), 6 H.L. Cas. 238; 27 L.J.Ch. 46; 29 L.T.O.S. 390; 10 E.R. 1287; 42 Digest 458, *279*.

(15) *Stokes* v. *Whicher*, [1920] 1 Ch. 411; 89 L.J.Ch. 198; 123 L.T. 23; 40 Digest 27, *122*.

(16) *Oliver* v. *Hunting,* (1890), 44 Ch.D. 205; 59 L.J.Ch. 255; 62 L.T. 108; 12 Digest (Repl.) 181, *1223.*

(17) *Sheers* v. *Thimbleby & Son,* (1897), 76 L.T. 709; 12 Digest (Repl.) 157, *1004.*

(18) *Burgess* v. *Cox,* [1950] 2 All E.R. 1212; [1951] Ch. 383; 2nd Digest Supp.

(19) *Studds* v. *Watson,* (1884), 28 Ch.D. 305; 54 L.J.Ch. 626; 52 L.T. 129; 40 Digest 24, *93.*

Appeal.

The plaintiff appealed from a decision of Lloyd-Jacob, J., given on Apr. 17, 1957, dismissing an action brought by the plaintiff by writ dated Sept. 28, 1955, claiming a declaration that the defendant company, Moreland Street Property Co., Ltd., had repudiated an oral agreement dated July 20, 1955, for the sale by the plaintiff to the defendant company of freehold property Nos. 6, 8 and 41, Boundary Street in the county of London, and claiming damages for breach of the agreement.

By an oral agreement made on July 20, 1955, the plaintiff* and the defendant company acting by Mr. Chait, a director and authorised agent of the defendant company, agreed that the plaintiff should sell and the defendant company should buy the freehold property Nos. 6, 8 and 41, Boundary Street in the county of London for £39,000. At the time of the contract the property was let by lease, dated Aug. 14, 1950, for a term of forty-two years from Dec. 25, 1949, to another company. The oral agreement for sale was evidenced, the plaintiff alleged, by a cheque of the defendant company dated July 20, 1955, and drawn for the amount of the deposit, £3,900, and by a receipt of the same date for the deposit. The cheque and receipt were signed at a meeting on July 20, 1955, between the plaintiff and Mr. Chait at which meeting the plaintiff also gave to Mr. Chait a copy of the lease of the property. At that meeting Mr. Chait gave to the plaintiff the defendant company's cheque drawn in favour of the plaintiff's solicitors, Holt, Beever & Kinsey, in blank and told the plaintiff to fill the cheque in for the amount of the deposit. The plaintiff completed the cheque and then drafted the receipt, which was typed and which he then signed and gave to Mr. Chait. The receipt was in the following terms—

> "Received of Moreland Street Property Co., Ltd. the sum of £3,900 as a deposit for the purchase of Nos. 6, 8 and 41, Boundary Street (Shoreditch) (freehold) which I agree to sell at £39,000."

The terms of the cheque, which was signed "for and on behalf of" the defendant company by Mr. Chait were—

> "Pay Holt, Beever & Kinsey or Order Three thousand nine hundred pounds——£3,900."

On July 21, 1955, the defendant company stopped payment of the cheque and repudiated the contract. The plaintiff's substantive claim in the action that he brought against the defendant company was for damages for breach of contract, viz., £4,128, which was made up of the difference between the agreed sale price, £39,000, and a price realised on a re-sale of the property, together with agents' commission on re-sale and costs of the abortive sale. The defendant company by their defence, after alleging that the contract was induced by misrepresentation and concealment entitling them to repudiate it, pleaded s. 40 of the Law of Property Act, 1925. At the trial of the action Lloyd-Jacob, J., rejected the defences based on misrepresentation and concealment but dismissed the plaintiff's claim on the ground that, though the cheque and receipt might be read together, they did not constitute a sufficient memorandum in writing to satisfy s. 40, because neither of them referred to the property being sold subject to and with the benefit of the lease. The plaintiff appealed and the defendant company gave cross-notice of grounds of appeal. The case is reported only on the plaintiff's appeal and the defence under s. 40 of the Law of Property Act, 1925. A

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*The plaintiff was a managing clerk to a firm of solicitors, Holt, Beever & Kinsey, and was involved in this matter as the sole surviving trustee of the will of James Keeves, deceased, which was dealt with in the offices of the solicitors.

P. Ingress Bell, Q.C., and *W. G. H. Cook* for the plaintiff, the vendor.
C. R. D. Richmount for the defendant company, the purchasers. B

JENKINS, L.J., after considering the defences based on alleged misrepresentation and concealment and agreeing with the conclusion of the trial judge thereon*, continued: I must now pass to the defence based on the absence of any sufficient memorandum in writing signed by the defendant company to satisfy s. 40 of the Law of Property Act, 1925. As to this defence counsel for the plaintiff contended that the cheque dated July 20, 1955, signed by Mr. Chait C on behalf of the defendant company in favour of Messrs. Holt, Beever & Kinsey for the sum of £3,900, which was in fact the amount of the deposit orally agreed on, and the receipt of the same date for a like amount signed by the plaintiff, whereby he acknowledged that he had received from the defendant company £3,900 deposit on the sale of the property in question, which he agreed to sell for £39,000, could and should be read together, and so read constituted a sufficient D memorandum containing all the essential terms of the oral agreement entered into.

Counsel for the defendant company contended, on grounds to which I will later refer, that the cheque and receipt could not be read together so as to constitute between them, for the purposes of s. 40, a memorandum in writing of the oral contract signed by the defendant company or their duly authorised E agent, Mr. Chait. Even if, contrary to this contention, the cheque and receipt could be read together, counsel for the defendant company contended that the memorandum so constituted would be insufficient because the receipt described the property agreed to be sold as "6, 8 and 41, Boundary Street, Shoreditch (freehold)", omitting to state that the plaintiff's freehold interest was subject to the lease of Aug. 14, 1950. It was, said counsel for the defendant company, F an essential term of the oral contract that the defendant company were to take the property subject to the lease, and the memorandum relied on by the plaintiff, even if good in other respects, was vitiated by its omission of this essential term.

The learned judge accepted the submission of counsel for the plaintiff that the cheque and the receipt could be read together so as to constitute a memorandum G for the purposes of s. 40, but, on the other hand, acceded to the objection of counsel for the defendant company that, even so, the memorandum thus constituted was insufficient, because it did not state that the plaintiff's freehold interest was subject to the lease. On the assumption that the cheque and receipt can be read together, I think that this objection is ill founded. Counsel for the defendant company argued (in effect) that this was a case of the omission from the H memorandum of a term of the oral agreement which, if the omitted term is a matter of any substance, might vitiate the memorandum, as in *Johnson* v. *Humphrey* (1) ([1946] 1 All E.R. 460), and *Hawkins* v. *Price* (2) ([1947] 1 All E.R. 689).

I cannot accept this view. The question here is whether the memorandum relied on by the plaintiff sufficiently described the subject-matter of the contract, I that is, in other words, that which was orally agreed to be sold, which was in fact the freehold reversion subject to the lease. The physical description of the property sold as "6, 8 and 41, Boundary Street, Shoreditch" is perfectly accurate, and so is the addition of the bracketed word "(freehold)". A description of this kind is to be taken as extending to the whole of the vendor's interest in the property, so that the memorandum on the face of it records an agreement for the sale and purchase of the whole of such interest. Moreover, unless the contrary appears, such interest is to be taken as comprising the fee simple in possession free from incumbrances, and the purchaser will be entitled to reject any less interest than that. But if it is shown that at the time when the oral contract was entered into the purchaser knew that the interest actually possessed and offered for sale by the vendor was subject to some irremovable incumbrance, such as a lease, then the presumption that the interest agreed to be sold by the vendor is the fee simple in possession free from incumbrances will, quoad that incumbrance, be rebutted, and the purchaser will be bound to accept a conveyance subject to that incumbrance as a sufficient performance of the contract. It appears to me, therefore, that the description in the receipt in the present case of the property agreed to be sold as " 6, 8 & 41, Boundary Street, Shoreditch (freehold) " is not vitiated for the purposes of s. 40 by its omission to state that the property was sold subject to the lease.

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*JENKINS, L.J., stated that LLOYD-JACOB, J., had held that there had been no misrepresentation or concealment and that the plaintiff had acted throughout with complete candour.

On the principle which I have stated it is abundantly plain, in the circumstances of the present case, that the defendant company could not object to taking the property subject to the lease. Even if they could have so objected, then the position would have been that the plaintiff had entered into a contract which he was unable to perform, and not that the terms of the contract were insufficiently stated in the memorandum. In a word, on the assumption that the memorandum relied on was sufficient in other respects, I think that, by virtue of their knowledge at the time of entering into the oral contract that the plaintiff's interest was subject to the lease, the defendant company were precluded by implication of law from objecting to take the property subject to the lease, whether it was or was not described in the memorandum as being so subject. The submission of counsel for the defendant company would make it very difficult to find an adequate memorandum in the case of a large estate of perhaps several thousand acres which might be subject as to different parts of it to numerous tenancies and other incumbrances. If the submission of counsel for the defendant company is accepted, a memorandum recording an informal oral agreement for the sale of a large estate of that kind would nearly always be defective because it had failed to set out all the incumbrances affecting the property. One may suggest, too, the case of a property held on a long lease. The owner of such a property, in negotiating its sale without the aid of a solicitor, might very well show the prospective purchaser the lease and say " this is the document under which I hold. I will sell the property to you for the whole of my interest under it ". Then if the parties thought it advisable to put the transaction into writing and they did it themselves, and the vendor in consequence signed a memorandum referring simply to " my house Blackacre ", or whatever its name may have been, without any reference to tenure, it would, as I think, be a most inconvenient and unfair result, given, of course, the essential element of knowledge on the part of the purchaser that the vendor's interest was leasehold only, that such a memorandum should be held to be insufficient. Accordingly, I think that the omission of any reference to the lease in the receipt was immaterial, and that this branch of the argument of counsel for the defendant company fails.

A number of authorities was referred to on or about this point. I may perhaps quote briefly from the following as affording some support for my conclusion. In DART ON VENDORS AND PURCHASERS (7th Edn.), Vol. 1, p. 240,* one finds this:

> " It is immaterial that the agreement does not distinguish the tenures of the several portions of the estate; or even the tenure of the whole estate, if this can be shown to have been in the knowledge of both parties . . .

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* This passage is reproduced in the 8th Edn., Vol. 1, at p. 220.

> On a contract for the sale of land the precise interest to be sold need not appear in the memorandum. Unless the contrary appears, such contracts are always assumed to be for the sale of the whole of the vendor's interest and, as against the vendor, for the sale of the fee simple free from incumbrances. Hence, where the nature of the interest to be sold does not appear from the contract, the vendor cannot force the purchaser to accept, nor the purchaser force the vendor to grant, any less estate than the fee simple. But an agreement by a vendor to sell 'all his estate and interest' does not necessarily imply that the interest to be sold is the fee simple."

A

B

Then in Fry on Specific Performance (6th Edn.), p. 173, one finds this: "A contract to sell a house simply implies that the interest sold is the fee simple". Then there is *Bower* v. *Cooper* (3) ((1843), 2 Hare, 408), in which specific performance of a contract was resisted on the ground, amongst others, that the interest intended to be sold did not sufficiently appear. Wigram, V.-C., held (ibid., at p. 410): ". . . the agreement must be construed as referring to and importing the whole of the defendant's interest in the premises . . ." Then there is *Cox* v. *Middleton* (4) ((1854), 2 Drew. 209), where Kindersley, V.-C., said (ibid., at p. 216):

C

D

> "Now I ought, it is said, to read it as if the words 'Mr. Cox paying the expenses of the lease' were left out. If the contract stood so, there could be no difficulty or doubt about it, because, if the parties contract together for the purchase of a house, prima facie the contract is to purchase the fee simple. It may be that the party purchasing may know that the vendor had not the fee simple, and then such a contract might be performed by the purchaser having all the interest of the vendor."

E

Then there is *Re Gloag & Miller's Contract* (5) ((1883), 23 Ch.D. 320), where Fry, J., said this (ibid., at p. 327):

> "In my view the law as to the first question stands in this way: When the contract is silent as to the title which is to be shown by the vendor, and the purchaser's right to a good title is merely implied by law, that legal implication may be rebutted by showing that the purchaser had notice before the contract that the vendor could not give a good title."

F

Then there is *Ellis* v. *Rogers* (6) ((1884), 29 Ch.D. 661). Kay, J., said (ibid., at p. 666):

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> "The law, as stated in the cases of *Cato* v. *Thompson* (7) ((1882), 9 Q.B.D. 616) and *Re Gloag & Miller's Contract* (5), is that where the contract does not expressly provide that there should be a good title, the knowledge of the purchaser before the contract that there was a defect which the vendor was unable to remove, prevents his raising an objection on that ground. But it is essential that the purchaser should have knowledge, not only of the existence of the incumbrance, but of the vendor's inability to remove it."

H

Finally on this part of the case I think some assistance is to be derived from *McGrory* v. *Alderdale Estate Co.* (8) ([1918] A.C. 503). The decision there was to the effect that when a specific performance action had reached the stage of inquiry as to title, it was too late for the vendor to say that the purchaser was precluded on the ground of knowledge from taking some particular objection. Mr. Maugham, K.C., for the appellant, stated in argument these propositions (ibid., at p. 504):

I

> "1. It is an implied term of an open contract for the sale of land that the vendor shall show a good title free from incumbrances; this is a legal as well as an equitable doctrine. 2. Evidence may be admitted in such a

> case, notwithstanding the Statute of Frauds, to identify the parcels and the nature of, and qualifications attaching to, the title as forming part of the facts which both parties had in their minds. 3. Where evidence can be adduced to limit or qualify the title to be shown it must be adduced at the trial, in order to determine whether there is a complete contract or a contract which will be specifically performed."

Then LORD FINLAY, L.C., said (ibid., at p. 508):

> "The law is clear that, if there is a written agreement of sale which expressly provides that a good title is to be made, it is not open to the vendor to prove that at the time of the contract the purchaser knew of a defect in the title for the purpose of leading to the inference that a good title was not to be shown in that particular. This would be to vary a written contract by parol evidence. But, if the contract is open, the obligation which the law would import into it to make a good title in every respect may be rebutted by proving that the purchaser entered into the contract with knowledge of certain defects in the title. The inference in such a case is that he was content to take a title less complete than that which the law would otherwise have given him by implication. In a case of this kind it seems to me to be clear on principle that if the vendor means to rely on such knowledge by the purchaser at the time of the contract he must establish this at the hearing."

Counsel for the defendant company further argued that the cheque and receipt could not be read together for the purpose of providing a memorandum to satisfy s. 40 of the Law of Property Act, 1925. He put this part of the case on two grounds, neither of which was dealt with by the learned judge, who contented himself by stating that, in his judgment, the cheque and receipt could be read together, without giving any reasons for that opinion.

The first of the arguments of counsel for the defendant company on this point was based on the plaintiff's evidence as to the order in which the two documents were signed. From that evidence it appears that Mr. Chait signed the defendant company's cheque in favour of Messrs. Holt, Beever & Kinsey, in blank and handed it to the plaintiff, telling him to "fill it in for the deposit", which the plaintiff accordingly did. The plaintiff then drafted a receipt, took it down to his secretary, and asked her to type it out. The secretary brought back the typed version, which the plaintiff then signed and handed to Mr. Chait. On these facts, says counsel for the defendant company, the receipt relied on as part of the memorandum was not in existence at the time when the cheque relied on as the other part of the memorandum—the vital part bearing the signature of the agent of the party to be charged—was signed by Mr. Chait; and a document signed by the party to be charged cannot be treated as referring to a document not in existence at the time when it was signed for the purpose of constructing a memorandum to satisfy s. 40. In support of this contention, counsel for the defendant company referred us to *Turnley* v. *Hartley* (9) ((1848), 3 New Pract. Cas. 96). I think that the facts appear sufficiently from the headnote:

> "At a sale by auction, the auctioneer signed the defendant's name upon a bill containing 'particulars of sale', as a purchaser of one of the lots. About one hour after, the plaintiff signed his name as vendor to a printed list of conditions, referred to in the particulars of sale. The name of the vendor appeared in no other part of the particulars or conditions. Held, that there was no sufficient note in writing under the Statute of Frauds to charge the defendant."

The judgments are extremely short, and they are these (ibid., at p. 97):

> LORD DENMAN, C.J.: "The nonsuit was perfectly right. It would be at once to repeal the statute, to hold that here it has been complied with."

> A COLERIDGE, J.: "When the defendant's agent signed the particulars, he signed something which did not bind him. It was no complete memorandum of a bargain, the name of one of the parties being wanting. If the vendor had signed the moment afterwards, so that it was clearly part of one transaction, it might have been sufficient; but that is not the case here."
>
> WIGHTMAN, J.: "To fulfil the requirements of the statute, the memorandum must be such that, at the time of the signature, it contains a valid B contract. It will not do to complete the contract by the introduction of something afterwards. Here, at the time the defendant signed the memorandum, there was no valid contract."
>
> ERLE, J.: "The note in writing, to be valid, must contain all the essentials of the contract, and the name of the vendor is one of the essentials."

C This point has caused me some difficulty, but I am, on the whole, of opinion that where two documents relied on as a memorandum are signed and exchanged at one and the same meeting as part of the same transaction, so that they may fairly be said to have been to all intents and purposes contemporaneously signed, the document signed by the party to be charged should not be treated as incapable of referring to the other document merely because the latter, on a D minute investigation of the order of events at the meeting, is found to have come second in the order of preparation and signing. I think that this view is supported by the judgment of COLERIDGE, J., in *Turnley* v. *Hartley* (9), to which I have referred. Accordingly, I would reject this argument.

The third contention of counsel for the defendant company on this part of the case is more formidable. It is to the effect that the cheque, which is on E the face of it nothing more than an order on the defendant company's bankers to pay Messrs. Holt, Beever & Kinsey the sum of £3,900, contains no reference, express or implied, to any other document or transaction, and therefore, cannot on the authorities, be connected with the aid of oral evidence to the receipt for the purpose of constructing a memorandum to satisfy the section. On this part of the case, counsel for the defendant company referred us to *Peirce* v. F *Corf* (10) ((1874), L.R. 9 Q.B. 210). QUAIN, J., said (ibid., at p. 217):

> "The first question that Mr. Herschell [counsel for the defendant] raised is that the catalogue, which contained the conditions, and the sales ledger, which contained the price and the name of the purchaser, are sufficiently connected, so as to be considered as a memorandum in writing within the G Statute of Frauds. I think they do not constitute a contract within the Statute of Frauds, because I cannot see on the face of them anything to connect the one with the other, so as to enable me to read them together. I take the principle to be well laid down in *Dobell* v. *Hutchinson* (11) ((1835), 3 Ad. & El. 355), where it is said by LORD DENMAN, C.J. (ibid., at p. 371): 'Upon examination it will be found that the cases establish this principle, H that where a contract in writing or note exists which binds one party, any subsequent note in writing signed by the other is sufficient to bind him, provided it either contains in itself the terms of the contract, or refers to any writing which contains them'. Therefore on the document itself there must be some reference from the one to the other, leaving nothing to be supplied by parol evidence . . ."

I Then ARCHIBALD, J., said this (L.R. 9 Q.B. at p. 218):

> "I am of the same opinion, and I think the judgment of the county court judge was right. As regards the first point, whether there is a contract within the Statute of Frauds, apart from the letter of Mar. 28, I think it is quite clear there must be, to satisfy the statute, either a written contract complete in itself, or a contract in writing on different papers, referring to each other in such a manner as to show they are parts of the same contract.

> No doubt the reference may be made in various ways, but it must be of such a nature as to make it clear that the one does refer to the other; and on that point there seems to me to be a failure here to connect these two documents together. It is impossible to do it except by the intervention of parol evidence. That would be going beyond any purpose for which parol evidence is admissible, which is merely to explain a latent ambiguity, and therefore there is no sufficient connexion between the papers to constitute a contract within the Statute of Frauds."

Peirce v. *Corf* (10) was followed in *Rishton* v. *Whatmore* (12) ((1878), 8 Ch.D. 467). These cases took, I think, a stricter view of what was necessary to constitute a reference to another document for the present purpose, and of the limits within which parol evidence was admissible to connect them, than is commonly held today.

A more liberal principle was applied in *Long* v. *Millar* (13) ((1879), 4 C.P.D. 450). In that case the purchaser (Long) orally agreed with the vendor (Millar) to buy three plots of land in Rickford Street, Hammersmith, for £310 and to pay £31 deposit. Long on Sept. 21, 1877, duly paid the deposit and signed a memorandum containing all the essential terms of the bargain other than the vendor's name. On the same day Millar signed a receipt in these terms: " Received of Mr. George Long the sum of £31 as a deposit on the purchase of three plots of land at Hammersmith ". Long sued Millar for breach of the contract, and the material question was whether the two documents to which I have referred could be combined to form a sufficient memorandum to satisfy s. 4 of the Statute of Frauds. The Court of Appeal held that the two documents could be so combined. BRAMWELL, L.J., said this (4 C.P.D. at p. 454):

> " But the point to be established by the plaintiff is that the defendant has bound himself, and a receipt was put in evidence signed by him, and containing the name of the plaintiff, the amount of the deposit, and some description of the land sold. The receipt uses also the word ' purchase ', which must mean an agreement to purchase, and it becomes apparent that the agreement alluded to is the agreement signed by the plaintiff, so soon as the two documents are placed side by side. The agreement referred to may be identified by parol evidence."

BAGGALLAY, L.J., said (ibid., at p. 455):

> " I agree that, subject to the question of the omission of the vendor's name, the document signed by the plaintiff would be sufficient to charge him. Out of these materials can a valid memorandum in writing be framed ? I think it can. The true principle is that there must exist a writing to which the document signed by the party to be charged can refer, but that this writing may be identified by verbal evidence. I think that in the present case by the words ' purchase of three plots of land ' the receipt sufficiently refers to the document signed by the plaintiff. Therefore the contract seems to me to be complete."

Then THESIGER, L.J., said (ibid.):

> " The first question is whether there is a sufficient reference in the receipt signed by the defendant to allow us to connect it with the document signed by the plaintiff. When it is proposed to prove the existence of a contract by several documents, it must appear upon the face of the instrument signed by the party to be charged that reference is made to another document; and this omission cannot be supplied by verbal evidence. If, however, it appears from the instrument itself that another document is referred to, that document may be identified by verbal evidence. A simple illustration of this rule is given in *Ridgway* v. *Wharton* (14) ((1857) 6 H.L. Cas. 238); there ' instructions ' were referred to; now instructions may be either

> written or verbal; but it was held that parol evidence might be adduced to show that certain instructions in writing were intended. This rule of interpretation is merely a particular application of the doctrine as to latent ambiguity. Although parol evidence may be given to identify the document intended to be referred to, it must be clear that the words of the document signed by the party to be charged will extend to the document sought to be identified . . . This document is somewhat informal, and does not contain such language as we should expect a lawyer to use; nevertheless, it contains all the terms necessary to create a valid contract except the name of the vendor; and the receipt contains the word 'purchase', which must refer to the purchase of the plots of land mentioned in the document signed by the plaintiff; if we read the two instruments together, we shall not be unduly straining the law by holding that the two, taken together, form a complete contract . . ."

A B C

In *Stokes* v. *Whicher* (15) ([1920] 1 Ch. 411), RUSSELL, J., summarised the effect of *Long* v. *Millar* (13) in this way ([1920] 1 Ch. at p. 418):

> "*Long* v. *Millar* (13) comes to this: that, if you can spell out of the document a reference in it to some other transaction, you are at liberty to give evidence as to what that other transaction is, and, if that other transaction contains all the terms in writing, then you get a sufficient memorandum within the statute by reading the two together."

D

In the same case RUSSELL, J., found it possible to supply the omission of the purchaser's name from the document signed by the party to be charged (who was the vendor) by connecting a cheque signed by the plaintiff in favour of the vendor with a receipt for the deposit written on the document signed by the vendor and likewise signed by him.

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RUSSELL, J., also in the same case considered, but did not adopt, an argument put forward by Mr. Clauson, K.C., the learned judge's observations on it being the following ([1920] 1 Ch. at p. 419):

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> "Mr. Clauson has put his case upon a higher platform and said that, even if you do not get any reference, either inferential or otherwise, in the second, the defective, document to the first, the authorities go to show that if, placing the two documents side by side, there is, upon an inspection of them, such a physical state of affairs that it is obvious that they were produced at the same time and that they originally, to that extent, formed a single document, you can take them and read them together, even though one document does not by inference or in terms contain a reference to the other. There is some colour for that proposition in *Oliver* v. *Hunting* (16) ((1890), 44 Ch.D. 205) before KEKEWICH, J., and more still in the later case before the Court of Appeal of *Sheers* v. *Thimbleby & Son* (17) ((1897), 76 L.T. 709). However that may be, I do not propose to decide this case upon that broad ground, because I have come to the conclusion that, upon this document as it stands, I can find in it a sufficient reference to another document which contains the necessary terms."

G H

It should be observed that the two documents under consideration in that case were in fact a top copy and carbon. That appears from Mr. Clauson's argument ([1920] 1 Ch. at p. 415). He said there:

I

> "If there exist two documents and, putting them together side by side, it is clear there is some connexion between them, that admits parol evidence as to the circumstances under which they came into existence. Here there is the typewritten original and the exact counterpart or duplicate in the carbon copy, and it would, as A. L. SMITH, L.J., said in *Sheers* v. *Thimbleby* (17), be 'sheer affectation' to pretend they are not connected: *Long* v. *Millar* (13)."

Mr. Clauson seems to have placed some reliance on the special circumstance in that case that the two documents were a top copy and carbon and, therefore, manifestly, when put side by side, documents which were brought into existence at the same moment. As to *Sheers* v. *Thimbleby & Son* (17) ((1897), 76 L.T. 709), the two documents which it was held could be read together were both signed by the party to be charged, but the earlier one had to be combined with the later one (they were dated on successive days) in order to provide a sufficient memorandum in writing of the guarantee sued on. Both documents contained what were obviously references to the same transaction. A. L. SMITH, L.J., said this (ibid., at p. 710):

> " The question which does arise is, can the whole promise be found in a memorandum in writing. If I were confined to the letter of Sept. 15, 1879 I should have thought that it could not; but the determination of this case does not, in my judgment, depend upon the letter of Sept. 15, 1879 alone, for the two letters of Sept. 15 and 16, 1879 appear to me, when placed side by side, to be so connected with each other, and without the aid of parol evidence, that both may be considered together when ascertaining what is the contract and whether there is a sufficient memorandum within the meaning of the Statute of Frauds. The case which best exemplifies this point is *Long* v. *Millar* (13), in which this court held that a contract is valid within the fourth section of the Statute of Frauds, where documents exist which can be connected together without the aid of verbal evidence."

Then after setting out the circumstances of *Long* v. *Millar* (13), the learned lord justice continued (76 L.T. at p. 711):

> " This court held that by the word ' purchase ' used in each document the two were so connected together that they could be looked at, for when placed side by side the one obviously referred to the other, and thus a valid memorandum existed within the fourth section of the statute. Now, in the present case, so soon as the two documents of Sept. 15 and 16, 1879 are placed side by side, to my mind it at once becomes apparent that they are connected together, and that this, as in the case of *Long* v. *Millar* (13), appears without the aid of parol evidence . . . So here it would, in my judgment, be sheer affectation to say that, without the aid of parol evidence, it cannot be predicated whether Burton's and Balderson's investments, in the letter of Sept. 15, referred to Burton's and Balderson's mortgages in that of Sept. 16, for, in my opinion, they clearly do, and formed part of, one and the same transaction. It does not seem to me that, the two documents having been written, one on one day and the other on the next, causes them to be such separate and distinct documents that the one cannot be connected with the other without the aid of parol evidence, for, in my judgment, it is not so."

CHITTY, L.J., said (76 L.T. at p. 712):

> " In the present case I think that the letter, when read in the light of the evidence of the surrounding circumstances, shows with a sufficient degree of certainty what investments were referred to, and that it is immaterial whether the investments were made on Sept. 15 or the day following. The guarantee applied to the investments already agreed to, whether actually made or not."

In *Burgess* v. *Cox* (18) ([1950] 2 All E.R. 1212) HARMAN, J., held, following *Sheers* v. *Thimbleby & Son* (17), that a letter from a purchaser to a vendor referring to the purchase of a certain holiday camp could be read with an earlier document stating terms for the sale of the same camp and signed by the vendor only, so as to constitute a memorandum for the purposes of s. 40, on the ground that the two documents, when placed side by side, manifestly referred to the same transaction.

It is said that in the present case the cheque for £3,900 drawn by Mr. Chait* on behalf of the defendant company in favour of Messrs. Holt, Beever & Kinsey* on July 20, 1955, and the receipt of the same date signed by the plaintiff, whereby he acknowledged that he had received of the defendant company the sum of £3,900 as a deposit for the purchase of the Boundary Street property, when laid side by side, are so manifestly connected without the aid of oral evidence as to justify their being read together on the principles stated in *Long* v. *Millar* (13), *Sheers* v. *Thimbleby & Son* (17) and *Stokes* v. *Whicher* (15). As to that, I would observe that I do not see how it could be possible, without oral evidence, to connect the cheque made out in favour of Messrs. Holt, Beever & Kinsey with the receipt given by the plaintiff. Quite apart from this, however, I think that we are being invited to go beyond anything warranted by the cases in the way of reading documents together for the purpose of providing a memorandum to satisfy s. 40. To the cases already cited I would add *Studds* v. *Watson* (19) ((1884), 28 Ch.D. 305), and *Oliver* v. *Hunting* (16) ((1890), 44 Ch.D. 205), neither of which, on their facts, went nearly as far as this. Some of the observations of KEKEWICH, J., in the latter case are, I think, manifestly too wide.

The rule has no doubt been considerably relaxed since *Peirce* v. *Corf* (10) was decided, but I think it is still indispensably necessary, in order to justify the reading of documents together for this purpose, that there should be a document signed by the party to be charged which, while not containing in itself all the necessary ingredients of the required memorandum, does contain some reference, express or implied, to some other document or transaction. Where any such reference can be spelt out of a document so signed, then parol evidence may be given to identify the other document referred to, or, as the case may be, to explain the other transaction, and to identify any document relating to it. If by this process a document is brought to light which contains in writing all the terms of the bargain so far as not contained in the document signed by the party to be charged, then the two documents can be read together so as to constitute a sufficient memorandum for the purposes of s. 40 of the Law of Property Act, 1925. The laying of documents side by side may no doubt lead to the conclusion as a matter of res ipsa loquitur that the two are connected; but before a document signed by the party to be charged can be laid alongside another document to see if between them they constitute a sufficient memorandum, there must, I conceive, be found in the document signed by the party to be charged some reference to some other document or transaction.

In the present case the only document signed by the defendant company is an ordinary cheque; that is to say, an order on the defendant company's bankers to pay a sum of money, the payees being a firm of solicitors. With the best will in the world, I find it quite impossible to spell out of this cheque any reference, express or implied, to any other document or to any transaction other than the order to pay a sum of money constituted by the cheque itself. The cheque, of course, gives no indication whatever of the purpose for which the payment was to be made, and I think it is clear that the mere fact that the payment must have been made for some purpose or for some consideration cannot reasonably be held to amount to a reference to some other document or transaction within the principle I have stated.

In *Stokes* v. *Whicher* (15) the receipt for the deposit was signed by the party to be charged, and obviously referred to another transaction in the shape of the payment of the deposit. That made it possible for the court to inquire as to the mode of payment which proved to have been by cheque. The cheque was signed by the purchaser and read together with the receipt, and the document on which it was written (likewise signed by the party to be charged) constituted a memorandum including the purchaser's name, which, apart from the cheque, would have been missing. The receipt with which we are concerned in this action, being a vendor's action, was not signed by the party to be charged and, consequently, no use can be made of any reference to the cheque which might be spelt out of the receipt.

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* Mr. Chait was a director of the defendant company and Messrs. Holt, Beever & Kinsey were the plaintiff's solicitors.

For these reasons, I would dismiss the appeal.

ROMER, L.J.: I agree, and I only wish to make a few observations on the points which arise out of s. 40 of the Law of Property Act, 1925, and which were argued before us. The first point to consider was the contention of counsel for the defendant company that assuming (which, of course, he did not admit) that the cheque and receipt of July 20, 1955, could together constitute a memorandum, nevertheless, as there was no reference in the receipt to the lease of Aug. 14, 1950, the memorandum was insufficient in that respect.

If the fact, which was in truth known to the defendant company at the time of the contract, that the property was being sold subject to and with the benefit of the lease ought to be regarded as a term of the bargain, I think that it is clear that it should have been mentioned in the memorandum, for it was a term which was obviously an important one, and the requirement that a memorandum must contain particulars as to the parties, price, and any other terms of the bargain except those implied by law would not be satisfied. But I do not think that it was a term of the contract at all for relevant purposes.

It can be said, and has been said, that the proper way of looking at the matter is that the agreement was a mere contract for the sale of the freehold, and that such a contract gives rise to an implication of vacant possession, but that then a term was imposed that vacant possession would be deferred until the expiration of the lease, and that until then the defendant company would merely be the landlords of the property and entitled to receive the rents. I do not think myself that that is the right way of regarding the contract.

It seems to me that the proper way of looking at it is that it was for the sale of a freehold reversion, which indeed the contracting parties intended it to be. Accordingly, the postponement of vacant possession and the transfer to the purchaser of the lessor's rights and obligations under the lease were not a term of the bargain but were inevitable incidents of the subject-matter of the sale. On this view, the question would appear to be not whether the memorandum is insufficient for failing to mention an important term of the oral agreement, but whether it sufficiently describes the subject-matter of the sale. I think that it does sufficiently describe the subject-matter. The agreement was in fact for the purchase of the freehold of the property. The memorandum specifies the property and parenthetically describes it as " freehold ". The memorandum is not insufficient if it omits to mention the particular interest which the vendor is selling in the property, provided that the property itself is sufficiently described. If no interest is mentioned, then prima facie an unencumbered freehold interest will be implied. No such implication arises, however, if the purchaser knew at the time of the contract (as the defendant company knew in the present case) that some lesser interest or some encumbered interest was to be the subject of the sale. I cannot think that a memorandum fails in point of sufficiency if it omits an explanation of why the implication of an unencumbered fee simple is displaced or if it fails to specify the precise legal interest in the identified property which the vendor has agreed to sell and the purchaser agreed to buy, or if it makes no reference to encumbrances affecting the property. A right of way, for example, over land agreed to be sold is not a term of the contract of sale but a matter of title, and need not be mentioned in the memorandum. Accordingly, in my view, the judge was wrong on that point, though, if it had been a term of the bargain, I would have agreed with his decision.

A The next point which counsel for the defendant company took was whether the cheque and receipt taken together could form a memorandum having regard to the order in which they were signed. His argument as to that was that although two separate documents can together constitute a memorandum for the purposes of s. 40, the party to be charged must have signed the second of the two; that is to say, if the defendant has signed a document, the plaintiff cannot rely on it in conjunction with a later document signed by himself. This B in general must be true. A defendant cannot be bound by a document which he has not signed unless he has in effect incorporated it in the document which he has signed, in which case he would be regarded as having notionally signed both documents; but as he cannot be taken to have incorporated or signed a document which does not exist, the theory is inapplicable except where the defendant has signed the second of two documents on which the plaintiff relies as C together constituting a memorandum. If, however, on the same occasion and as part of one and the same transaction—for example, as here, the payment of a deposit under an oral agreement for sale—a vendor and purchaser sit down at a table and respectively write out a receipt and a cheque, then, assuming that these documents between them sufficiently evidence the terms of the bargain, it would be going too far to say that the vendor could not rely on them as con- D stituting a memorandum if the purchaser signed his cheque a few seconds before the vendor signed the receipt. I think it is enough to say that the documents relied on were brought into being more or less contemporaneously for the purpose of furthering a bargain which the parties had made. This was substantially what happened in the present case. In the circumstances in which, according to the evidence, the cheque and receipt were exchanged, it E would, I think, be rather absurd to say that the receipt must be excluded from consideration on the ground that it came second in point of time, seeing that they both form part of one single transaction, and to all intents and purposes were signed and changed hands simultaneously at the meeting between the plaintiff and Mr. Chait on July 20, 1955.

Counsel for the defendant company then takes a third point. He says that, F even so, the cheque and the receipt cannot be treated together as a memorandum, for there is no sufficient indication on the face of the cheque that it related to the oral agreement on which the plaintiff is suing or to the receipt which the plaintiff signed. True it is, says counsel for the defendant company, that the cheque and the receipt bear the same date, that they both relate to the same amount, £3,900, and that they both contain a reference to the defendant company; G but whereas the cheque was made payable to Holt, Beever & Kinsey, the receipt was given by the plaintiff signing as trustee of James Keeves Trust*. Accordingly, says counsel for the defendant company, no one who looked at the documents would connect them up with the same transaction, and extrinsic evidence is not permissible to show that they did.

This appears to be a very formidable objection. The relevant principle of H law which is applicable is the summary of RUSSELL, J., in *Stokes* v. *Whicher* (15) ([1920] 1 Ch. 411), to which my Lord has referred, of the decision in *Long* v. *Millar* (13) ((1879), 4 C.P.D. 450). He said ([1920] 1 Ch. at p. 418):

> "*Long* v. *Millar* (13) comes to this: that, if you can spell out of the document a reference in it to some other transaction, you are at liberty to give I evidence as to what that other transaction is, and, if that other transaction contains all the terms in writing, then you get a sufficient memorandum within the statute by reading the two together."

The "reference" need not be express, but I cannot collect from the cheque any reference, even by implication, to the transaction in the course of which and as part of which the receipt was brought into existence. Had the plaintiff been the payee under the cheque, the position might have been different, though it is not necessary to decide that point. As it is, there seems to be nothing on the face of the cheque itself which connects it in any way with the sale agreement or with the receipt.

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* The terms of the cheque and of the receipt are stated at p. 267, ante.

Counsel for the plaintiff said that a cheque was in a different category from such things as letters or postcards, and that of necessity it must be drawn with reference to some transaction; that the court was entitled and bound, therefore, to inquire into what that transaction was, and that such an inquiry in the present case would lead to the contract of sale and to the receipt which was brought into being in connexion with it. Although this approach to the matter is not without attraction, I cannot myself adopt it. I think that it would be going much further than is justified by any of the authorities which were cited to us to hold that the cheque of the defendant company in the present case may be regarded, simply on the ground that it was a cheque, as a sufficient reference to the oral agreement between the plaintiff and the defendant company or to the deposit payable thereunder. I think that so to hold would constitute an unwarranted, and possibly dangerous, addition to the many judicial glosses which have already been put on this legislation. It seems to me that the most favourable way in which the plaintiff's case could be put would be by adopting the argument of Mr. Clauson, K.C., in *Stokes* v. *Whicher* (15) ([1920] 1 Ch. 411), as stated by RUSSELL, J. (ibid., at p. 419). He said:

> " Mr. Clauson has put his case upon a higher platform and said that, even if you do not get any reference, either inferential or otherwise, in the second, the defective, document to the first, the authorities go to show that if, placing the two documents side by side, there is, upon an inspection of them, such a physical state of affairs that it is obvious that they were produced at the same time and that they originally, to that extent, formed a single document, you can take them and read them together, even though one document does not by inference or in terms contain a reference to the other. There is some colour for that proposition in *Oliver* v. *Hunting* (16) ((1890), 44 Ch.D. 205), before KEKEWICH, J., and more still in the later case before the Court of Appeal of *Sheers* v. *Thimbleby & Son* (17) ((1897), 76 L.T. 709)."

I am not sure that Mr. Clauson was wholly relying for the purposes of his argument on the physical relation between the original and the carbon copy of the document which was there relied on, because if one looks at the report of his argument ([1920] 1 Ch. at p. 415), he seems to put it first in a general way. He said (ibid.):

> " If there exist two documents and, putting them together side by side, it is clear there is some connexion between them, that admits parol evidence as to the circumstances under which they came into existence."

That appears to me to be a general proposition which Mr. Clauson was advancing. Then he said:

> " Here there is the typewritten original and the exact counterpart or duplicate in the carbon copy, and it would, as A. L. SMITH, L.J., said in *Sheers* v. *Thimbleby & Son* (17), be ' sheer affectation ' to pretend they are not connected: *Long* v. *Millar* (13)."

Even assuming, however, both the generality and the validity of that argument, it does not, in my opinion, enable the plaintiff here to succeed, for if one places the cheque and the receipt side by side, it is not obvious on an inspection of them that they originally formed a single document and could be taken and read together. In view of the discrepancy between the payees on the cheque and the signatory of the receipt it is by no means obvious that the two documents were connected with each other at all.

On the questions other than those concerned with s. 40 which were argued before us, I agree with all that my Lord has said, and I have nothing to add.

SELLERS, L.J.: I agree. The difficult point in the case, as I see it, is A whether the cheque for £3,900 signed by the defendant company by their director, L. Chait, can be read together with the receipt for that sum made out and signed by the plaintiff, so as to bring the signature on behalf of the defendant company into association with the terms of the receipt.

At the trial the plaintiff produced the cheque with the defendant company's signature thereon, and on discovery the defendant company, as they were B bound to do, disclosed the receipt, thereby recognising and impliedly admitting that the receipt related to the payment made under the oral agreement on which the plaintiff sues in the action. Otherwise, the receipt would not have been a relevant document and would not have been disclosed or discoverable. From those circumstances, without any further evidence, it would appear that the defendant company had had the receipt, had retained it, and had apparently C accepted it, and thereby acknowledged the transaction in respect of which the payment by cheque had been made. These facts provide evidence, and can leave little doubt, that the defendant company had been party to a transaction with the plaintiff in relation to the premises referred to in the receipt. The receipt was an adequate memorandum of the transaction; that is, it contained all the material terms, as both my Lords have held and with which I agree. D

The bargain between the parties is thereby sufficiently evidenced in writing but is it signed by the party to be charged, the defendant company ? The authorities to which we have been referred, and which have been reviewed in the judgments just delivered, have gone a long way in seeking to avoid the statute doing an injustice, as it seems to me to be doing here. The plea of s. 40 here is of mere technical application and does not leave one in any doubt that a E concluded contract had been entered into. However, the fact remains that the signature is to the cheque only, and I do not find any satisfactory way of linking it up with the memorandum—that is, the receipt—so as to make the receipt or memorandum a document signed by the defendant company. If the learned judge had given his reasons for so doing, it might have been sufficient, for little more would be required to persuade me to uphold his finding, having regard F to the way s. 40 and its predecessor have been interpreted throughout the years. However, I agree with the conclusions to which my Lords have come.

Appeal dismissed.

Solicitors: *Holt, Beever & Kinsey* (for the plaintiff, the vendor); *Israel, Joslin & Co.* (for the defendant company, the purchasers).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

UNITED GRAND LODGE OF ANCIENT FREE AND ACCEPTED MASONS OF ENGLAND *v.* HOLBORN BOROUGH COUNCIL.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Donovan and Ashworth, JJ.), October 8, 9, 16, 1957.]

Rates—Limitation of rates chargeable—Hereditament occupied by organisation for the promotion of Freemasonry—Organisation mainly concerned with administrative work relating to Freemasonry—Whether main object of organisation concerned with advancement of religion—Whether objects of Freemasonry concerned with the advancement of religion—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *&* 5 *Eliz.* 2 *c.* 9), *s.* 8 (1).

The appellants, the United Grand Lodge of Masons, were the occupiers of a hereditament at which they carried out their functions, viz., the central administration and government of masonic activities which included administering a benevolent fund. The objects of Freemasonry, as set out in its constitution, were to promote and advance the virtues of good citizenship, honest work, morality and wisdom, brotherly love, compassion, charity to the poor, and belief in a supreme architect of heaven and earth. On the initiation of a Mason, the Bible was recommended to him as the standard of truth and justice, and he was urged to regulate his conduct by it, and while a Mason was not required to have a particular religious belief, he must believe in a Supreme Being and lead a moral life. In Freemasonry, there was no religious instruction, no programme to persuade unbelievers, no religious supervision, nor were any services held or pastoral or missionary work carried out. The appellants who, it was found, were not established for profit nor conducted their activities for profit, appealed against a rate levied on them by the respondents on the ground that they were an organisation, not established or conducted for profit, whose main objects (though not charitable in the legal sense) were otherwise concerned with the advancement of religion within s. 8 (1) (a)* of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, and therefore, that the amount of rates chargeable in respect of the hereditament should be limited by s. 8 (2) of the Act of 1955.

Held: (i) in determining what were the main objects of the appellants, regard must be had to the main purpose of the organisation taken as a whole, not merely to the functions of the appellants within the organisation.

(ii) the main objects of Freemasonry were not the advancement of religion, and therefore the appellants were not an organisation within s. 8 (1) (a) of the Act of 1955 and the amount of rates chargeable in respect of the hereditament was not limited by s. 8 (2).

Appeal dismissed.

[For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, see 35 HALSBURY'S STATUTES (2nd Edn.) 394.]

Case Stated.

This was a Case Stated by the deputy chairman of the appeal committee of the County of London Quarter Sessions. On June 26, 1956, the appellants, the United Grand Lodge of Ancient Free and Accepted Masons of England, gave notice of appeal against a rate made on Mar. 8, 1956, and levied on them by the respondents, Holborn Borough Council, in respect of a hereditament described in the rate as the Masonic Peace Memorial, 48-60, Great Queen Street, 3-29, A Wild Street and 1-9, Wild Court in the borough of Holborn; the grounds of appeal were that the appellants were an organisation which came within s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, and accordingly, were entitled to the partial relief from rates provided in s. 8 (2) of the Act of 1955. The following facts were found.

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* For the relevant terms of s. 8 (1) (a) of the Act of 1955, see p. 283, letter E, post.

The hereditament was known as Freemasons' Hall and comprised a grand B temple which was used for meetings of the Grand Lodge, seventeen lodge rooms which were let to masonic lodges in the London area, a museum and library, and administrative offices for the clerical staff who numbered fifty. The hereditament was occupied for the purposes of the appellants who were referred to in the book of " Constitutions " of Freemasons as " the Grand Lodge ". The appellants were not established or conducted for profit and were not incor- C porated; their position in Freemasonry and their composition were described in rules set out in the book of " Constitutions ". They were a body representing all private lodges on the register and were the supreme superintending authority; they had power to make laws regulating the government of the Craft and of deciding all matters relative to the Craft; and they could erase lodges and expel Masons from the Craft. They represented seven thousand lodges over which they D exercised control. The purpose of the appellants, in so far as they had any separate existence, was to promote Freemasonry. The two main functions of the appellants were to administer and centrally govern masonic activities and to administer the Fund of Benevolence. The exercise of both functions was partially delegated, in the first case to the Grand Master, the Grand Secretary and the Board of General Purposes, and, in the second, to the Board of Benevolence which was a E registered charity. The main objects of Freemasonry were to carry out the objects set out in the " Antient Charges " which were reproduced in the book of " Constitutions ", and those objects which were set out in an extract from the solemn admonition to Masons on their initiation into Freemasonry, the latter being regarded in substance as the same as the " Antient Charges " but worded in modern form. The " Antient Charges " were directed to promoting principles F of social conduct founded on a moral or ethical basis. The beginning of the extract from the solemn admonition read as follows:—

> " As a Freemason, let me recommend to your most serious contemplation the Volume of the Sacred Law, charging you to consider it as the unerring standard of truth and justice, and to regulate your actions by the Divine G precepts it contains; therein, you will be taught the important duties you owe to God, to your neighbour, and to yourself . . ."

Freemasonry was not itself a religion. A candidate was not required to have a particular religious belief, but he was required to declare his belief in a Supreme Being; in their lodges Masons must not discuss religion other than universal H religion and belief in God. Freemasonry had a religious foundation, and Masons were actuated by religious motives in joining the Craft. Their principles were brotherly love, relief and truth which were the subject of the solemn admonition to Masons on their initiation into Freemasonry. At an earlier stage of the initiation the virtues of benevolence and charity were emphasised, but these followed as a consequence of the foregoing principles. All ceremonies opened I and closed with a prayer and constant references were made to the Volume of the Sacred Law, viz., in English lodges the Bible, which lay open throughout the ceremonies. Lodges were entitled to appoint a chaplain. The principles of the Bible and a belief in God were fundamental to Freemasonry. Generally described, Freemasonry was an organisation devoted to advancing the acceptance and practice of basic religious principles which could be particularised as man's relations to God, to his neighbour and to himself; its objects and practices were

A religious in that they were directed to furthering a religious attitude to God and to one's fellow men on a basis common to most civilised religions.

Quarter sessions dismissed the appeal, deciding that the appellants were mainly concerned with the co-ordination and administration of Freemasonry in England and were not, therefore, within s. 8 (1) (a) of the Act of 1955; they further decided that it was unnecessary for them to consider whether the main objects of Free- B masonry came within the sub-section as, in their view, the appellants were not directly concerned with those objects. The question of law for the opinion of the court was whether, on the facts stated, quarter sessions came to a correct decision.

Milner Holland, Q.C., W. L. Roots and *David Trustram Eve* for the appellants.

C *P. R. E. Browne* for the respondents.

Cur. adv. vult.

Oct. 16. **DONOVAN, J.**, read the following judgment of the court: This is an appeal by way of Case Stated from a decision of the appeal committee of London quarter sessions dismissing an appeal by the United Grand Lodge of Masons of England (hereinafter called the appellants) against a rate levied on D them by the Holborn Borough Council. The appellants claimed the benefit of the partial relief from rates conferred in certain cases by s. 8 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The Holborn Borough Council refused the claim and quarter sessions upheld the refusal.

Section 8 (1) is in these terms:

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> "This section applies to the following hereditaments, that is to say—(a) any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare."

F Section 8 (2) then goes on to confer partial relief from rates.

The hereditament here in question is the building known as Freemasons' Hall in Holborn. It is occupied by the appellants. The appellants make no claim to be a charity in the legal sense of that word; but they do not conduct their affairs for profit, and they claim that their main object is to advance religion, otherwise than as a charity. Quarter sessions dismissed their claim to the G benefit of s. 8 (1) on the ground that whether or not the objects of Masonry came within the section, the function of the appellants was the co-ordination of the work of the seven thousand lodges of Freemasonry throughout England: and that the work which this involved, being largely administrative in character, was not the advancement of religion, education or social welfare. Accordingly, the claim H failed. This made it unnecessary, in the view of quarter sessions, to decide whether the objects of Masonry as such came within the section.

This short cut to the solution of the problem is, in our view, unsound. It confuses the purpose of the appellants with the manner in which they seek to effect it. Indeed, para. 4 (f) of the Case Stated finds that the purpose of the appellants is to promote Masonry: but that their functions are to administer I and govern masonic activities including a benevolent fund. Quarter sessions did not look beyond such "functions". But these are simply the ways in which the purpose of promoting Masonry is pursued; and accordingly when the problem to be solved is the nature of the appellants' purpose, or object, one must find out what is the purpose or object of Masonry itself. Every organisation setting out to advance some cause must, if it is of any size, have an office where the necessary clerical and administrative work is done; but one cannot isolate this, and say that the purpose of the office is different from that of the organisation itself. To do so is to confuse ends with means. There is only one purpose, which is that of the organisation as a whole; though the different units within it may be working out that purpose in different ways. Accordingly, we think that quarter sessions were wrong to dismiss the appeal on the ground they did; and that it is essential to consider the nature of the objects of Masonry itself.

Since quarter sessions came to no finding on this matter there were two courses open to us: either to remit the case for such a finding or to come to a conclusion ourselves on the facts which are set out in the Case. Both sides asked us to take this second course, which is obviously more convenient.

The contention of the appellants was that the facts found established that their main object was the advancement of religion. It is not claimed on their behalf that their main object is the advancement of education or social welfare. Nor is any contention rested on the well-known and admirable benevolent work done by the appellants through the Board of Benevolence mentioned in the Case. It is said that this is simply one consequence of the pursuit by the appellants of their main object, namely, the advancement of religion; and accordingly all that we have to decide is whether such a main object has been established. The respondent council deny that it has.

The objects, main and otherwise, of any body of persons, corporate or unincorporate, are usually to be discovered from its written constitution, if it has one. Otherwise one must discover from the available evidence what it is that the particular body does, and infer from that what its main object is. In the present appeal there is exhibited to the Case a book called " United Grand Lodge of England. Constitutions "; and the Case finds that the main objects of Freemasonry are to carry out the objects set out in the " Antient Charges " particularised at pp. 3 to 15 of this book, and also in a solemn admonition to newly initiated Masons which is reproduced in the Case. Accordingly, one turns to these sources to see what those objects are, and whether the main one is the advancement of religion. The " Antient Charges " set out at pp. 3 to 15 of the " Constitutions " begin by saying that a Mason is obliged to obey the moral law, and to act according to the dictates of his conscience. They go on as follows:

> " Let a man's religion or mode of worship be what it may, he is not excluded from the Order, provided he believe in the glorious architect of heaven and earth, and practise the sacred duties of morality. Masons unite with the virtuous of every persuasion in the firm and pleasing bond of fraternal love: they are taught to view the errors of mankind with compassion, and to strive, by the purity of their own conduct, to demonstrate the superior excellence of the faith they may profess. Thus Masonry is the centre of union between good men and true, and the happy means of conciliating friendship amongst those who must otherwise have remained at a perpetual distance."

The rest of the " Antient Charges ", save those dealing with such matters as the running of the lodge, admission of new members, and election of officers, may be sufficiently summarised thus:—Masons are charged to be good citizens, to work honestly, to act as moral and wise men, to relieve a brother Mason in want in preference to other poor, and to cultivate brotherly love, " so that all may see the benign influence of Masonry."

In form, therefore, these " Antient Charges " are not " objects " but, as the name implies, exhortations to Masons. When the Case finds, therefore, that the main objects of Freemasonry are to carry out the objects set out in these charges what presumably is meant is that Freemasonry's main object is to promote and advance those virtues which every Mason is charged to cultivate: good citizenship, honest work, morality and wisdom, brotherly love, compassion, charity to the poor, and belief in a supreme architect of heaven and earth.

The solemn admonition to a Mason on his initiation follows the same lines. The " Volume of the Sacred Law " is recommended to him as the standard of truth and justice, and he is urged to regulate his conduct by it, that is, his conduct towards God, his neighbour and himself. In particular he is urged to be reverent, honest, compassionate, loyal, temperate, benevolent and chaste.

Admirable though these objects are it seems to us impossible to say that they add up to the advancement of religion. Indeed, as already stated, the first Antient Charge, headed " Concerning God and Religion " says, among other things, this: " Let a man's religion or mode of worship " (the contrast is not perhaps without significance) " be what it may, he is not excluded from the Order, provided he believe in the glorious architect of heaven and earth, and practise the sacred duties of morality ". Thus it would seem that no Mason need practise any religion, but, provided that he believes in a Supreme Being and lives a moral life, he may be and remain a Mason.

Accordingly, one cannot really begin to argue that the main object of Freemasonry is to advance religion, except perhaps by saying that religion can be advanced by example as well as by precept, so that the spectacle of a man leading an upright moral life may persuade others to do likewise. The appellants did not in fact advance this argument, but even if it were accepted, it leads to no useful conclusion here. For a man may persuade his neighbour by example to lead a good life without at the same time leading him to religion. And there is nothing in the " Constitutions ", nor, apparently, in the evidence tendered to quarter sessions, to support the view that the main object of Masonry is to encourage Masons to go out in the world, and by their example lead persons to some religion or another. When one considers the work done by organisations which admittedly do set out to advance religion, the contrast with Masonry is striking. To advance religion means to promote it, to spread its message ever wider among mankind; to take some positive steps to sustain and increase religious belief; and these things are done in a variety of ways which may be comprehensively described as pastoral and missionary. There is nothing comparable to that in Masonry. This is not said by way of criticism. For Masonry really does something different. It says to a man, " Whatever your religion or your mode of worship, believe in a Supreme Creator and lead a good moral life ". Laudable as this precept is, it does not appear to us to be the same thing as the advancement of religion. There is no religious instruction, no programme for the persuasion of unbelievers, no religious supervision to see that its members remain active and constant in the various religions they may profess, no holding of religious services, no pastoral or missionary work of any kind.

Counsel for the appellants relied strongly, however, on the following finding in the Case:

> " As a general description of the basis of Freemasonry, it is an organisation devoted to advancing the acceptance and practice of basic religious principles, which may be particularised as man's relations to God, to his neighbour and to himself."

Without wishing to be pedantic, it is not easy to understand the term " basic religious principles ". Had quarter sessions said " basic moral principles " their meaning would have been clear; and indeed when they go on to give particulars it would seem that this is really what they do mean. In any event, however, the main object of Freemasonry must be discovered from a consideration of its constitution and its work; and such consideration leads us to the view that its main object is clearly not the advancement of religion.

We think, therefore, quarter sessions came to the right decision, though not for the right reason, and that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Blundell, Baker & Co.* (for the appellants); *Town clerk*, Holborn Borough Council (for the respondents).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

REGAZZONI *v.* K. C. SETHIA (1944), LTD.

[HOUSE OF LORDS (Viscount Simonds, Lord Reid, Lord Cohen, Lord Keith of Avonholm and Lord Somervell of Harrow), July 8, 9, 10, 11, 15, October 21, 1957.]

Contract—Illegality—Enforcement of illegal contract—Contract involving shipment from India contrary to the law of India—Recognition of relevant Indian law.

Conflict of Laws—Foreign law—Recognition—Political law.

The Government of India by ordinance* prohibited the taking out of British India of goods which were destined for any port or place in the Union of South Africa or which were intended to be taken to the Union although destined for a port or place outside it. The respondents agreed to sell and deliver to the appellant a quantity of jute bags c.i.f. Genoa. To the knowledge of both parties to the contract the goods were to be shipped from India and were to be made available in Genoa so that they might be re-sold to the South African buying agency contrary to the ordinance. The proper law of the contract was English law. The respondents did not deliver the jute bags and the appellant brought an action for damages for breach of contract.

Held: the contract would not be enforced in England as a matter of public policy, because its performance would have involved, as the parties to it knew, doing in a foreign and friendly country an act which would have violated a law (which was not a revenue or penal law) of that country.

Foster v. *Driscoll* ([1929] 1 K.B. 470) and *Ralli Brothers* v. *Compañia Naviera Sota y Aznar* ([1920] 2 K.B. 287) approved.

Per VISCOUNT SIMONDS: it does not follow from the fact that the court will not enforce a revenue law at the suit of a foreign state that the court will enforce a contract which requires the doing of an act in a foreign country which violates the revenue law of that country (see p. 292, letter D, post).

Decision of the COURT OF APPEAL ([1956] 2 All E.R. 487) affirmed.

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*The description and terms, so far as relevant, of the ordinance were—

" Ordinance Government of India, Department of Commerce, New Delhi, the 17th July, 1946.

No. 2-C (6)/46 (1).—In exercise of the powers conferred by s. 19 of the Sea Customs Act 1878 (VIII of 1878) the Central Government is pleased: . . . (b) to prohibit the taking by sea or by land out of British India of goods from whatever place arriving which are destined for any port or place in the Union of South Africa or in respect of which the Chief Customs Officer is satisfied that the goods although destined for a port or place outside the Union of South Africa are intended to be taken to the Union of South Africa."

[As to impossibility of performance of a contract by reason of illegality under foreign law, see 8 HALSBURY'S LAWS (3rd Edn.) 185, para. 319; and for cases on the subject, see 11 DIGEST (Repl.) 441-443, *828-840*.]

Cases referred to:

(1) *Foster* v. *Driscoll, Lindsay* v. *Attfield, Lindsay* v. *Driscoll*, [1929] 1 K.B. 470; 98 L.J.K.B. 282; 140 L.T. 479; 11 Digest (Repl.) 441, *832*.

(2) *Government of India* v. *Taylor*, [1955] 1 All E.R. 292; [1955] A.C. 491; 3rd Digest Supp.

(3) *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Akt. & Hungarian General Creditbank*, [1939] 3 All E.R. 38; [1939] 2 K.B. 678; 108 L.J.K.B. 861; 160 L.T. 615; 11 Digest (Repl.) 428, *746*.

(4) *Biggs* v. *Lawrence*, (1789), 3 Term Rep. 454; 100 E.R. 673; 11 Digest (Repl.) 441, *828*.

(5) *Hodgson* v. *Temple*, (1813), 5 Taunt. 181; 1 Marsh. 5; 128 E.R. 656; 12 Digest (Repl.) 307, *2361*.

(6) *De Wutz* v. *Hendricks*, (1824), 2 Bing. 314; 2 State Tr. N.S. 125; 130 E.R. 326; sub nom. *De Witts* v. *Hendricks*, 3 L.J.O.S.C.P. 3; 11 Digest (Repl.) 613, *425*.

(7) *De Beéche* v. *South American Stores, Ltd., & Chilian Stores, Ltd.*, [1935] A.C. 148; 104 L.J.K.B. 101; 152 L.T. 309; 11 Digest (Repl.) 442, *839*.

(8) *Aksionairnoye Obschestvo A.M. Luther* v. *Sagor (James) & Co.*, [1921] 3 K.B. 532; 90 L.J.K.B. 1202; 125 L.T. 705; 11 Digest (Repl.) 325, *19*.

(9) *Boucher* v. *Lawson*, (1736), Lee *temp.* Hard. 85, 194 (95 E.R. 53, 125); Cunn. 144 (94 E.R. 1116); 11 Digest (Repl.) 440, *823*.

(10) *Pellecat* v. *Angell*, (1835), 2 Cr. M. & R. 311; 4 L.J. Ex. 326; 150 E.R. 135; 11 Digest (Repl.) 441, *831*.

(11) *Austria (Emperor)* v. *Day & Kossuth*, (1861), 3 De G.F. & J. 217; 30 L.J.Ch. 690; 4 L.T. 494; 45 E.R. 861; 28 Digest 483, *888*.

(12) *Holman* v. *Johnson*, (1775), 1 Cowp. 341; 98 E.R. 1120; 11 Digest (Repl.) 325, *16*.

(13) *Sharp* v. *Taylor*, (1849), 2 Ph. 801; 14 L.T.O.S. 1; 41 E.R. 1153; 11 Digest (Repl.) 440, *824*.

(14) *Ralli Brothers* v. *Compañia Naviera Sota y Aznar*, [1920] 2 K.B. 287; 89 L.J.K.B. 999; 123 L.T. 375; 11 Digest (Repl.) 435, *791*.

(15) *Kahler* v. *Midland Bank, Ltd.*, [1949] 2 All E.R. 621; [1950] A.C. 24; [1949] L.J.R. 1687; 2nd Digest Supp.

(16) *Waugh* v. *Morris*, (1873), L.R. 8 Q.B. 202; 42 L.J.Q.B. 57; 28 L.T. 265; 12 Digest (Repl.) 264, *2041*.

(17) *Huntington* v. *Attrill*, [1893] A.C. 150; 62 L.J.P.C. 44; 68 L.T. 326; 57 J.P. 404; 11 Digest (Repl.) 515, *1293*.

(18) *Pearce* v. *Brooks*, (1866), L.R. 1 Exch. 213; 35 L.J. Ex. 134; 14 L.T. 288; 30 J.P. 295; 12 Digest (Repl.) 294, *2264*.

Appeal.

Appeal by the buyer, Polissino Regazzoni, from an order of the Court of Appeal (DENNING, BIRKETT and PARKER, L.JJ.), dated Apr. 26, 1956, and reported [1956] 2 All E.R. 487, affirming an order of SELLERS, J., dated Dec. 19, 1955, and reported [1956] 1 All E.R. 229, dismissing an action for damages for breach of contract brought by the appellant against the respondents, K. C. Sethia (1944), Ltd., for failure to deliver five hundred thousand new B. twills September/October, 1948, c.i.f. Genoa under an agreement made in September, 1948. The facts appear in the opinion of VISCOUNT SIMONDS.

Neil Lawson, Q.C., E. J. Cohn and *L. J. Blom-Cooper* for the appellant.

A. A. Mocatta, Q.C., R. W. Vick and *B. P. F. Kenworthy-Browne* for the respondents.

The House took time for consideration.

Oct. 21. The following opinions were read.

VISCOUNT SIMONDS: My Lords, the appellant, Polissino Regazzoni, who resides in Switzerland, brought the action out of which this appeal arises against K. C. Sethia (1944), Ltd., an English company, claiming damages for breach of contract. He alleged that the respondents had agreed to sell and deliver to him five hundred thousand jute bags of the quality and standard known in the trade as new B. twills and that they had wrongfully repudiated the agreement. The respondents defended the action on numerous grounds, with only one of which your Lordships are now concerned, viz., that the contract, if any, was to the appellant's knowledge an illegal contract and/or was void and unenforceable in that it had for its purpose an object which was illegal and/or contrary to public policy, namely, the taking and shipment of jute goods from India when the ultimate destination was the Union of South Africa in breach of a certain Act of the Indian Parliament and Regulations made thereunder.

The Act in question was the Sea Customs Act, 1878, which (as modified up to Dec. 1, 1950) provided by s. 19 that the Central Government might from time to time, by notification in the Official Gazette, prohibit or restrict the bringing or taking by sea or by land goods of any specified description into or out of the states across any customs frontier as defined by the Central Government, and by s. 134 that the Central Government might from time to time, by similar notification, prohibit at any specified port or at all ports, the trans-shipment of any specified class of goods, generally or when destined for any specified ports. By s. 138 of the Act provision was made for security for the due shipment, export and landing of goods, and by s. 167 for the punishment of offences. The prescribed penalties were severe. It was provided that, if any goods, the importation or exportation of which was prohibited or restricted by or under the Act should be imported into or exported from India contrary to such prohibition or restriction, or if any attempt should be made so to import or export any such goods, the goods themselves should be liable to confiscation and any person concerned in any such offence should be liable to a penalty not exceeding three times the value of the goods or not exceeding 1,000 rupees. In exercise of the powers conferred by this Act on July 17, 1946, the Central Government of India duly made an order prohibiting the taking

> " by sea or by land out of British India of goods from whatever place arriving which are destined for any port or place in the Union of South Africa or in respect of which the Chief Customs Officer is satisfied that the goods although destined for a port or place outside the Union of South Africa are intended to be taken to the Union of South Africa."

I do not think it necessary to state at length the facts of the case. They have been found by SELLERS, J., and his findings were accepted by the Court of Appeal. No other conclusion was, in my opinion, possible than that (in the words of the learned judge) ([1956] 1 All E.R. at p. 232):

> " Both parties . . . contemplated and intended that the contract goods should be shipped from India and be made available in Genoa so that the [appellant] might make a re-sale or fulfil a bargain of re-sale to the South African buying agency."

A Nor is it to be doubted that both parties were well aware of the restrictions imposed by the order of July 17, 1946. A strenuous attempt was made to persuade your Lordships that the contract did not infringe Indian law, and this was vouched by a Mr. Nissim whose qualification to give expert evidence was not challenged. But I must say with all respect to him that I find his testimony confused and unconvincing. It may well be that an Indian shipper would not B be subject to any penalty if he could prove that he was unaware of the ultimate destination of the goods. But it is not possible for parties whose common intention it is to procure the shipment of goods from India directly or indirectly to the Union of South Africa to plead the innocence of the transaction on the ground that the Indian shipper may be deceived or even that the chief customs officer may be satisfied (contrary to the fact) that the ultimate destination is C not the Union of South Africa. On the contrary, it must be assumed that the chief customs officer would not be so satisfied; if so the shipment inevitably falls within the prohibition and could only be carried out in violation of Indian law.

The question then arises—and it is, as I say, the only question for your Lordships' consideration—whether the respondents were justified in repudiating the D contract. They claim to be justified on the ground that I have already stated. Their broad proposition is that, whether or not the proper law of the contract is English law, an English court will not enforce a contract or award damages for its breach, if its performance will involve the doing of an act in a foreign and friendly state which violates the law of that state. For this they cite the authority of the well-known case of *Foster* v. *Driscoll* (1) ([1929] 1 K.B. 470), and E much of the debate in this House has been whether that case was rightly decided and, if so, whether it is distinguishable from the present case. The appellant contends that it was not rightly decided and further invokes a familiar principle which he states in these wide but questionable terms " An English court will not have regard to a foreign law of a penal, revenue, or political character " and claims that the Indian law here in question is of such a character.

F My Lords, in the consideration of this matter I deem it of the utmost importance to bear in mind that we are not here concerned with a suit by a foreign state to enforce its laws. The recent case in this House of *Government of India* v. *Taylor* (2) ([1955] 1 All E.R. 292) shows beyond all doubt that an English court will not enforce the penal or revenue laws of another country at the suit G of that country. That proposition was there exhaustively examined and nothing remains to be said about it except that there is still a question how far, if at all, the doctrine extends to laws which are described as having a " political " or " public " character. It is clear at least, as DENNING, L.J., said in this case that ([1956] 2 All E.R. at p. 490): " These courts do not sit to collect taxes for another country or to inflict punishments for it . . ." But, as I say, we are not H concerned with such a case, but with a very different question, viz., whether, in a suit between private persons, the court will enforce a contract which involves the doing in a foreign country of an act which is illegal by, and violates, the law of that country. When I say " foreign country " I mean a foreign and friendly country and will not repeat the phrase. In the statement of the question I call particular attention to the words " the doing in a foreign country ", for it may I well be that different considerations will arise and a different conclusion will be reached if the law of the contract is English and the contract can be wholly performed in England or at least in some other country than that whose law makes the act illegal (see *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Akt. & Hungarian General Creditbank* (3), [1939] 3 All E.R. 38). There are points at which the two questions appear to touch each other and sometimes the one proposition has been treated as an exception to the other. But there is, I think, a fundamental difference. It can hardly be regarded as a matter of comity that the courts of this country will not entertain a suit by a foreign state to enforce its revenue laws. It is, on the other hand, nothing else than comity which has influenced our courts to refuse as a matter of public policy to enforce, or to award damages for the breach of, a contract which involves the violation of foreign law on foreign soil, and it is the limits of this principle that we have to examine. If the principle is, as I think it clearly is, based on public policy, your Lordships will not hesitate, while disclaiming any intention to create any new head of public policy, to apply an old principle to new circumstances.

It will be observed that I have said that the appellant's contention is that the English courts will not pay regard to the penal, revenue or political laws of a foreign state, not merely that they will not enforce such laws at the suit of a foreign state. If he is right, then *Foster* v. *Driscoll* (1) was wrongly decided and nothing stands in the way of the success of this appeal except the counter argument that the Indian law with which we are concerned does not fall within this category. But before examining the cases in which the question has been the enforcement of a contract involving the violation of a foreign law it is, perhaps, desirable to refer to the analogous cases in which contracts involving the violation of English law have been considered. I say " analogous cases " because here too public policy is involved. Whether the illegality be robbery on Hounslow Heath, or smuggling goods into England contrary to our law (see *Biggs* v. *Lawrence* (4) (1789), 3 Term Rep. 454), or the hiring of a brougham to a prostitute for the purpose of her trade, a party cannot recover in a court of justice on a contract so tainted. Here the only question will be whether the party suing is to be regarded as a sharer in the transaction (see, e.g., *Hodgson* v. *Temple* (5) (1813), 5 Taunt. 181) and refinements have been introduced into this branch of the law which may one day merit examination.

Just as public policy avoids contracts which offend against our own law, so it will avoid at least some contracts which violate the laws of a foreign state, and it will do so because public policy demands that deference to international comity. The question is what contracts? ". . . it was contrary to the law of nations . . ." said Best, C.J., in *De Wutz* v. *Hendricks* (6) ((1824), 2 Bing. 314 at p. 315):

> " for persons in England to enter into engagements to raise money to support the subjects of a government in amity with our own, in hostilities against their government . . . no right of action could arise out of such a transaction."

More than a hundred years later in *De Beéche* v. *South American Stores, Ltd. & Chilian Stores, Ltd.* (7) ([1935] A.C. 148) it was said in this House (ibid., at p. 156):

> " . . . it cannot be controverted that the law of this country will not compel the fulfilment of an obligation whose performance involves the doing in a foreign country of something which the supervenient law of that country has rendered it illegal to do."

I make two observations on this citation; first the case is a fortiori if the illegality is not supervenient but, as in the case under appeal, existent and known at the time of the contract; secondly—and I say this in deference to an argument that was vigorously addressed to us—it would, as Scrutton, L.J., said in *Aksionairnoye Obschestvo A.M. Luther* v. *James Sagor & Co.* (8) ([1921] 3 K.B. 532 at p. 558) be a serious breach of international comity, if a state is recognised as a sovereign independent state, to postulate that its legislation is contrary to essential principles of justice and morality. Your Lordships were, in effect, invited to say that the relevant Indian legislation was of such a character. I can only say that there could be no possible justification for such a view, however hardly the Act may bear on the Union of South Africa.

It is time then to turn to those cases in which an exception has been made to the principle thus authoritatively stated. In doing so, I repeat that, the principle being based on public policy, exceptions to it must be similarly based. It would, therefore, not be surprising if a contract in one age falls within the proposition, in another without it. This observation has particular relevance to the first case that I shall cite. In *Boucher* v. *Lawson* (9) ((1736), Lee *temp.* Hard. 85), the trade of exporting gold from Portugal being prohibited by the law of that country, Lord Hardwicke, L.C.J., nevertheless upheld a contract which involved the violation of that law, observing that (ibid., at p. 89):

> ". . . if it should be laid down, that because goods are prohibited to be exported by the laws of any foreign country from whence they are brought, therefore the parties should have no remedy or action here, it would cut off all benefit of such trade from this kingdom, which would be of very bad consequence to the principal and most beneficial branches of our trade; nor does it ever seem to have been admitted."

I must admit to some doubts whether, if this case had come before the court two hundred years later, so robust an assertion in favour of national interest to the prejudice of international comity would have been made. But at any rate in what might be regarded as purely revenue laws the same idea persisted. Thus, in *Pellecat* v. *Angell* (10) ((1835), 2 Cr. M. & R. 311), where it was held that a foreigner, selling and delivering goods abroad to a British subject and knowing at the time of sale and delivery that the purchaser intended to smuggle them into England, was not debarred from recovering the price of the goods, it was said by Lord Abinger, C.B. (ibid., at p. 313), that it would be most unfortunate if it were so in this country "where, for many years, a most extensive foreign trade was carried on directly in contravention of the fiscal laws of several other states". The smuggling was in this case a breach of English law but it illustrates the view that was then entertained.

So, too, in *Emperor of Austria* v. *Day & Kossuth* (11) ((1861), 3 De G.F. & J. 217), Lord Campbell, L.C., after what may be regarded as a valuable exposition of the general principle, said (ibid., at p. 241):

> "A more specious objection was rested on the class of cases in which it has been held that we take no notice of the 'revenue laws' of foreign countries, so that an injunction would certainly be refused to a foreign sovereign who should apply for one to prevent the smuggling of English manufactures into his dominions to the grievous loss of his fisc. But, although from the comity of nations, the rule has been to pay respect to the laws of foreign countries, yet, for the general benefit of free trade, 'revenue laws' have always been made the exception; and this may be an example of an exception proving the rule."

In the case before him, the Lord Chancellor was dealing with a claim by the foreign sovereign himself and in the earlier part of the passage that I have cited refers specifically to such a claim, but in the latter part his language is more comprehensive and clearly refers to the cases that I have cited, and particularly also to *Holman* v. *Johnson* (12) ((1775), 1 Cowp. 341) and the observation of Lord Mansfield often repeated and often criticised (ibid., at p. 343) ". . . no country ever takes notice of the revenue laws of another". One more example I will give because it was much relied on by counsel for the appellant. In *Sharp* v. *Taylor* (13) ((1849), 2 Ph. 801), Lord Cottenham, L.C., said (ibid., at p. 816):

> "Will the courts of this country refuse to administer justice between joint importers of any article of commerce upon proof that, in the production or importation of such article, some fiscal law of the country of produce had been violated?"

Here, my Lords, was a formidable line of authority when, in 1920, *Ralli Brothers* v. *Compañia Naviera Sota y Aznar* (14) ([1920] 2 K.B. 287) came before the Court of Appeal. In that case the contract in suit was governed by English law, but it required the performance in Spain of an act illegal by Spanish law, and it was held that for that reason it could not be enforced. I will cite one passage only from the judgment of Scrutton, L.J. (ibid., at p. 304):

> ". . . where a contract requires an act to be done in a foreign country, it is, in the absence of very special circumstances, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that country. This country should not in my opinion assist or sanction the breach of the laws of other independent states."

In the *Ralli Brothers* case (14) the relevant law was not a revenue law, and I am content to assume that Scrutton, L.J., might have qualified his statement if he had had such a law in mind. But I venture to return to what I said earlier in this opinion. It does not follow from the fact that today the court will not enforce a revenue law at the suit of a foreign state that today it will enforce a contract which requires the doing of an act in a foreign country which violates the revenue law of that country. The two things are not complementary or co-extensive. This may be seen if for revenue law penal law is substituted. For an English court will not enforce a penal law at the suit of a foreign state, yet it would be surprising if it would enforce a contract which required the commission of a crime in that state. It is sufficient, however, for the purposes of the present appeal to say that, whether or not an exception must still be made in regard to the breach of a revenue law in deference to old authority, there is no ground for making an exception in regard to any other law. I should, myself, have said—and this is, I think, the only point on which I do not agree with the Court of Appeal—that the present case was precisely covered by the decision in *Ralli Brothers* (14). For when the fact is found that the very thing which the parties intended to do was to export the jute bags from India in order that they might go via Genoa to the Union of South Africa, it appears to me irrelevant that, on the face of the documents, that wrongful intention was not disclosed. But, whether this is so or not, it is clearly covered by *Foster* v. *Driscoll* (1), a decision the correctness of which is not to be doubted. The distinctive feature of the case was that Scrutton, L.J., thought that the contract there in question could be carried out legally and for that reason, differing from Lawrence and Sankey, L.JJ., held that it was not invalid. The principle of the decision in *Ralli Brothers* (14) was emphatically reasserted and the apparent innocence of the documents was disregarded, the guilty intention being proved ab extra. So, here, it has been conclusively found that the common intention of the parties was to violate the law of India, and it is of no consequence that the documents did not disclose their intention. I ought not to part from the case without noting that Sankey, L.J., observed that the cases relating to the breach of a revenue law were not germane to the issue. Nor are they germane to this appeal. Whether they are still to be regarded as a binding authority is a question that must await determination.

The appeal should, in my opinion, be dismissed with costs.

LORD REID: My Lords, in September, 1948, a contract was made under which the respondents agreed to sell to the appellant five hundred thousand B. twills (a kind of jute bag) to be shipped September or October c.i.f. Genoa at a price of 248 shillings per hundred. The appellant now sues for damages for breach of contract. Admittedly the proper law of the contract is English law. The respondents' defence is that the contract is unenforceable because of the facts known to both parties and their intentions when the contract was made.

I shall not detain your Lordships by examining the evidence because I agree with what my noble and learned friend, LORD SIMONDS, has said about it.

The facts which appear to me to be material are (i) that both parties knew that it was impossible to obtain so large a quantity of B. twills for early shipment from any source other than India; (ii) that, to the knowledge of the respondents, the appellant intended to sell the goods for shipment to the Union of South Africa; (iii) that both parties knew that the law of India prohibited the export from India of goods destined to South Africa directly or indirectly; and (iv) that the respondents intended, and the appellant knew that they intended, to evade the Indian prohibition by finding a shipper in India who would not ask inconvenient questions about the destination of the goods and who would be able to get the goods out of India. It appears that there was great demand for B. twills in South Africa and that large profits could be made by evading the Indian prohibition and finding means to get these goods from India to South Africa.

To my mind, the question whether this contract is enforceable by English courts is not, properly speaking, a question of international law. The real question is one of public policy in English law; but, in considering this question, we must have in mind the background of international law and international relationships often referred to as the comity of nations. This is not a case of a contract being made in good faith but one party thereafter finding that he cannot perform his part of the contract without committing a breach of foreign law in the territory of the foreign country. If this contract is held to be unenforceable it should, in my opinion, be because from the beginning the contract was tainted so that the courts of this country will not assist either party to enforce it. I do not wish to express any opinion about a case where parties agree to deal with goods which they both know have already been smuggled out of a foreign country, or about a case where the seller knows that the buyer intends to use the goods for an illegal purpose or to smuggle them into a foreign country. Such cases may raise difficult questions. The crucial fact in this case appears to me to be that both parties knew that the contract could not be performed without the respondents' procuring a breach of the law of India within the territory of that country. On that question I do not get very much assistance from the older cases. Most of them do not deal with that point and, further, it must, I think, be borne in mind that they date from a time when international relationships were somewhat different and when theories of political economy now outmoded were generally accepted. Many dealt with revenue laws or penal laws which have always been regarded as being in a special position, and I do not wish on this occasion to say more than that probably some re-examination of some of these cases may in future be necessary. The Indian law prohibiting exports to South Africa does not appear to me to be a revenue or penal law any more than was the law of exchange control considered by this House in *Kahler* v. *Midland Bank, Ltd.* (15) ([1949] 2 All E.R. 621). Further, this case does not, in my view, involve the enforcement of Indian law in England. In fact, no breach of Indian law in the execution of this contract was ever committed or attempted because the contract came to an end by its repudiation by the respondents within a few days after it was made.

The only recent authority which is directly in point is *Foster* v. *Driscoll* (1) ([1929] 1 K.B. 470). There, SCRUTTON, L.J., dissented because he took a different view of the facts; if he had held that performance of the contract necessarily involved a breach of American law, I think that he would have agreed with the majority. He said (ibid., at p. 496):

> "I have no doubt that if seller and buyer agreed to ship the whisky into the United States contrary to the laws of that country the contract would

> not be enforced here: *Ralli Brothers* v. *Compañia Naviera Sota y Aznar* (14) ([1920] 2 K.B. 287), not because it was illegal here but as a matter of public policy based on international comity." A

He then cited (ibid., at p. 497) with approval DICEY'S CONFLICT OF LAWS (4th Edn.), p. 620:

> "It must, however, be noted that if a contract is an English contract, it will only be held invalid on account of illegality if it actually necessitates the performance in a foreign and friendly country of some act which is illegal by the law of such country." B

And he also quoted with approval a passage from the judgment of BLACKBURN, J., in *Waugh* v. *Morris* (16) ((1873), L.R. 8 Q.B. 202 at p. 208): C

> "We quite agree, that, where a contract is to do a thing which cannot be performed without a violation of the law it is void, whether the parties knew the law or not. But we think, that in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law; and, if this be so, the knowledge of what the law is becomes of great importance." D

By "a thing which cannot be performed without a violation of the law" I think that BLACKBURN, J., meant a thing which the contract expressly or by clear implication requires to be done. This contract does not require the seller to obtain the goods from India; it is only after investigation of the facts that it appears that he could not have got them anywhere else. And this contract E does not disclose the buyer's intention to send the goods to South Africa. On the face of it this contract could be performed without a breach of the laws of any country. I shall also quote from what LAWRENCE, L.J., said in *Foster's* case (1) ([1929] 1 K.B. at p. 510):

> "On principle however I am clearly of opinion that a partnership formed F for the main purpose of deriving profit from the commission of a criminal offence in a foreign and friendly country is illegal, even although the parties have not succeeded in carrying out their enterprise, and no such criminal offence has in fact been committed; and none the less so because the parties may have contemplated that if they could not successfully arrange to commit the offence themselves they would instigate or aid and abet some G other person to commit it."

These passages cover the present case and I agree with them.

Finally, it was argued that, even if there be a general rule that our courts will take notice of foreign laws so that agreements to break them are unenforceable, that rule must be subject to exceptions, and this Indian law is one of which we ought not to take notice. It may be that there are exceptions. I can H imagine a foreign law involving persecution of such a character that we would regard an agreement to break it as meritorious. But this Indian law is very far removed from anything of that kind. It was argued that this prohibition of exports to South Africa was a hostile act against a Commonwealth country with which we have close relations, that such a prohibition is contrary to international usage, and that we cannot recognise it without taking sides in the I dispute between India and South Africa.

My Lords, it is quite impossible for a court in this country to set itself up as a judge of the rights and wrongs of a controversy between two friendly countries, we cannot judge the motives or the justifications of governments of other countries in these matters, and, if we tried to do so, the consequences might seriously prejudice international relations. By recognising this Indian law so that an agreement which involves a breach of that law within Indian territory is unenforceable we express no opinion whatever either favourable or adverse as to the policy which caused its enactment.

In my judgment, this appeal should be dismissed.

LORD COHEN: My Lords, I concur.

LORD KEITH OF AVONHOLM: My Lords, on the only question of fact in this case I agree that the contracting parties knew that the contract could only be carried out and intended that it should be carried out in circumstances which, if all the facts were known to the Indian shipper, would be a violation of Indian law. It is accepted that the proper law of the contract is English law and the only other question is whether the contract is one which the English courts will enforce. I am clear that it is not. The case is within the ratio of the decision in *Foster* v. *Driscoll* (1) ([1929] 1 K.B. 470), and that case was, in my opinion, rightly decided. I would say a few words about *Foster* v. *Driscoll* (1). In that case recourse was had to the courts in the form of three separate actions involving rights and liabilities inter se of the members of an English partnership or joint adventure. Owing to failure among the partners to achieve the objects of the joint adventure certain of the members brought actions to rescind, or to enforce against the others, liabilities incurred under their agreement, including certain bills of exchange drawn by some and accepted by others. The decision of the court was that the agreement constituted an illegal joint adventure, being designed to run whisky into the U.S.A. during a period of prohibition in that country. LAWRENCE, L.J., stated the matter thus (ibid., at p. 510):

> " On principle however I am clearly of opinion that a partnership formed for the main purpose of deriving profit from the commission of a criminal offence in a foreign and friendly country is illegal, even although the parties have not succeeded in carrying out their enterprise, and no such criminal offence has in fact been committed; and none the less so because the parties may have contemplated that if they could not successfully arrange to commit the offence themselves they would instigate or aid and abet some other person to commit it. The ground upon which I rest my judgment that such a partnership is illegal is that its recognition by our courts would furnish a just cause for complaint by the United States government against our government (of which the partners are subjects), and would be contrary to our obligation of international comity as now understood and recognised, and therefore would offend against our notions of public morality."

In the result the court refused to entertain the suits between the various partners and all the actions were dismissed. No point can be made of the fact that the decision related to an illegal partnership. It was necessary so to find because the court was concerned with disputes within the partnership. It was for that reason that Lindsay, for instance, one of the co-partners, endeavoured unsuccessfully to make out that his share in the transaction was merely as an independent seller of whisky in the ordinary course of trade to certain parties to the agreement, in which case other considerations might have arisen. If the contemplated object of the adventure had been achieved and the partners had found themselves forced to sue the purchaser of the whisky for the price in the English courts, it would have been equally impossible for them to succeed against a plea of illegality, even assuming delivery had taken place on the high seas or somewhere outwith the territory of the United States.

In the present case I see no escape from the view that to recognise the contract between the appellant and the respondents as an enforceable contract would give a just cause for complaint by the Government of India and would be contrary to our conceptions of international comity. On grounds of public policy, therefore, this is a contract which our courts ought not to recognise. It is said that the Indian legislation is discriminatory legislation against a country which is a member of the Commonwealth and with which this country is on friendly terms. But that, in my opinion, is irrelevant. The English courts cannot be called on to adjudicate on political issues between India and South Africa. The Indian law is not a law repugnant to English conceptions of what may be regarded as within the ordinary field of legislation or administrative order even in this country. It is the illegality under the foreign law that is to be considered and not the effect of the foreign law on another country.

I have not found it necessary to refer to a number of cases which were much canvassed in the course of the hearing. Apart from those where there were clear violations of English law, as in *Biggs* v. *Lawrence* (4) ((1789), 3 Term Rep. 454) and *De Wutz* v. *Hendricks* (6) ((1824), 2 Bing. 314), many of these cases would seem to fall broadly into two categories: (i) cases where a vendor knew or suspected that goods sold and delivered abroad were to be smuggled by the purchaser into England in breach of her customs laws (e.g., *Holman* v. *Johnson* (12) ((1775), 1 Cowp. 341); *Pellecat* v. *Angell* (10) ((1835), 2 Cr. M. & R. 311)); (ii) cases where goods or moneys had been acquired and brought to this country in breach of some foreign law (*Boucher* v. *Lawson* (9) ((1734), Lee *temp.* Hard. 85); *Sharp* v. *Taylor* (13) ((1848), 2 Ph. 801)). I agree with the view entertained by some of your Lordships and by all the lords justices in the Court of Appeal that the proposition that " no country ever takes notice of the revenue laws of another " is too widely expressed. It may require in some other case fuller examination and elucidation. It was but lightly touched on in *Government of India* v. *Taylor* (2) ([1955] 1 All E.R. 292). But it is not a proposition that can be invoked in the circumstances of this case. I would reserve my opinion whether, apart from any such supposed rule of law, some of these decisions may not be supported on the view that the transaction in question was unaffected by the illegality, either because in one category of case the transaction was finished and the vendor had no concern, or reason to be concerned, with the intentions of the purchaser, or because in the other category the illegality had been exhausted and new rights and liabilities had emerged which did not call for any recognition of the illegality.

I would dismiss the appeal.

LORD SOMERVELL OF HARROW: My Lords, a foreign state or prosecuting authority cannot in our courts enforce its criminal law.

> " . . . crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the state government, or of some one representing the public, are local in this sense, that they are only cognisable and punishable in the country where they were committed "

(*Huntington* v. *Attrill* (17), [1893] A.C. 150 at p. 156.) In the result there are treaties of extradition. At the other end of the legal scale our courts, in a dispute between contracting parties, will enforce foreign law of contract if, according to the applicable rules, it is the proper law by which to determine the issues raised. The fact that the contract was made abroad and to be performed abroad does not affect the jurisdiction. Although many revenue laws do not come within the words from *Attrill's* case (17) cited above, they are unenforceable in our courts (*Government of India* v. *Taylor* (2), [1955] 1 All E.R. 292).

The principles stated above do not, in themselves, solve or throw any real light on the present problem, which may be stated as follows:—Will our courts enforce a contract if its performance involves a breach of foreign criminal or " public " law? If the answer is " No ", one has to consider the degree of involvement that will produce unenforceability. It seems to me impossible to suggest that our courts would enforce an agreement to commit in country A a crime such as murder, arson or burglary. Is there any justification for drawing a line between what are evils generally and acts prohibited by the foreign state no doubt because they are regarded as local evils?

The statements in the old cases support the view that it is the illegality under the foreign law which is the test and one does not have to distinguish or attempt to distinguish between what is " wrong " from what is prohibited. In *Holman* v. *Johnson* (12) ((1775), 1 Cowp. 341), tea had been sold and delivered in Dunkirk, the seller knowing that the buyer intended to smuggle it into England. The proper law of the contract was the law of Dunkirk, and the illegality had to be considered in the first place under that law. LORD MANSFIELD, in considering this point, held that the contract was valid not on the ground that illegality under foreign law is never relevant but on the ground that no country ever takes notice of the *revenue* (my italics) laws of another country. He was clearly directing his mind to the law in force in Dunkirk, as the revenue law in question was the law of England. He implies that the law of one country would take notice of illegalities arising under the laws of another country other than revenue laws. The principle appears clearly from a paragraph in LORD CAMPBELL, L.C.'s judgment in *Emperor of Austria* v. *Day & Kossuth* (11) ((1861), 3 De G.F. & J. 217 at p. 241):

> " A more specious objection was rested on the class of cases in which it has been held that we take no notice of the ' revenue laws ' of foreign countries, so that an injunction would certainly be refused to a foreign sovereign who should apply for one to prevent the smuggling of English manufactures into his dominions to the grievous loss of his fisc. But, although from the comity of nations, the rule has been to pay respect to the laws of foreign countries, yet, for the general benefit of free trade, ' revenue laws ' have always been made the exception; and this may be an example of an exception proving the rule."

That is the principle rightly applied in *Foster* v. *Driscoll* (1) ([1929] 1 K.B. 470). It is a principle of our municipal law. Its aim is no doubt to preserve comity with other friendly states, but it is in no sense dependent on proof of universality or reciprocity.

In the present case, for reasons which have been stated by your Lordships, the performance of the contract to the knowledge and intention of both parties involved a breach of Indian law. Prima facie that is sufficient to make it unenforceable in our courts. Your Lordships were invited to make an exception to the principle on the ground that the law in question was directed against the Union of South Africa arising out of a dispute between the two states. I do not think this would justify taking the case out of the rule.

The statements that in this field one country takes no notice of the revenue laws of another seems to have been based on the principle that smuggling and freedom "gang thegither", and had its high-water mark in *Boucher* v. *Lawson* (9) ((1736), Lee *temp.* Hard. 85). SCRUTTON, L.J., in *Ralli Brothers* v. *Compañia Naviera Sota y Aznar* (14) ([1920] 2 K.B. 287 at p. 300) reserved the issue for consideration should it arise. It was submitted that the prohibition in the present case of export to a particular destination was a revenue law and one can imagine such a prohibition being a revenue law. On the evidence in the present case it would seem not to fall within the ordinary meaning of the phrase, but in any event I myself think that the courts of this country should not today enforce a contract to smuggle goods into or out of a foreign and friendly state. There may, of course, be laws the enforcement of which would be against " morals ". In such a case an exception might be made to the general principle. The point can be dealt with if it arises.

In conclusion, I would like to say a word as to the scope of the word " involves " in my statement of the question raised in the present appeal. One has at one end of the scale a contract which, on its face, necessitates a breach of the foreign law: a contract to deliver prohibited goods in the territory. At the other end one may have a contract of sale legal on its face at a normal market price, the vendor suspecting or knowing that the buyer intends to use the goods for an illegal purpose in a foreign country. The same problem arises when a contract is said to be unenforceable as immoral or illegal under our own law (*Pearce* v. *Brooks* (18) ((1866), L.R. 1 Exch. 213). In *Foster* v. *Driscoll* (1), the majority found that the evidence established a joint enterprise to import whisky into the United States. " It is not a case " said SANKEY, L.J. ([1929] 1 K.B. at p. 515), " where one or other of them merely knew that the whisky was going to the States ". I am never very clear as to the effect of " mere " and " merely " though I may have used one or other myself. If the question is one of illegality under our law the contract is unenforceable if the defendant knew that the goods or money or other consideration were to be used for a purpose immoral or illegal under our law. It would be convenient if the same principle was applied, but it does not arise directly in this case.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Buckeridge & Braune* (for the appellant); *Stuart Hunt & Co.* (for the respondents).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

PRACTICE NOTE.

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

Divorce—Fees—Court fees—Impressed stamps.
Probate—Fees—Court fees—Impressed stamps.

On and after Oct. 1, 1957, all probate and divorce fees in the Principal Probate Registry and the Divorce Registry will be payable by impressed judicature fee stamps.

The use of adhesive stamps in payment of fees will be discontinued.

B. LONG,
Senior Registrar.

August 26, 1957.

MACFISHERIES (WHOLESALE & RETAIL), LTD. *v.* COVENTRY CORPORATION.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Donovan and Havers, JJ.), October 18, 1957.]

Food and Drugs—Food hygiene—Contamination—Protection of food from risk of contamination—Whether enactment extends to contamination not injurious to public health—Food and Drugs Act, 1955 (4 *&* 5 *Eliz.* 2 *c.* 16), *s.* 13—*Food Hygiene Regulations,* 1955 (*S.I.* 1955 *No.* 1906), *reg.* 8.

Statutory Instrument—Construction—Purpose of regulations determined by regard to purpose of statutory enactment under which regulation was made—Statutory power to make regulations for the protection of the public health—Regulation prohibiting the placing of food so as to involve risk of contamination—Whether contamination included contamination of such a nature as not to be injurious to public health—Food and Drugs Act, 1955 (4 *&* 5 *Eliz.* 2 *c.* 16), *s.* 13—*Food Hygiene Regulations,* 1955 (*S.I.* 1955 *No.* 1906), *reg.* 8.

Section 13 of the Food and Drugs Act, 1955, authorises the making of regulations " for securing the observance of sanitary and cleanly conditions and practices in connection with . . . (b) the . . . exposure for sale . . . of food intended for . . . human consumption, or otherwise for the protection of the public health . . . " Regulation 8 of the Food Hygiene Regulations, 1955, which were made pursuant to s. 13, provides that " a person who engages in the handling of food . . . (a) shall not so place the food, or permit it to be so placed, as to involve any risk of contamination."

A company carrying on the business of retail fishmongers permitted fish and other food to be exposed for sale in a shop that was a new shop designed and constructed in a most up-to-date manner. There was risk of contamination to the food, e.g., from customers in the shop, but the risk was only of contamination which was not of such a nature as to be injurious to health.

Held: the company had not committed an offence against reg. 8 of the Food Hygiene Regulations, 1955, because the object of s. 13 of the Food and Drugs Act, 1955, was the protection of the public health, and therefore the words " risk of contamination " in reg. 8 must be construed as limited to risk of contamination injurious to public health.

Appeal allowed.

[**Editorial Note.** Prima facie the proper mode of construing subordinate legislation is to apply the same interpretation to terms used in it as is applied to the like terms in the statute under which the subordinate legislation is made; see per GROVE, J., in *Blashill* v. *Chambers* (1884), 14 Q.B.D. at p. 485, and generally 1 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 12. The present case illustrates the application of a like rule in determining the purpose of a regulation, and thus in interpreting it.

As to hygiene requirements of persons handling food, see 17 HALSBURY'S LAWS (3rd Edn.) 512, para. 952.

For the Food and Drugs Act, 1955, s. 13, see 35 HALSBURY'S STATUTES (2nd Edn.) 111, and for the Food Hygiene Regulations, 1955, reg. 8, see 9 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 231.]

Case Stated.

This was a Case Stated by the justices for the City of Coventry in respect of their adjudication as a magistrates' court sitting at Coventry on Apr. 17, 1957.

A The respondents, the Corporation of the City of Coventry, preferred eight informations against the appellants (herein referred to as "the defendant company") alleging that, contrary to reg. 8 (a) and reg. 32 (3) of the Food Hygiene Regulations, 1955, made under s. 13 and s. 123 of the Food and Drugs Act, 1955, the defendant company on Feb. 1, 1957, at its shop in the Precinct in the City of Coventry being a person who engages in the handling of food did B permit food to be so placed as to involve the risk of contamination. The particulars of the food so placed were that on the main counter of the shop there were permitted to be placed uncovered fishcakes, uncovered cured fish, uncovered wet fish and uncovered crustacea; that on a food counter sited against the side wall on the public side of the counter there were permitted to be placed uncovered fishcakes, uncovered sausage and uncovered crustacea; and that in a C part of the display window to which the public had access there were permitted to be placed uncovered wet fish. The following facts were found.

The defendant company was engaged in the handling of food. In December, 1955, the defendant company had opened a new shop in the Precinct, which was the new main shopping parade in the reconstructed centre of the city. The D defendant company had spared no expense on equipment and fittings, which alone cost £8,000. The shop was a closed fronted shop and was one of the most up to date of its kind in the country, and in designing and constructing the premises the defendant company had acted in the best of good faith, adopting methods which in their judgment and experience were best suited to keeping fish fresh and to a shop of this description. The interior of the shop was shown E in photographs attached to the Case. On Feb. 1, 1957, many varieties of wet, cured and shell fish and sausages were displayed in open plastic trays on the two tiers forming the main counter extending along the whole length of the shop, on the shop window and on the shelf affixed to the wall on the customers' side of the counter. For the purpose of sale a selection of fish was put on view to prospective customers and comparatively small quantities were exposed in the F trays at any one time. As this was a busy shop the food was not normally so exposed for more than half to three quarters of an hour before it was sold, the trays being refilled by bulk supplies kept fresh and cool in airy conditions at the rear of the shop.

G The justices found that the defendant company while engaged in the handling of food failed to take all such steps as were reasonably necessary to protect the food which was the subject of the informations from the risk of the contamination that is referred to in para. (ii), post and that the defendant company permitted the food to be so placed as to involve the risk of the contamination referred to in para. (ii), post. They further found—(i) on Feb. 1, 1957, the clothing of the customers when at or moving along the front of the main counter could come in H contact with the food displayed, particularly when a purchase was made and the arm of the customer was extended over the food to the shop assistant at the rear of the main counter for the purpose of receiving the purchase, handing over the money or receiving change. These actions could, and on a number of occasions did, carry the loose clothing of the customer against the food and cause bags looped over the arm or rested on the basket rail in front of the main counter, I to come in contact with the food. Customers and children could touch the exposed food either accidentally or by way of appraising the food or, in the case of children, mischievously or out of curiosity. The position with regard to the food on the other counters and the glass shelves was the same, except that the shop assistants did not serve from the rear. The faces of small children were level with and close to the exposed food. Customers and assistants spoke over, and might have sneezed or coughed over, the exposed food and some of them might have been carriers of infectious organisms. (ii) By reason of the circumstances set out previously in para. (i) there was a risk of contamination but, if such contamination had in fact occurred, it was not of such a nature as to be injurious to health.

The defendant company contended (a) that the risk of contamination referred to in reg. 8 (a) of the Food Hygiene Regulations, 1955, was a risk of such contamination as was injurious to health and that unless such a risk of contamination was proved the defendant company was not guilty of the offences charged; (b) that para. (a) of reg. 8 was governed by the preceding words of the regulation and that an offence was committed only if it was proved both that there was a failure to take all such steps as might be reasonably necessary to protect the food from risk of contamination and that the food was so placed as to involve such risk, and (c) that there was no evidence to support a finding that the defendant company had failed to take all such steps as were reasonably necessary to protect the food from contamination. The corporation contended (a) that under reg. 8 the prosecution had to prove no more than a risk of contamination but did not have to prove actual contamination or that such contamination, if it did occur, would be injurious to health; (b) that the prosecution did not have to prove that all reasonable steps to prevent a risk of contamination had not been taken but that reg. 8 was absolute in that the person engaged in the handling of food must not place the food so as to involve a risk of contamination; and (c) that there was evidence on which the court could conclude that actual contamination might have ensued.

The justices were of opinion that the risk of contamination referred to in reg. 8 was the risk of any contamination, whether or not it was injurious to health; they considered that the Ministers had power under s. 13 of the Food and Drugs Act, 1955, to make such regulations " as appear to them to be expedient for securing the observance of sanitary and cleanly conditions and practices in connexion with the sale of food . . .", that the Food Hygiene Regulations, 1955, were made for those purposes and that the words " otherwise for the protection of the public health " in s. 13 did not govern the provisions of the regulations. Accordingly they convicted the defendant company of the offences charged.

J. M. G. Griffith-Jones for the defendant company.
Paul Wrightson for the corporation.

LORD GODDARD, C.J.: This is a Case Stated by justices for the City of Coventry, before whom MacFisheries (Wholesale & Retail), Ltd. (herein referred to as the defendant company) were charged on eight informations preferred by the corporation that the defendant company " being a person who engages in the handling of food did permit food to be so placed as to involve the risk of contamination", contrary to reg. 8 (a) and reg. 32 (3) of the Food Hygiene Regulations, 1955. On the facts found by the justices, it seems that the defendant company are the largest fishmongers in Great Britain. They have four hundred and eighteen shops. They serve a million and a quarter customers a week, and they have never had a single complaint for unwholesomeness or improper storing or keeping of fish during the history of the company. They have lately opened in the City of Coventry what looks* to be a remarkably fine and modern fish shop, and on the fittings alone they have spent, so the justices find, a sum of £8,000, and I do not think that anybody can say that they have not taken every precaution to make this shop the most modern and up-to-date shop that can be imagined.

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*See p. 300, letter D, ante; photographs were attached to the Case Stated.

The proceedings were based on reg. 8 of the Food Hygiene Regulations, 1955, which provides: A

> " A person who engages in the handling of food shall while so engaged take all such steps as may be reasonably necessary to protect the food from risk of contamination, and in particular (without prejudice to the generality of the foregoing)—(a) shall not so place the food, or permit it to be so placed, as to involve any risk of contamination; . . ." B

The regulations were made under the Food and Drugs Act, 1955 and, in order to interpret the regulations it is necessary and desirable to have regard to what the statute says. The Ministers make the regulations to carry out the will of Parliament. Two Ministers, the Minister of Health and the Minister of Agriculture, Fisheries and Food, are concerned and s. 13 (1) of the Act of 1955 provides: C

> " The Ministers may make such regulations as appear to them to be expedient for securing the observance of sanitary and cleanly conditions and practices in connection with—(a) the sale of food for human consumption, or (b) the importation, preparation, transport, storage, packaging, wrapping, exposure for sale, service or delivery of food intended for sale or sold for human consumption, or otherwise for the protection of the public health in connexion with the matters aforesaid." D

It is, therefore, quite obvious that the object of the statute, and therefore the object of the regulations, is to procure the protection of the public health. Those words must be kept in mind when one is construing the regulations and when one is coming to a decision on them whether an offence has been committed. E

The justices in this case have obviously given great care and attention to the case. They have stated the Case very fully in a way which enables the court to get a clear view of the reasons which moved the justices to decide as they did. They obviously did not think that it was a serious case because they inflicted only nominal fines. Nevertheless I differ from the justices because they have taken a view of the construction of the section which I do not think is justified, and thus there runs right through their decision, I think, a mistake which is vital. F

I need not read the whole of the facts. If I did, it would show the extreme care the defendant company used to provide a sanitary and up-to-date shop, and I do not hesitate to say that if I had been sitting at first instance I should have come to a different decision from that of the justices. However, that does not matter because if the justices have applied the right tests, this court does not interfere. The question here is whether the justices have applied the proper tests. The justices among other things find and state: G

> " By reason of the circumstances set out in para. 2 (g)* hereof there was a risk of contamination but, if such contamination had in fact occurred, it was not of such a nature as to be injurious to health." H

Later on they say:

> " We were of opinion:—(a) that the risk of contamination referred to in reg. 8 is the risk of any contamination whether or not it is injurious to health." I

Then they ask this court the question:

> " Were we correct in holding that the risk of contamination referred to in the said regulation is a risk of any contamination, whether or not it is injurious to health? "

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*The terms of para. 2 (g) are set out as para. (i) at p. 300, letter H, ante.

The answer to that, in my opinion, is that they were not correct in so holding. For the reasons that I have pointed out it seems to me that the governing consideration in this case is the words of s. 13 of the Food and Drugs Act, 1955, and therefore the whole task here is to see whether there was contamination which was injurious to health. If there was not contamination which was injurious to health, there was no offence. I do not know whether it is possible that you can have an article of food exposed for sale (unless you put it in some hermetically sealed vacuum or compartment) in which there cannot be some contamination. We are told that at various times there are epidemics and that the infection is caught by simply being in a room or a place affected by the epidemic. I do not suppose the wit of man, short of putting things in hermetically sealed compartments, will ever prevent some form of contamination, which means touching the thing in some way to make it injurious. However, what we have to consider is whether this food has been so exposed that there is a risk of contamination injurious to health, and the justices have found that there is not. They thought that whether the risk of contamination was injurious to health or not was immaterial, except, no doubt, for the purpose of penalty. It is, however, the one thing that is really material in the case, and as the justices have found here that any contamination to which this food was exposed in this very modern shop was not so injurious, they ought to have found that no offence was committed. Therefore, I would allow this appeal and quash the convictions.

DONOVAN, J.: I entirely agree, and I add one or two observations of my own merely because of the importance of the matter and in deference to the argument of counsel for the corporation.

Section 13 of the Food and Drugs Act, 1955, makes it clear that all these regulations are made for the purpose of protecting public health. Accordingly, the words " risk of contamination " in reg. 8 of the Food Hygiene Regulations, 1955, ought, in my view, to be construed as risk of such contamination as might be injurious to public health. I agree that the question is not whether it is a risk which has in fact damaged someone's health, since that would be locking the stable door after the horse had bolted, and the regulations have in mind, as counsel says, prevention rather than cure.

On that construction, the question in this case becomes: Was there a risk of contamination here to public health? In para. 2 (h) of the Case the justices find this:

> "By reason of the circumstances set out in para. 2 (g)* hereof there was a risk of contamination but, if such contamination had in fact occurred, it was not of such a nature as to be injurious to health."

Counsel for the corporation argues that we should read that as: in fact the contamination had not been injurious to anybody's health. However, that, as I have said, is not the question which the regulations pose, and in this particular context we are concerned with possibilities rather than with what has in fact happened. So the question is: does this finding not rather mean: this contamination, if any, was not of the kind injurious to public health; it was innocuous contamination, if one may use that term. I think that is what the finding clearly does mean. When the justices talk of the nature of the contamination they are referring to the kind of contamination, and when they say it is not of such a nature, and so on, they are saying it is not of the kind injurious to public health. In other words, to say it was not of such a nature as to be injurious is to say more than that it has not hurt anybody; it is, in effect, to say that it could not hurt anybody.

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* The terms of para. 2 (g) are printed as para. (i) at p. 300, letter H, ante.

Accordingly, on the construction which we are giving to reg. 8 and s. 13 of the Act of 1955, there was no risk of the kind of contamination referred to in reg. 8, and I agree that the appeal should be allowed. Of course, if a state of affairs should arise in any fish shop where customers were continually sneezing or coughing over the fish or continually handling it with dirty hands, a very different situation would arise, and nothing the court is saying today would preclude a prosecution in such a case. This case, however, really turns on the construction of s. 13 of the Act of 1955 and on the particular finding of the justices which I have already quoted.

HAVERS, J.: I agree with the conclusions at which my brethren have arrived and with the reasons on which they base their decision.

Appeal allowed: convictions quashed.

Solicitors: *Simpson, North, Harley & Co.* (for the defendant company); *Sharpe, Pritchard & Co.*, agents for *C. Barratt*, Coventry (for the corporation).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

CORRIGENDUM

Re 34, BRUTON STREET, WESTMINSTER.

On May 6, 1957, the Court of Appeal was reconstituted, owing to the indisposition of ROMER, L.J., for the hearing of the appeal in this case. We regret that the name of ROMER, L.J., was erroneously included among the members of the court named in the report, [1957] 2 All E.R. 539. The members of the court were JENKINS and SELLERS, L.JJ., and UPJOHN, J.

PHIPPS *v.* ORTHODOX UNIT TRUSTS, LTD.

[COURT OF APPEAL (Jenkins, Parker and Pearce, L.JJ.), October 14, 1957.]

Pleading—Damage—Special damage—Wrongful dismissal—Loss of remuneration—Whether claimant must give particulars of his taxable income and tax assessments and allowances.

Practice—Particulars—Action for wrongful dismissal—Special damage—Loss of remuneration—Whether particulars of taxable income must be given.

The plaintiff in an action for wrongful dismissal, which he alleged took place on July 13, 1949, pleaded as special damage loss of remuneration (estimated at an average annual rate of not less than £10,000) and of director's fees for the period for which, he alleged, his contract of service provided that his employment should have continued. The defendants applied for further particulars "of the alleged damage stating whether the plaintiff received any taxable income in any of the tax years from 1948-49 onwards, and if so then (i) the amount of such income from every source in each of such years; (ii) the amount of any and all assessments to income tax and surtax respectively in each of such years showing how such amounts are made up; and in any event giving full particulars of any facts which entitled or would have entitled the plaintiff to tax allowances in respect of each of the said years."

Held: the particulars should be ordered because the plaintiff's real claim for special damage was the amount of his net loss, viz., the amount of his lost earnings computed after tax had been paid on his gross remuneration, and the particulars were necessary in order to enable this special damage to be calculated.

Monk v. *Redwing Aircraft Co., Ltd.* ([1942] 1 All E.R. 133) followed.

Observations on the need for caution in applying this decision, and on the type of particulars necessary in ordinary cases: see p. 308, letter G, and p. 309, letter C, post.

Appeal dismissed.

[As to the degree of particularity required in pleading special damage, see 25 HALSBURY'S LAWS (2nd Edn.) 277, para. 467, note (t); and as to assessing damages for loss of taxable earnings, see 11 HALSBURY'S LAWS (3rd Edn.) 240, para. 408, text and note (o), as corrected by the CUMULATIVE SUPPLEMENT.]

Cases referred to:

(1) *British Transport Commission* v. *Gourley*, [1955] 3 All E.R. 796; [1956] A.C. 185; 3rd Digest Supp.

(2) *Monk* v. *Redwing Aircraft Co., Ltd.*, [1942] 1 All E.R. 133; [1942] 1 K.B. 182; 111 L.J.K.B. 277; 166 L.T. 42; 2nd Digest Supp.

Interlocutory Appeal.

The plaintiff appealed from an order of GLYN-JONES, J., dated July 31, 1957, that the plaintiff should give further and better particulars of special damage, viz., loss of future remuneration by percentage on estimated sales and loss of director's fees, alleged in his statement of claim for damages for his wrongful dismissal by the defendants. The further particulars ordered related to the plaintiff's taxable income. The facts appear in the judgment of JENKINS, L.J.

G. R. Swanwick, Q.C., and *B. Finlay* for the plaintiff.

R. J. Parker for the defendants.

JENKINS, L.J.: This interlocutory appeal arises in an action brought by Mr. Ivon Morgan Phipps against a company called Orthodox Unit Trusts, Ltd. for damages for wrongful dismissal. The plaintiff was sole managing director of the defendants, and his claim is in respect of a wrongful dismissal which took place as long ago as July 13, 1949. He claims very substantial sums as arrears of remuneration and as damages for wrongful dismissal. He bases the main part of his claim to damages on the contention that the terms of his service were such that he was entitled to remain in the service of Orthodox Unit Trusts, Ltd. during the whole of the life of the trust. There is an alternative claim to the effect that in any event he must have been entitled to reasonable notice which he did not get, and he claims one year's remuneration on that basis. There is also a matter of director's fees. His main remuneration appears to have been a percentage on sales of units by the defendants. The defendants admit that the plaintiff was wrongfully dismissed, but say that his percentage was not one per cent. but was one-third of one per cent.; and they contest his allegation that he was entitled to continue in their service during the life of the trust.

After narrating the facts, the statement of claim gives certain particulars of damages in these terms:

> "The plaintiff will contend that had he remained as sole managing director of the defendants for the full period of the said trust the gross value of the sales of all units or other interests in unit or other trusts or funds formed, managed or sponsored by the defendants would, as far as can reasonably be estimated, have been not less than an average of £1,000,000 per annum after July 13, 1949, and would in all probability have been considerably in excess of that average and that in the premises the plaintiff's yearly remuneration after such date would have been, on an average, not less than £10,000 until the termination of the said trust, and would probably have been considerably greater. The damage sustained by the plaintiff is the loss of the said remuneration, together with the loss of director's fees at the aforesaid rate."

On that pleading, there was a request for particulars, and the request was in these terms:

> "Under para. 9. Of the alleged damage stating whether the plaintiff received any taxable income in any of the tax years from 1948-49 onwards, and if so then (i) the amount of such income from every source in each of such years; (ii) the amount of any and all assessments to income tax and surtax respectively in each of such years showing how such amounts are made up; and in any event giving full particulars of any facts which entitled or would have entitled the plaintiff to tax allowances in respect of each of the said years."

The defendants' application for particulars in the terms I have read was refused by the master, but on appeal Glyn-Jones, J., at chambers, by an order dated July 31, 1957, reversed the master's decision and ordered that the particulars should be given. From that decision the plaintiff now appeals to this court.

The question involved in the case is, to my mind, by no means free from difficulty. It is what one might describe as a by-product of the decision of the House of Lords in *British Transport Commission* v. *Gourley* (1) ([1955] 3 All E.R. 796). Since that decision it has been established that where a claim is made for damages, whether for personal injuries or for wrongful dismissal, the income tax and surtax liability of the plaintiff is an essential element in the calculation of damages. The question in this case is whether, that being so, the defendants are entitled to particulars in the form which I have read. In opposition to that view counsel for the plaintiff says that the particulars here sought go beyond the proper function of particulars. He points out that under the rules a pleading should contain, and contain only, a statement of the facts on which the party relies*. He says that the particulars sought here are not facts material to the case; they are no more than facts from which a calculation might be made for the purpose of estimating the plaintiff's tax liability. He admits, and he could not well do otherwise, that matters such as those referred to in the particulars sought—that is to say, the amount of the plaintiff's income from every source during the years in question, the amount of all assessments and the question whether the plaintiff would have been entitled to any tax allowances—are all relevant to the quantum of damages and will have to be dealt with at some stage, but he says that they are not matters to be ascertained by way of particulars, because they are not facts material to the plaintiff's case, and that he therefore ought not to be compelled to introduce them into his statement of claim. Counsel for the plaintiff says that the proper course is to leave this matter to discovery, including (if the defendants are so advised) interrogatories.

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* R.S.C., Ord. 19, r. 4 provides that "Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved . . ."

On the other side, much reliance is placed on *Monk* v. *Redwing Aircraft Co., Ltd.* (2) ([1942] 1 All E.R. 133). It is said that this is a case in which special damages are being claimed and that it is the duty of a plaintiff claiming special damage to give full particulars showing what is the amount of the damage which he claims. *Monk* v. *Redwing Aircraft Co., Ltd.* (2) certainly provides a clear authority for that proposition. It was an action for wrongful dismissal in a case where the contract of service did not state the length of notice required to terminate it. The defendants there applied before defence for particulars of (1) the period of time claimed by the plaintiff to constitute a reasonable notice, and (2) the special damage alleged, stating whether during the period alleged to constitute reasonable notice he obtained other employment or employments and if so (a) when, (b) with whom, (c) date of commencement, (d) salary and terms of employment, (e) the nature thereof, and (f) whether any such employment is still continuing and, if not, when it determined. Lord Greene, M.R., said this (ibid., at p. 135):

> "The [plaintiff's] salary is really one element in ascertaining what the just measure of damage is, and another element in ascertaining the just measure of damage is the salary which he in fact earned in another employment. Nevertheless, the damages claimed are damages, and not, so to speak, the balance of an account. It is, therefore, misleading to use the phrases 'give credit for' and 'bring into account' . . . although there is no particular harm in them provided that it is realised that they are not used in any strict sense at all. What, then, is the position of a plaintiff who claims damages in a case such as this? It seems to me that he must specify what he is claiming, and in every statement of what he claims by way of special damage there is, it seems to me, necessarily implicit one of two allegations . . . either an allegation that he has not in fact earned any other remuneration during the relevant period or an allegation that he has in fact earned remuneration in other employment. Any form of pleading or any particulars given which do not bring to the clear knowledge of the defendant which of those two implicit statements is the one on which the plaintiff is going to rely is, in my judgment, embarrassing . . . As I have said, I am unable to ascertain whether [the plaintiff] is saying 'I earned nothing' or 'I earned something which I do not specify'. In those circumstances, the defendants ask for particulars . . . [Then Lord Greene set out the particulars, and went on] . . . having regard to the form of the pleading in this case, it seems to me that the defendants are entitled to get particulars in that form in order to enable them to know what the plaintiff's real claim for damages is."

Then Lord Greene, M.R., went on to discuss the bearing on these particulars of the possible case of a payment into court.

Counsel for the defendants, strongly relying on *Monk* v. *Redwing Aircraft Co., Ltd.* (2), says that in the present case also it is necessary that the defendants should have the particulars sought in order that they may know what the plaintiff's real claim for damages is. Counsel for the plaintiff seeks to displace *Monk* v. *Redwing Aircraft Co., Ltd.* (2) by saying that the sum of which particulars were ordered in that case was a real sum entering directly into the calculation of the plaintiff's loss of earnings. In contrast to that, he says, the matters of which particulars are here sought are merely circumstances which may or may not result in or facilitate the making of an estimate of the allowance which should be made for tax in the plaintiff's claim for damages. He says that this case is distinguishable from *Monk* v. *Redwing Aircraft Co., Ltd.* (2) on that ground.

I do not think that that distinction is valid. The essential thing is that the pleading should suffice to tell the defendants what the plaintiff's real claim for damages is. Since *British Transport Commission* v. *Gourley* (1) ([1955] 3 All E.R. 796), the plaintiff's real claim for damages is not the gross amount he can show that he has lost, but the amount which he has lost on the footing that the remuneration he would have received but for his dismissal would have been liable to tax. It seems to me that the particulars sought are directly material from that point of view. They have a direct bearing on the amount of tax which it would be proper to bring into calculation. Nor do the particulars relate to any purely hypothetical state of affairs. They are asked for in respect of the period from the year of wrongful dismissal onwards, and they are actual figures relating to that period. One may say that the plaintiff himself introduced in his particulars, which I have read, a hypothetical calculation which supported the allegation that his yearly remuneration during the period in question or after such date—that is, the date of wrongful dismissal—

> " would have been, on an average, not less than £10,000 until the termination of the said trust."

That figure not having allowed for tax, what the defendants say is: that may be your gross remuneration year by year, but, as against that, we must set your tax liability year by year, and that will form the basis for an estimate of your real claim for damages. Accordingly, I regard this case as in substance covered by *Monk* v. *Redwing Aircraft Co., Ltd.* (2) ([1942] 1 All E.R. 133), and I agree with the submission of counsel for the defendants that discovery and interrogatories would in this case be no substitute for particulars, inasmuch as unless and until the particulars sought are given, it will not be possible for the defendants to know what case they have to meet.

Accordingly, I think that this appeal fails and should be dismissed. I arrive at that conclusion without any satisfaction, for it seems to me that it is a conclusion which, unless applied with caution and common sense, may well result in a great waste of time and expense. If in every one of these cases elaborate particulars are to be sought of the plaintiff's tax position, the costs of litigation in a wide area of cases will be greatly increased; but, after giving the matter the best consideration I can, it does not seem to me that any other conclusion is open. I trust that the matter will be kept in check by the masters and learned judges applying the principle that particulars should be limited to what is really reasonably necessary to enable the party seeking them to know what case he has to meet. The result of this case, however, is that the appeal should be dismissed.

PARKER, L.J.: I agree. The damages claimed in this case are damages for wrongful dismissal and as such are clearly special damage, particulars of which must be given. The claim as put forward in the statement of claim particularised those damages in this way: " The damage sustained by the plaintiff is the loss of the said remuneration ". Clearly that, even before *British Transport Commission* v. *Gourley* (1) ([1955] 3 All E.R. 796), was a defective plea, because it did not state whether the plaintiff had during the period of the claim entered into any other, and if so, what, employment. That particular

A matter was cured by particulars; but it is said that, even then, as cured, it is still defective having regard to the decision in *British Transport Commission* v. *Gourley* (1). For my part, I am satisfied, and I think that counsel for the plaintiff is forced to agree, that the plaintiff must make an estimate of the amount of tax which he would have had to pay if he had remained in employment and subtract that from the gross remuneration in order to show the real B loss claimed.

I therefore approach the matter in this way: assuming that the estimate had been made, could the defendants have come forward and asked for further particulars? I confess, somewhat reluctantly, I have come to the conclusion that a defendant is entitled to particulars, not necessarily a calculation, but the C facts relied on by the plaintiff in arriving at that estimate.

I would only add one word of caution, following what my Lord has said. I think it would be unfortunate if the decision of this court should give rise to application after application for detailed particulars to be given in every case. In my judgment, particulars should generally be confined to the broad facts, such as " The plaintiff is a married man ", " He is entitled to an allowance in D respect of two children ", " His unearned income is £100 a year ", matters of that sort, and in the ordinary case that can give rise to no difficulties. It is only in a case such as the present that considerable labour is no doubt put on the plaintiff and his advisers in order to give proper particulars. However, if the particulars in the ordinary run of cases are the broad facts which I have indicated, and if they are limited as they must be to special damage in cases of tort, I E cannot see that any difficulties should arise.

I would dismiss this appeal.

PEARCE, L.J.: I agree entirely with what my Lords have said.

Appeal dismissed; particulars to be delivered within twenty-eight days; leave to appeal to the House of Lords refused.

Solicitors: *Alfred Neale & Co.* (for the plaintiff); *Linklaters & Paines* (for the defendants).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

INDEPENDENT ORDER OF ODDFELLOWS MANCHESTER UNITY FRIENDLY SOCIETY *v.* MANCHESTER CORPORATION.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Donovan and Ashworth, JJ.), October 9, 16, 1957.]

Rates—Limitation of rates chargeable—Hereditament occupied for purposes of friendly society—Society not established or conducted for profit—Society's benefits payable to non-members—Whether organisation whose main objects are charitable or otherwise concerned with the advancement of social welfare—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *&* 5 *Eliz.* 2 *c.* 9), *s.* 8 (1).

The objects of a registered friendly society, which were set out in one of the rules under thirteen heads, were to provide for payment of insurance benefits to members, and also benefits for the relief and maintenance of members and certain non-members, viz., substantially, the families of members. Benefits were calculated and paid on an actuarial basis, although in certain circumstances the society had a discretionary power to pay a benefit to a member not otherwise entitled to receive it. Similarly, a member who was in default with the contributions which he paid to the society, might still receive a benefit. The society's income was mainly derived from members' contributions and from accumulated funds, a relatively small amount being received from other sources which included donations. The society was not established or conducted for profit. On the question whether the rates on a hereditament occupied by the society should be limited pursuant to s. 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, on the ground that the society was an organisation whose objects were charitable or otherwise concerned with the advancement of social welfare within s. 8 (1) (a)*,

Held: the society's main objects were not the advancement of social welfare, even though non-members were eligible to receive benefits, but were the carrying into effect of a mutual insurance business; therefore the amount of rates chargeable in respect of the hereditament which the society occupied was not limited by s. 8 (2) of the Act of 1955.

Trustees of the National Deposit Friendly Society v. *Skegness Urban District Council* (ante, p. 199) followed.

Appeal allowed.

[For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, see 35 HALSBURY'S STATUTES (2nd Edn.) 394.]

Cases referred to:

(1) *Trustees of the National Deposit Friendly Society* v. *Skegness Urban District Council*, [1957] 1 All E.R. 407; [1957] 1 Q.B. 531; *affd.* C.A., [1957] 3 All E.R. 199.

(2) *Re Buck, Bruty* v. *Mackey*, [1896] 2 Ch. 727; 65 L.J.Ch. 881; 75 L.T. 312; 60 J.P. 775; 8 Digest (Repl.) 356, *348*.

Case Stated.

This was a Case Stated by N. J. LASKI, Esq., Q.C., Recorder of Liverpool, a judge of the Crown Court at Manchester, in respect of his adjudication as a court of quarter sessions sitting at Manchester on Jan. 3, 1957. By a notice of appeal dated May 14, 1956, the Independent Order of Oddfellows Manchester Unity

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* Section 8 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, provides, so far as is relevant:

"(1) This section applies to the following hereditaments, that is to say—(a) any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare; . . ."

Friendly Society (hereinafter referred to as " the society "), appealed against a rate in the sum of £1,197 made for the year 1956-57, by the Corporation of the City of Manchester (hereinafter referred to as " the rating authority "), in respect of a hereditament situated at 93-97, Grosvenor Street, Manchester, on the grounds that the society was an organisation which came within s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, and was entitled to the relief from liability provided by that section. The following facts were found. The hereditament was occupied by the society, and was used as its head office and registered office. The society was founded in 1851 and was registered under the Friendly Societies' Acts, being first registered on Aug. 8, 1851. The membership of the society, at all material times, was six million, and was divided into various classes. Ordinary members were admitted to the society on being proposed by a member in lodge and elected by a majority of members present and voting at the lodge meeting; members were also required to sign a declaration set out in the rules and to undergo an initiation ceremony. The rules of the society, which were effective at all material times, were contained in a book of rules published in 1949, as amended in 1954 and 1955, and the objects of the society were set out in r. 2* of the book of rules; the society furthered all its objects by its activities. The society's income and capital funds were made up not only from members' contributions, interest from investments but also from moneys received by fines, donations and levies. The objects and activities of the society included the provision of discretionary benefits both to members and to persons other than members, viz., their wives, children, fathers, mothers, brothers, sisters, nephews and nieces, orphans and wards being orphans. In certain circumstances, the right of a member or his wife to receive benefits might be suspended and a member could be expelled from the society and required to accept the surrender value of insurance effected by him.

Persons joined the society and contributed to its funds in order to obtain for themselves or such non-members as have been mentioned previously the benefits which the society disbursed as of right or by way of discretion. Benefits payable to members as of right were only payable if the members' contributions had been paid or dealt with in accordance with the society's rules. Between 1905 and 1954, the society's capital had increased from £13,000,000 to £34,000,000, and in recent years, the investment income had greatly exceeded the amount of members' contributions. There was a surplus of assets over liabilities which amounted in 1954 to £3,801,000; out of this sum £1,000,000 was appropriated by the lodges of the society under its rules and used to provide benefits and benefit funds for members and such non-members as were eligible for benefit, the benefits being discretionary in character. The society's capital included capital which was appropriated to various benefit funds from which discretionary benefits or grants to members and such non-members as were eligible were made. The cash benefit fund, which amounted to £1,148,111 at Dec. 31, 1954, was a savings or pure endowment fund for the provision of benefits with no element of life assurance in it. The society was not established or conducted for profit, and was not a charity.

It was contended by the society that it was an organisation not established or conducted for profit, whose main objects were concerned with the advancement of social welfare, and that the hereditament which it occupied was one to which s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, applied. It was contended by the rating authority that the society was no such organisation.

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* The first two objects of the society set out in r. 2 of the rules were to provide by entrance fees, contributions of the members, fines, donations, levies, and interest on capital for (a) insuring a sum of money to be paid on a member's death, or death of a member's wife or husband, or effecting certain other insurances, and (b) insuring a sum of money to be paid on the birth of a member's child. Other objects were set out in the subsequent eleven paragraphs, paras. (c)-(m), of r. 2.

The Crown Court at Manchester, as court of quarter sessions for Manchester, allowed the society's appeal on the ground that the main objects of the society were concerned with the advancement of social welfare. The rating authority now appealed from that decision.

Michael Rowe, Q.C., and *F. P. R. Hinchcliffe* for the rating authority.
Sir Andrew Clark, Q.C., and *C. N. Glidewell* for the society.

Cur. adv. vult.

Oct. 16. **ASHWORTH, J.**, read the following judgment of the court: This is an appeal from a decision of the learned recorder of the City of Liverpool sitting at Manchester as a court of quarter sessions whereby he held that the Independent Order of Oddfellows Manchester Unity Friendly Society (hereinafter referred to as the society) being conducted otherwise than for profit was entitled to the relief in respect of rates conferred by s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, as being a body of persons whose main object was the advancement of social welfare. It is only fair to mention that this decision was given on Jan. 3, 1957, before *Trustees of the National Deposit Friendly Society* v. *Skegness Urban District Council* (1) ([1957] 1 All E.R. 407) had come before this court or the Court of Appeal (ante, p. 199).

In our view, unless there are valid reasons for distinguishing this case from *Trustees of the National Deposit Friendly Society* v. *Skegness Urban District Council* (1), the present appeal must be allowed and as was to be expected, the argument of counsel for the society was largely directed to the establishment of such reasons.

The objects of the society are set out in r. 2 of its rules, and counsel for the society's first point was that three at least and possibly six of these objects could properly be described as charitable, whereas none of the objects of the society involved in *Trustees of the National Deposit Friendly Society* v. *Skegness Urban District Council* (1) could be so described. The problem, however, is to ascertain the main objects of the organisation, and even if it be the fact that some of its objects are charitable the society is not within the sub-section if its main objects are outside it.

Secondly, it was pointed out that in the present case benefits are not confined to members, whereas in *Trustees of the National Deposit Friendly Society* v. *Skegness Urban District Council* (1) they were. Although the rules do not appear to preclude the provision of benefit to persons who are unconnected with the society or its members, it seems to us that in substance the class of potential beneficiaries may be described as comprising members and their families. Thirdly, it was said that in the present case the society's benefits are derived from a number of sources, including donations, whereas in *Trustees of the National Deposit Friendly Society* v. *Skegness Urban District Council* (1) they were derived only from members' contributions. In this connexion, however, our attention was drawn to the summary of income and expenditure for the year 1954 set out on p. 56 of the November 1955 Report issued by the society from which it appears that the society's total income for that year was approximately £2¼ million, of which £550,000 was derived from contributions, £867,000 from interest, nearly £800,000 from other funds, and only £55,000 from "other income". It is in our view clear that the society's income is derived to a very large extent from contributions and accumulated funds and that the amount received by the society from sources other than members or past members is relatively small. Fourthly, it was contended by counsel for the society that in the present case benefits are discretionary, whereas in *Trustees of the National Deposit Friendly Society* v. *Skegness Urban District Council* (1) they were calculated actuarially. In our view this contention cannot be maintained in the face of the elaborate tables of contributions and benefits included in the book of rules, all of which appear to have been prepared and certified by an actuary. While it may be true that in certain circumstances a discretion is conferred by the society's rules for the purpose of enabling a payment of benefit to be made to a person who would not otherwise be entitled to it, there cannot be any doubt but that the society's benefits are in substance calculated and paid on an actuarial basis. The fifth point of distinction related to the effect of default in payment of contributions: in the present case a member in default may receive a discretionary benefit whereas in *Trustees of the National Deposit Friendly Society* v. *Skegness Urban District Council* (1) default appears to have disentitled a member to any benefits.

Lastly, counsel for the society cited the decision of Kekewich, J., in *Re Buck, Bruty* v. *Mackey* (2) ([1896] 2 Ch. 727), as authority for the proposition that it is possible for a friendly society to be in law a charity. It was not contended that the society involved in this appeal is a charity but the decision in question was relied on as an answer to an impression, which might be created by the last paragraph of the judgment of the Court of Appeal in *Trustees of the National Deposit Friendly Society* v. *Skegness Urban District Council* (1) (ante, at p. 203), that friendly societies were altogether outside the scope of s. 8 (1) (a). In the paragraph in question the court did not purport to lay down any universal rule in regard to friendly societies but adopted the view expressed in this court that if friendly societies were to receive the relief conferred by the sub-section, it was remarkable that Parliament did not so provide in plain terms. That is still the view of this court.

In deference to counsel for the society's argument we have mentioned all the grounds on which he sought to distinguish *Trustees of the National Deposit Friendly Society* v. *Skegness Urban District Council* (1), but in our view no valid distinction can be drawn between the two cases. Such differences as exist are insufficient to afford a distinction between the main objects of the respective societies, and the deciding factor in each case must be the main objects of the society. While it is true that in the present case the class of person who is eligible for benefit is wider than in *Trustees of the National Deposit Friendly Society* v. *Skegness Urban District Council* (1) and includes non-members, we do not think that this is sufficient to convert the main objects of the society from being the carrying into effect of a business arrangement in the form of mutual insurance into the advancement of social welfare.

For these reasons this appeal succeeds and the answer to the question raised in the Case Stated is that the rate should remain unaltered in the sum of £1,197.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Manchester (for the rating authority); *Forsyte, Kerman & Phillips*, agents for *John Gorna & Co.*, Manchester (for the society).

[*Reported by* Wendy Shockett, *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* WOOD BROS. (BIRKENHEAD), LTD. (In Liquidation).

[Court of Appeal (Jenkins, Parker and Pearce, L.JJ.), October 3, 4, 1957.]

Surtax—Undistributed income—Direction and apportionment—" Actual income from all sources "—Computation of income—Whether balancing charge included—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *s.* 245, *s.* 248 (1), *s.* 292 (1), (3), *s.* 323 (4).

A resolution to wind-up a company voluntarily was passed on Apr. 16, 1952, and subsequently a balancing charge of £18,675 was made on the company under s. 292 (3) and s. 323 (4) of the Income Tax Act, 1952*, equal to the excess of the proceeds of the sale of plant and machinery over their written-down value for income tax purposes. The Special Commissioners of Income Tax thereafter made a direction under s. 245 and s. 248, requiring an apportionment among the members of the company of its income from all sources from Apr. 29, 1950, to Apr. 16, 1952, the period from the end of the last year for which accounts of the company had been made up to the commencement of the winding-up. The balancing charge was included in the computation of the actual income of the company for that purpose. On appeal,

Held: the balancing charge should be excluded from the actual income of the company to be apportioned among the members, since, although the fact that the amount of the balancing charge was reached by a capital calculation did not determine finally its character for income tax purposes (see p. 320, letter A, post), and although " actual income " in s. 245 and s. 248 (1) meant the income for the actual period in respect of which the assessment was made as computed for income tax purposes (dicta of Scott, L.J., [1940] 3 All E.R. at p. 660, and of Lord Atkin, [1942] 1 All E.R. at p. 625, in *Thomas Fattorini* (*Lancashire*), *Ltd.* v. *Inland Revenue Comrs.* applied), yet there was no statutory provision that the amount of the balancing charge should be deemed to be income in the hands of the company for income tax purposes (see p. 322, letter A, post).

Decision of Harman, J. (ante, p. 147) affirmed.

[As to balancing charges, see 20 Halsbury's Laws (3rd Edn.) 503, para. 966; and, as to apportionment of actual income of companies for surtax purposes, see ibid., 558, para. 1085, and, in liquidation, ibid., 562, 563, para. 1095.

For the Income Tax Act, 1952, s. 245, s. 248 (1), s. 292 (1), (3), and s. 323 (4), see 31 Halsbury's Statutes (2nd Edn.) 232, 235, 283, 284 and 313.]

Cases referred to:

(1) *London County Council* v. *A.-G.*, [1901] A.C. 26; 70 L.J.Q.B. 77; 83 L.T. 605; 65 J.P. 227; 4 Tax Cas. 265; 28 Digest 73, *392*.

(2) *Glenboig Union Fireclay Co., Ltd.* v. *Inland Revenue Comrs.*, 1922 S.C. (H.L.) 112; 12 Tax Cas. 427; Digest Supp.

(3) *Thomas Fattorini* (*Lancashire*), *Ltd.* v. *Inland Revenue Comrs.*, [1940] 3 All E.R. 657; *revsd.* H.L., [1942] 1 All E.R. 619; [1942] A.C. 643; 111 L.J.K.B. 546; 167 L.T. 45; 24 Tax Cas. 328; 2nd Digest Supp.

(4) *Glazed Kid, Ltd.* v. *Inland Revenue Comrs.*, (1930), 15 Tax Cas. 445; Digest Supp.

(5) *Kirkness* v. *Hudson* (*John*) *& Co., Ltd.*, [1955] 2 All E.R. 345; [1955] A.C. 696; 36 Tax Cas. 28, 57; 3rd Digest Supp.

(6) *Coltness Iron Co.* v. *Black*, (1881), 6 App. Cas. 315; 51 L.J.Q.B. 626; 45 L.T. 145; 46 J.P. 20; 1 Tax Cas. 287; 28 Digest 6, *13*.

(7) *Townsend* v. *Electrical Yarns, Ltd.*, [1952] 1 All E.R. 918; 33 Tax Cas. 166; 3rd Digest Supp.

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* The terms of these sub-sections are printed at p. 318, letters D and H, post.

Appeal.

The taxpayer company appealed to the Special Commissioners of Income Tax against a direction and apportionment made by the Special Commissioners of Income Tax on Mar. 11, 1955, under s. 245 and s. 248 of the Income Tax Act, 1952, directing that the actual income of the company from all sources as computed for the purposes of Ch. 3 of Part 9 of the Act, for the period from Apr. 29, 1950, to Apr. 16, 1952, should be apportioned among its members. The actual income so computed was £76,264, and it was apportioned as follows: To preference shareholders £9,732; to ordinary shareholders: A. & E. Wood £22,168 9s.; E. C. V. Wood £22,168 9s.; S. C. V. Wood £22,168 10s.; E. Randle £26 12s. The grounds of appeal were that the actual income as computed was excessive in that it included £18,675 in respect of a balancing charge.

The company, formerly known as Woodson Stores, Ltd., had an issued capital of £65,000, and carried on a wholesale grocery business. It sold its business and ceased trading on Apr. 28, 1951, and on Apr. 25, 1951, it changed its name to Wood Bros. (Birkenhead), Ltd. On Apr. 16, 1952, it went into voluntary liquidation. It was common ground between the parties that a balancing charge fell to be made on the company in respect of sales of plant and machinery on the cessation of its business under s. 292 (1) and s. 323 (4) of the Income Tax Act, 1952, and that the amount of this charge was correctly computed at £18,675. The company's accounts for the year ended Apr. 28, 1951, and from Apr. 29, 1951, to Apr. 16, 1952, were not certified by the auditors until May 7, 1952, and it was common ground between the parties that the whole of the period from Apr. 29, 1950, to Apr. 16, 1952, inclusive was the period from the end of the last year for which accounts of the company had been made up to the time of the commencement of the winding-up within the meaning and for the purposes of s. 253 of the Income Tax Act, 1952. It was also common ground between the parties that the actual income of the company from all sources as computed for the purposes of Ch. 3 of Part 9 of the Income Tax Act, 1952, for that period fell to be apportioned among its members under s. 245 and s. 248 of the Income Tax Act, 1952. Excluding the balancing charge this amounted to £57,589.

The company contended that the amount which fell to be apportioned among its members under s. 245 and s. 248 in computing the company's actual income from all sources from Apr. 29, 1950, to Apr. 16, 1952, should not include the amount of the assessment on the company in respect of the balancing charge of £18,675. The Crown contended that the amount of the balancing charge was correctly included in the computation of the company's actual income from all sources for the period. The commissioners held that the amount of the balancing charge should not be included in the company's actual income from all sources. They allowed the appeal and amended the direction of the Special Commissioners by reducing the amount of the company's income to be apportioned among the members from £76,264 to £57,589.

On appeal, HARMAN, J., held (ante, p. 147) that the balancing charge and the proceeds of the sale of the plant and machinery were not "actual income" of the company requiring to be apportioned among the members under the surtax direction and dismissed the appeal. The Crown appealed to the Court of Appeal.

John Senter, Q.C., and *E. Blanshard Stamp* for the Crown.

P. Shelbourne for the taxpayer company.

JENKINS, L.J.: This is an appeal by the Commissioners of Inland Revenue from a judgment of HARMAN, J., dated July 16, 1957, whereby he affirmed a determination of the Special Commissioners in favour of the taxpayer concerned, a company called Wood Bros. (Birkenhead), Ltd. It is common ground that this company was a company amenable to the provisions relating to surtax on undistributed income of certain bodies corporate now to be found in Ch. 3 of Part 9 of the Income Tax Act, 1952. It is further common ground that under these provisions, in the events which have happened, it is proper that the income of the company should be apportioned amongst its members. It is further not in dispute that the accounts of the company were last made up for the period ending Apr. 29, 1950 (though it sometimes seems to be stated as Apr. 30), so that the relevant period for the present purpose, the company having gone into liquidation, is the period from Apr. 29 or 30, 1950, to the date of the commencement of the winding-up, Apr. 16, 1952. Furthermore, all figures are agreed between the parties, and the appeal involves one point only.

The company contends that the proper amount of income liable to be apportioned to the members is £57,589. The commissioners do not dispute that figure, as a figure, but they say that a further sum of £18,675 ought to be included, being the amount of a balancing charge which became chargeable under the relevant provisions of Part 10 of the Act of 1952, which re-enacted in substance provisions formerly to be found in the Finance Act, 1945.

There is no dispute that it is proper for a balancing charge to be made, or as to the figure of £18,675, the point at issue being simply whether the amount of that balancing charge is part of the company's actual income from all sources for the relevant period so as to make it proper to be included in the figure of income to be apportioned amongst the members.

Of the leading provisions on surtax on undistributed income of companies, the familiar s. 245, formerly s. 21 (1) of the Finance Act, 1922, is in these terms:

> " With a view to preventing the avoidance of the payment of surtax through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted that where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year or other period for which accounts have been made up, distributed to its members, in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of surtax, a reasonable part of its actual income from all sources for the said year or other period, the commissioners may, by notice in writing to the company, direct that, for purposes of assessment to surtax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members, and the amount thereof shall be apportioned among the members."

Section 248 (1) provides:

> " Where a direction has been given under s. 245 of this Act with respect to a company, the apportionment of the actual income from all sources of the company shall be made by the Special Commissioners in accordance with the respective interests of the members."

Then there are machinery provisions with which I need not trouble. Section 253 (1) which deals with the case of a company in liquidation, provides:

> " Where an order has been made or a resolution passed for the winding-up of a company to which s. 245 of this Act applies—(a) the income of the company for the period from the end of the last year or other period for which accounts of the company have been made up to the time of the commencement of the winding-up shall, for the purposes of the said section, be deemed to be income of that period available for distribution to the members of the company; and (b) as respects that period, and the next preceding year or other preceding period or periods ending within that next preceding year for which accounts have been made up, the said section shall apply as if the words ' within a reasonable time ' were omitted therefrom."

That provision admittedly applies to the company, as does s. 245, and the income in question is the actual income of the company from all sources from the date to which its accounts were last made up down to the commencement of the winding-up. Finally, I should refer to a definition in s. 255 (3), which is in these terms:

> " In computing, for the purposes of this Chapter, the actual income from all sources of a company for any year or period, the income from any source shall be estimated in accordance with the provisions of this Act relating to the computation of income from that source, except that the income shall be computed by reference to the income for such year or period as aforesaid and not by reference to any other year or period."

Pausing there, it follows that the balancing charge in the present case cannot be included in the income for apportionment amongst the members unless it is within the terms of this definition part of the actual income of the company from all sources for the relevant year or period, and it is in effect round this definition and its implications that the argument in this appeal has centred.

To reach a view on the question whether the balancing charge bears the character of actual income of the company from any source for the period in question, so as to bring it within the definition and make it a proper subject of apportionment, it is necessary to consider the provisions of the Act relating to allowances and charges of the kind here in question. As I have said, this elaborate legislation as to allowances and charges in respect of machinery and plant was originally enacted by the Income Tax Act, 1945, and it is now to be found in Part 10 of the Act of 1952. There have been some amendments which, I think, do not touch this case. Section 279 (1) provides:

> " Subject to the provisions of this Act and, in particular, subject to the provisions of sub-s. (5) of this section, where a person carrying on a trade incurs capital expenditure on the provision of machinery or plant for the purposes of the trade, there shall be made to him, for the year of assessment in the basis period for which the expenditure is incurred, an allowance (in this Chapter referred to as ' an initial allowance ') equal to [then a fraction is mentioned] of the expenditure."

The fraction seems to have been altered by subsequent legislation, but I think it was under the Income Tax Act, 1952, two-fifths and has since been reduced to one-fifth*. Nothing, however, turns on that. Then s. 280 deals with annual allowances:

> " Subject to the provisions of this Act, where the person carrying on a trade in any year of assessment has incurred capital expenditure on the provision of machinery or plant for the purposes of the trade, an allowance (in this Chapter referred to as ' an annual allowance ') shall be made to him for that year of assessment on account of the wear and tear of any of the machinery or plant which belongs to him and is in use for the purposes of the trade at the end of the basis period for that year of assessment."

The basis period is defined in s. 325 (1) which provides:

> " In this Part of this Act, ' basis period ' has the meaning assigned to it by the following provisions of this section."

I do not think I need go into those provisions, as in the present case the relevant period is the actual period with which we are concerned.

Section 292 appears under the cross-heading, "Balancing allowances, balancing charges, etc.", and as it originally stood it provided:

> " (1) Subject to the provisions of this section, where any of the following events occurs in the case of any machinery or plant in respect of which an initial allowance or an annual allowance has been made for any year of assessment to a person carrying on a trade, that is to say, either—(a)

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* By the Finance Act, 1953, s. 16 (2) (a).

> the machinery or plant is sold, whether while still in use or not; or (b) the machinery or plant, whether still in use or not, ceases to belong to the person carrying on the trade by reason of the coming to an end of a foreign concession; or (c) the machinery or plant is destroyed; or (d) the machinery or plant is put out of use as being worn out or obsolete or otherwise useless or no longer required, and the event in question occurs before the trade is permanently discontinued, an allowance or charge (in this Chapter referred to as 'a balancing allowance' or 'a balancing charge') shall, in the circumstances mentioned in this section, be made to, or, as the case may be, on, that person for the year of assessment in his basis period for which that event occurs . . . A B
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> " (2) Where there are no sale, insurance, salvage or compensation moneys or where the amount of the capital expenditure of the person in question on the provision of the machinery or plant still unallowed as at the time of the event exceeds those moneys, a balancing allowance shall be made, and the amount thereof shall be the amount of the expenditure still unallowed as aforesaid, or, as the case may be, of the excess thereof over the said moneys. C
>
> " (3) If the sale, insurance, salvage or compensation moneys exceed the amount, if any, of the said expenditure still unallowed as at the time of the event, a balancing charge shall be made, and the amount on which it is made shall be an amount equal to the excess or, where the said amount still unallowed is nil, to the said moneys . . . D
>
> " (4) Notwithstanding anything in sub-s. (3) of this section, in no case shall the amount on which a balancing charge is made on a person exceed the aggregate of the following amounts, that is to say—(a) the amount of the initial allowance, if any, made to him in respect of the expenditure in question; and (b) the amount of any annual allowance made to him in respect of the machinery or plant in question . . . " E

and certain other matters which I do not think I need enter into. Sub-section (4) imposes a ceiling or maximum designed broadly to recoup the amount of the allowances in cases where the losses which they represent have been more than offset by the sale of the plant or machinery. F

Section 301 (1) provides:

> " Any allowance or charge made to or on any person under the preceding provisions of this Chapter shall, unless it is made under or by virtue of s. 296 (2) of this Act, or under or by virtue of s. 298 of this Act, be made to or on that person in charging the profits or gains of his trade." G

Section 323 provides:

> " (1) Any claim by a person for an allowance falling to be made to him under any of the provisions of this Part of this Act in charging the profits or gains of his trade shall be included in the annual statement required to be delivered under this Act of the profits or gains thereof, and the allowance shall be made as a deduction in charging those profits or gains. H
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> " (4) Any charge falling to be made under any of the provisions of this Part of this Act on a person for any year of assessment in charging the profits or gains of his trade shall be made by means of an assessment on the profits or gains of that trade for that year of assessment in addition to any other assessment falling to be made thereon for that year." I

In the present case, the company in fact ceased business on Apr. 28, 1951, and at or about the same time it sold the plant or machinery. As appears from what I have already said, this was a case in which allowances had been made. I think an initial allowance was made (I am not sure if that is positively found in the Case) and there were annual allowances, and the sale of the plant and machinery realised an excess of the proceeds as compared with the amount of the depreciation or capital loss allowed for, and consequently the excess became the subject of a balancing charge.

The learned judge rejected the appeal of the Commissioners of Inland Revenue in effect, I think, on two grounds. First, he said that the amounts expended or losses incurred in relation to plant or machinery were capital losses, and any profit realised on the sale of the plant and machinery was in like manner a capital profit, and he said no question of income arose in this case at all. There was simply a figure which might be regarded as a capital gain realised on the sale of the plant and machinery, and in his view, on this aspect of the case, if the amount of the capital gain had been made by the legislation a subject for charge to income tax, it was in fact tax on something which was not income at all but was capital.

Counsel for the Crown combated that view by reference, among other cases, to *London County Council* v. *A.-G.* (1) ([1901] A.C. 26) for the well-known statement of the law by LORD MACNAGHTEN. LORD MACNAGHTEN said (ibid., at p. 35):

> "Income tax, if I may be pardoned for saying so, is a tax on income. It is not meant to be a tax on anything else. It is one tax, not a collection of taxes essentially distinct. There is no difference in kind between the duties of income tax assessed under Sch. D and those assessed under Sch. A or any of the other schedules of charge. One man has fixed property, another lives by his wits; each contributes to the tax if his income is above the prescribed limit. The standard of assessment varies according to the nature of the source from which taxable income is derived. That is all. Schedule A contains the duties chargeable for and in respect of the property in all lands, tenements, and hereditaments capable of actual occupation. There the standard is annual value. It is difficult to see what other standard could have been adopted as a general rule. But there again, if the subject of charge be lands let at rack-rent, the annual value is 'understood to be the rent by the year at which the same are let'. In every case the tax is a tax on income, whatever may be the standard by which the income is measured."

Counsel for the Crown used that passage to show that income for income tax purposes might be the subject of a notional or conventional measurement, and that in the present case the balancing charge might well be income for tax purposes, although its amount was arrived at by reference to a figure of capital gain. To the same end, counsel also referred to a passage from *Glenboig Union Fireclay Co., Ltd.* v. *Inland Revenue Comrs.* (2) ((1922), 12 Tax Cas. 427 at p. 464). The case concerned a sum received by a company which operated pits of fireclay in consideration of their permanently discontinuing the winning of fireclay in a particular place. As I understand it, the question was whether the sum paid there was income for income tax purposes, and LORD BUCKMASTER said (ibid., at p. 463):

> "It is unsound to consider the fact that the measure, adopted for the purpose of seeing what the total amount should be, was based on considering what are the profits that would have been earned. That, no doubt, is a perfectly exact and accurate way of determining the compensation, for it is now well settled that the compensation payable in such circumstances is the full value of the minerals that are to be left unworked, less the cost of working, and that is, of course, the profit that would be obtained were they in fact worked. But there is no relation between the measure that is used for the purpose of calculating a particular result and the quality of the figure that is arrived at by means of the application of that test. I am unable to regard this sum of money as anything but capital money, and I think therefore it was erroneously entered in the balance sheet ending Aug. 31, 1913, as a profit on the part of the Fireclay Company."

So far, I agree with counsel for the Crown that the fact that the amount of the balancing charge is arrived at by means of a capital calculation does not necessarily conclude the question as to its character for income tax purposes, as it seems to me that a sum so calculated may well be income for those purposes if the relevant legislation declares it to be such. But it clearly cannot be said in itself to bear the character of income at all.

The other line of reasoning which appealed to the learned judge was based, in effect, on s. 255 (3) of the Act, which I will read again:

> " In computing, for the purposes of this Chapter, the actual income from all sources of a company for any year or period, the income from any source shall be estimated in accordance with the provisions of this Act relating to the computation of income from that source, except that the income shall be computed by reference to the income for such year or period as aforesaid and not by reference to any other year or period."

The learned judge naturally attached great importance to the word " actual " both in that passage and in s. 245 and other sections dealing with surtax on undistributed income of companies. As I understand him, he took the view that " actual income " meant income in the popular sense of that expression, as opposed to fictional or notional income, and he concluded that the amount of the balancing charge could not be said to be part of the actual income of the company.

If " actual " is used in the sense accorded to it by the learned judge, i.e., the real or the true, as opposed to the hypothetical or fictitious or notional income, then I think that his view would clearly be right. But light is thrown on the meaning of the word " actual " in a case to which the learned judge was not referred, *Thomas Fattorini* (*Lancashire*), *Ltd.* v. *Inland Revenue Comrs.* (3) ([1940] 3 All E.R. 657; [1942] 1 All E.R. 619). I can go straight to the passages in the judgment of Scott, L.J., and in the speech of Lord Atkin in the House of Lords on which counsel relied. Scott, L.J., said ([1940] 3 All E.R. at p. 660):

> " It was contended for the company that its ' actual income ' (within the meaning of s. 21) for the two years in question consisted solely of the dividends receivable on the whole of the shares in the three operative companies, and that, in the circumstances, the actual income and the dividends in fact meant the same thing, so that apparently the company had contracted itself out of the whole of its ' actual income '. However, that statement of the position is only a half-truth. The dividends, no doubt, constituted the company's gross receipts, but not its ' income ' for income tax purposes. The interest paid to the bank, for instance, had to be deducted from the gross receipts. However, if on the contention it was intended to base an inference of fact that the company possessed no assets out of which it could raise money, to take the place of income which it had found it convenient to devote to a capital purpose, with a view to a declaration of dividend, the facts do not support the inference."

The learned lord justice said (ibid., at p. 663):

> " Our reasons are these. Rowlatt, J., attached to the expression 'actual income ' a meaning with which we disagree. He treated it as connoting the receipts side only of the income account. He assumed that, if the actual receipts in the statutory year mentioned in s. 21 had been assigned or hypothecated under a binding contract, the company's ' actual income ' had passed out of its control, and, therefore, ceased to be available for distribution. This, in our opinion, is an error. The true meaning of the phrase, we think, is indicated by the context, and by certain provisions of the Act of 1918 . . . ' Income tax . . . is a tax on income . . . whatever may be the standard by which the income is measured ' ";

A that, of course, is a reference to LORD MACNAGHTEN'S speech in *London County Council* v. *A.-G.* (1) ([1901] A.C. at p. 35), to which I have already referred.

> " The phrase ' profits and gains ' in income tax legislation is—at any rate, under Sch. D—no more than a synonym for ' income '. For purposes of assessment, the income of an anterior period was, and is, ' deemed to be the B income ' of the person charged for the year of assessment. He is charged on a conventional or putative, and not on the actual, income. Until 1927, it was an average of three years. Since then, it has been the income of the preceding year."

Then he goes on to deal with the case of super-tax, the total income in that case also falling to be ascertained on the previous year's basis, and he refers to some C of the provisions dealing with that. He goes on ([1940] 3 All E.R. at p. 663):

> " Finally, Sch. D, Cases I and II, r. 8, reproducing the Finance Act, 1907, s. 24, but repealed by the Finance Act, 1926, provided that, where '. . . the *actual* profits or gains [the income] . . . in the year of assessment fall short of the profits or gains as computed in accordance with this Act, D he shall be entitled to be charged on the *actual* amount of the profits or gains so arising, instead of on the amount of the profits or gains so computed . . . ' That rule in the Act of 1918, we think, supplies the key to the meaning of the word ' actual ' in s. 21 of the Act of 1922, which called for interpretation in *Glazed Kid, Ltd.* v. *Inland Revenue Comrs.* (4) ((1930), 15 Tax Cas. 445), and calls for it in the present case. It was inserted to make it clear that E it is not the conventional income, but the de facto income of the year in question which is subject to the duty to distribute. The epithet ' actual ' in such a sense is illustrated in income tax law by the Finance Act, 1907, s. 24 (2), (3), where the successor to a continuing business, and his predecessor, who ceases to carry it on, are taxed on their ' actual income ' in the two broken periods of the year. The fact that the word is used in that sense in income tax legislation still in force in 1922 seems to us conclusive."

F LORD ATKIN said ([1942] 1 All E.R. at p. 625):

> " It will be convenient here to deal with the argument, which was pressed upon us by counsel for the appellants that, in the present case, the dividends from the operative company's shares formed the whole of the ' actual ' income of the company within the meaning of s. 21 of the Act of G 1922, and that, since the whole of that ' actual ' income had been assigned to the bank, there was no part of it which could have been distributed. My Lords, the Court of Appeal have effectively disposed of this argument. Actual income does not mean the specific receipts that come in from time to time, but the ' income tax income ' as calculated at the end of the year of assessment. To hold otherwise would make nonsense of the section when H applied to commercial companies, who use their receipts as soon as they come in, and hardly ever have left for distribution the actual incomings as sought to be defined in the argument."

I accept the submission of counsel for the Crown that the observations of the court in that case make it reasonably plain that we should treat the word I " actual " here in the phrase " the actual income from all sources " as meaning the income for the actual period in respect of which the assessment is made, as distinct from the income from some other basic period of a conventional kind such as the previous year or, as it once was, the three years' average selected as the basis of calculation; and that, being referable to that matter, the word " actual " does not have the restrictive effect which HARMAN, J., attributed to it. Accordingly, the circumstance that the balancing charge was not actual income, meaning thereby income in the literal or real sense of the word, but if it was income at all was a sum to which the character of income had been notionally attributed by the legislation would not necessarily exclude it from the calculation of the company's total income from all sources. But that does not conclude the matter, for, even so, it is necessary to my mind to find somewhere in the relevant provisions of the Act some sufficiently clear and unambiguous provision to the effect that the amount of the balancing charge shall be deemed to be an addition to the income of the company for the period in question. It seems to me that, notwithstanding his detailed and careful argument, counsel for the Crown has not succeeded in doing that. I find nothing to say that this particular sum is to be deemed to be income in the hands of the company.

In that connexion I would refer once more to s. 323, because of what appears to me to be a somewhat significant change of language which is to be found when one compares the terms of sub-s. (4) with the terms of sub-s. (1). Sub-section (1) deals with allowances, and it provides:

> " Any claim by a person for an allowance falling to be made to him under any of the provisions of this Part of this Act in charging the profits or gains of his trade shall be included in the annual statement required to be delivered under this Act of the profits or gains thereof, and the allowance shall be made as a deduction in charging those profits or gains."

One would have thought that in the case of a charge, if it had been so intended, the converse would have been provided for, and the amount of the balancing charge would have been directed to be added to the amount of the profits or gains; but sub-s. (4) is not so framed, and it provides:

> " Any charge falling to be made under any of the provisions of this Part of this Act on a person for any year of assessment in charging the profits or gains of his trade shall be made by means of an assessment on the profits or gains of that trade for that year of assessment in addition to any other assessment falling to be made thereon for that year."

There is to be an assessment on the profits or gains of that trade for that year, in addition to any other assessment falling to be made thereon for that year, but there is nothing that I can see which says that the amount of a balancing charge must be added to the amount of profits or gains. It is true that there is to be a surcharge on profits or gains to the extent of the balancing charge, but that does not to my mind involve the conclusion that the balancing charge becomes part of the actual income from all sources for the relevant period. No doubt it must be brought in in some way for the purposes of calculation, but it does not follow from that that it must be treated as part of the company's income for all purposes.

Counsel for the Crown referred to other authorities and in particular to *Kirkness* v. *John Hudson & Co., Ltd.* (5) ([1955] 2 All E.R. 345), which is of interest because it discussed these very provisions which at that time were to be found in the Act of 1945. As I understand it, the question there was whether a balancing charge was payable by reason of the compulsory acquisition of railway wagons belonging to a certain company, so that the actual matter which had to be decided was whether a compulsory acquisition of the kind that had taken place there was a sale within the meaning of the legislation dealing with balancing charges; but views were expressed on the character of the Act by Lord Morton of Henryton and Lord Reid, to which counsel for the Crown referred us. Lord Morton said this (ibid., at p. 353):

> " The Act of 1945 greatly extended the scheme of capital allowances for depreciation of capital assets, for the purpose of the taxation of the profits of business undertakings; a special feature of such allowances was the making of an initial allowance on the acquisition of the asset, in addition to subsequent annual allowances. The object of the provisions contained in s. 17 (1) (a) is, I think, plain. The legislature realised that machinery or plant

> might be sold before the trader had obtained the full amount of the depreciation allowances which might have accrued in respect thereof, and the moneys received on the sale might be less than the written-down value of the asset. This would indicate that the depreciation allowances had not been sufficiently generous in this particular instance, and, by way of putting the matter right, a ' balancing allowance ' became claimable by the trader. Conversely, if the moneys received on the sale were in excess of the written-down value of the asset, a ' balancing charge ' was imposed, in order to restore to the public revenue the amount by which the past allowances were shown to have been excessive."

LORD REID said (ibid., at p. 362):

> " I find nothing in the Income Tax Act, 1945, to justify giving to the word ' sale ' a meaning wider than its ordinary meaning. In a taxing Act, and particularly in a charging section, one assumes that language is used accurately unless the contrary clearly appears, and, in my opinion, s. 17 is a charging section. It is the only section which could authorise the assessment in this case. It is true that its provisions may sometimes favour the taxpayer by entitling him to a balancing allowance. But that does not prevent it from being a charging section as regards those whom it makes liable to pay tax, and ' No tax can be imposed on the subject without words in an Act of Parliament clearly showing an intention to lay a burden on him '*. It may be that there is no apparent reason why the taxpayer should be subject to a balancing charge or entitled to a balancing allowance if his plant is sold but not if it is taken compulsorily but ' . . .† if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be . . .' "

In contradistinction to that passage from LORD REID's speech, LORD MORTON had expressed the view that this was not a charging section. He said ([1955] 2 All E.R. at p. 358):

> " It is true that, in one event, the section imposes a charge on the subject, but it is equally true that, in another event, it confers a benefit on him, and the words ' is sold ' must bear the same meaning in each event. In these circumstances, I do not think that the principle of strict construction of a charging section can be applied in this case."

Those passages do not appear to me really to afford much assistance in the present case, and I share the difficulty expressed by HARMAN, J., in applying the principle that a charging section or charging provision must be strictly construed. All one can do is to construe the provisions of any enactment according to their tenor as best one can. If they are advanced to the court as imposing some charge, the court rightly requires that the intention of imposing a charge should be expressed in clear terms; and if, in truth, there is any ambiguity, it should be resolved against the person seeking to set up the charge. But really this comes to very little more than saying that provisions imposing charges, like any other statutory provisions, must be construed according to their language.

Counsel for the Crown attached some importance to the passage at the conclusion of the passage from LORD MORTON's speech which I have just read where he said (ibid., at p. 353):

> " . . . a ' balancing charge ' was imposed, in order to restore to the public revenue the amount by which the past allowances were shown to have been excessive."

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* Per LORD BLACKBURN in *Coltness Iron Co.* v. *Black* (6) ((1881), 6 App. Cas. 315 at p. 330).

† Per LORD CAIRNS in *Partington* v. *A.-G.* ((1869), L.R. 4 H.L. at p. 122).

Counsel for the Crown says that, bearing that principle in mind, this emerges A
clearly as an income transaction, the position in a case such as this being that events, as they ultimately turn out, show that the taxpayer has been accorded relief from income tax on the strength of losses which in the end of all do not materialise or are fully recouped by the sale of the plant or machinery in relation to which the allowances are given. The position then is that the taxpayer has paid too little tax, and the provisions dealing with balancing charges are designed B
to rectify that. The balancing charge thus appears as an item invested with the character of income, introduced into the assessment to income tax of the given taxpayer so as to rectify the underpayment due to the allowances made in past years. That line of argument is attractive, but it suggests that the intention enacted would have been better carried out by provisions enabling assessments for past years to be re-opened and for the adjustment to be made year by year. C
Be that as it may, while this argument indicates the policy of these statutory provisions, it does nothing, so far as I can see, to carry the case of the Crown any further on the question whether the balancing charge is part of the actual income from all sources of the company. Accepting what was said by SCOTT, L.J., on the meaning of " actual " in this context, I still find it necessary that it should be shown that by some express statutory provision this notional item represented D
by the balancing charge is to be deemed for income tax purposes to be income of the company. Finding no such provision, I think it necessarily follows that the appeal here fails.

We were referred to various other authorities, but none, I think, really has any bearing on this matter, with the exception of *Townsend* v. *Electrical Yarns, Ltd.* (7) ([1952] 1 All E.R. 918), which was heard by DONOVAN, J., the facts being E
quite different from those in this case. DONOVAN, J., came to the conclusion that the amount of the balancing charge ought not to be included in the profits of the year in which it was to be charged, and he regarded that assessment as a separate matter from the ordinary assessment. Accordingly, he seems so far to have taken very much the same view as I have done on the question of the balancing charge.

For the reasons I have endeavoured to state, I think this appeal fails and F
should be dismissed.

PARKER, L.J.: I entirely agree, and there is nothing which I can usefully add.

PEARCE, L.J.: I also agree.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Solicitor of Inland Revenue; Simmons & Simmons* (for the taxpayer company).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

JOEL *v.* SWADDLE AND ANOTHER.

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Ormerod, L.JJ.), October 10, 1957.]

Landlord and Tenant—New tenancy—Business premises—Opposition by landlord—Intention to reconstruct premises on termination of current tenancy—"Reconstruct"—Substantial interference with structure—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2 *c.* 56), *s.* 30 (1) (*f*).

The tenant occupied part only of the ground floor of certain premises, known as No. 3, Marine Avenue, for the purpose of carrying on the business of selling candy and rock. The tenant's holding consisted of an open shop front and two rooms at the back separated from one another and from the rest of the premises by brick walls. The ground floor of No. 3, Marine Avenue, also included a passage leading to a back store room, a scullery and a coal shed. The tenant applied for the grant of a new tenancy of the holding under Part 2 of the Landlord and Tenant Act, 1954; and the landlord opposed the application on the ground (provided by s. 30 (1) (f) of the Act) that he intended to "reconstruct the premises comprised in the holding or a substantial part of those premises . . . and . . . could not reasonably do so without obtaining possession of the holding". The landlord proposed to convert the ground floor of the whole of No. 3, Marine Avenue, including the part occupied by the tenant, into a single arcade by (amongst other alterations) removing the partition walls and substituting for them steel rolled joists across the roof of the ground floor, the joists resting on pillars and thus supporting the first floor. The holding of which the tenant was tenant would thus cease to exist as a separate entity, the work of substituting the joists and pillars was work reconstructing the structure not only of the whole building but also of the tenant's holding.

Held: the proposed work taken as a whole amounted to a work of reconstruction of a substantial part of the holding in that it involved a substantial interference with the structure of the premises comprised in the holding, and accordingly the application for a new tenancy should be dismissed.

Percy E. Cadle & Co., Ltd. v. *Jacmarch Properties, Ltd.* ([1957] 1 All E.R. 148) explained; definition of "reconstruct" given by ORMEROD, L.J. ([1957] 1 All E.R. at p. 150) adopted (see p. 329, letter C, and p. 330, letter B, post).

Observations on the proper approach to the question whether work proposed to be done will be work of "reconstruction" within s. 30 (1) (f) of the Landlord and Tenant Act, 1954 (see p. 328, letter F and p. 329, letter H, post).

Appeal allowed.

[For the Landlord and Tenant Act, 1954, s. 30 (1) (f), see 34 HALSBURY'S STATUTES (2nd Edn.) 414.]

Case referred to:

(1) *Percy E. Cadle & Co., Ltd.* v. *Jacmarch Properties, Ltd.*, [1957] 1 All E.R. 148; [1957] 1 Q.B. 323.

Appeal.

This was an appeal by the respondent landlord from an order of His Honour JUDGE CHARLESWORTH made at the North Shields County Court on Apr. 25, 1957, granting the applicant tenant a new lease for a term of three years of certain premises. The demised premises were situated on, and comprised part of, the ground floor at No. 3, Marine Avenue, Whitley Bay. The whole of the ground floor comprised a shop with an open front, behind which were two storage rooms and then a yard. Alongside the shop and storage rooms ran a passage leading to another store room, scullery, coal shed and a water closet (all of which abutted on to the yard). The tenant's holding comprised the shop with the two storage rooms behind and the water closet with a right of access through the yard to the water closet. The tenant whose tenancy expired on Oct. 16, 1956, applied under the Landlord and Tenant Act, 1954, for a new tenancy of the premises let to him; and the landlord opposed the application on the ground provided by s. 30 (1) (f) and stated that he intended to roof the yard and to convert the whole of the ground floor (including the yard) into an amusement arcade for which he had obtained planning permission. He intended to demolish the dividing partitions and walls and substitute as support for the first floor steel rolled joists supported on pillars built into the ground: he also intended to take up the existing flooring and make a new concrete floor at a lower level. The county court judge held that the proposed work was neither a demolition or reconstruction of the premises comprised in the holding nor a substantial work of construction on the holding, within the meaning of s. 30 (1) (f), and granted a new tenancy to the tenant. The landlord appealed.

J. F. S. Cobb for the appellant, the landlord.
R. A. Percy for the respondent, the tenant.

LORD EVERSHED, M.R.: The question in this appeal arises on s. 30 (1) (f) of the Landlord and Tenant Act, 1954, which already, on more than one occasion, has been before the courts. That paragraph, when read with the opening words of the sub-section, is as follows:

> " The grounds on which a landlord may oppose an application [for a new tenancy] are . . . (f) that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding."

In the present case the holding consists of a certain portion only of the ground floor of premises situate at No. 3, Marine Avenue, Whitley Bay. The holding consists first of an open shop front whereon the tenant had for some time carried on the business of offering to the inhabitants of Whitley Bay, candy or rock; in addition, the holding comprises two separate rooms behind, which were used for storage unconnected with the confectionery business and are rooms approximately sixteen feet square and separated one from the other and from the rest of the premises by brick walls. At the relevant date it appears that the tenant also occupied a water closet at the rear of the premises, and separated from the nearest storage room by a yard over which it is said, and indeed it is conceded, that he had some right of access. Reference to the tenancy agreement to which counsel for the tenant drew our attention, shows that in point of fact neither the water closet nor the yard nor the right over the yard was referred to in the agreement, although it is said by counsel for the landlord, and I think rightly having regard to the form of the judgment, that for the purposes in hand it was deemed that the rights of the tenant as regards the shop and storage rooms were not exhaustive of his rights, and that his holding must also be taken to have comprehended whatever rights he possessed as regards the yard and the water closet.

The landlord, having acquired the premises only in 1956, was disabled* from relying, as he might otherwise have done, on s. 30 (1) (g); he was, therefore, bound to establish, in order to succeed (the onus being on him) that what he was proposing to do and intending at the relevant date to do, was work of demolition or reconstruction or of construction within the language that I have read from para. (f). The work which he proposed to do and was in a position to do, as he had obtained the necessary planning permission, involved, putting it generally, that the separate entity of which the tenant was the holder would disappear and become wholly merged in a single room or space which would cover the entire ground floor of the premises from north to south. He proposed to use that single hall or space as an amusement arcade. Such a transfiguration of the premises—and for the moment I mean the whole premises; I am not confining it to the tenant's holding only—involved the removal of all the intervening partitions and walls and it involved also the substitution for the walls of whatever support was requisite to bear the superincumbent first floor of the building.

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* See the Landlord and Tenant Act, 1954, s. 30 (2).

As counsel for the tenant, however, points out with some force, we are bound to confine our attention for this purpose to the holding itself—to that part of the premises of which the tenant was and is the tenant. The work as regards that part none the less required that the walls, which, I think I am right in saying, run broadly east and west across the premises separating the shop from the first storage room, the first storage room from the second storage room and from the passage on the east, and the second storage room from the yard in the north and the passageway to the east, should all be removed. It is not, however, merely a question of removal of those walls; in lieu of them and in order that the ground floor might perform its structural purpose vis-à-vis the first floor, it is necessary that there should be substituted steel rolled joists across the roof of the ground floor premises, supported on substantial pillars which would be built into the ground, capable of bearing the girders and enabling the structural support to be given to the rooms above. I hope I have sufficiently stated that aspect of the matter, because in my judgment it is of real importance.

The learned judge, as we were informed, felt a degree of sympathy with the landlord; so much so that apparently his conclusion was reached with some reluctance. As I follow his judgment, however, he felt bound by authority to take a particular view of the meaning of the relevant words in para. (f). This is not a case in which, as I read the learned judge's judgment, his conclusion was that the work, although it might be described as work of reconstruction, was not sufficiently substantial. If that had been his view, then I think that this court might have been compelled to say, whatever view it might have taken itself, that the question was one of degree and fact, in respect of which the learned county court judge's judgment must be treated as final. I read this judgment as not being of that nature; I read it as involving a statement of principle to be applied, namely, that of the meaning and effect of the language of the paragraph in the section. The judgment reads as follows:

> "It was contended that these works amounted to (a) a demolition of a substantial part of the holding. Where the holding is entirely on the ground floor with another floor, not part of the holding, above it I held that it was very difficult to demolish a substantial part of the holding when the floor above is substantially undisturbed unless the main walls or a substantial part of them are removed. I do not regard a demolition of the internal division walls as demolition of a substantial part of the premises comprised in the holding. In this case the back wall, which is of fourteen inch brickwork, is to be removed and the division walls between the rooms marked 'storage' and the passage are also to be removed but, in my view, this was not substantially to demolish the premises comprised in the holding. The premises remain substantially what they were, the same area with the same boundaries with the same party wall dividing them from the premises next door and the same ceiling dividing them from the premises on the first floor above."

It will be observed that in the passage which I have read the learned judge says nothing at all about the substitution for the party walls of the pillars and the rolled steel joists, which, as I have indicated and as I think, are structurally of significance, and indeed of necessity, to the upkeep of the building as a whole. The learned judge goes on:

> "It was next contended that the proposed works showed (b) an intention to reconstruct a substantial part of the premises comprised in the holding. The meaning of reconstruct was recently considered by the Court of Appeal in *Percy E. Cadle & Co., Ltd.* v. *Jacmarch Properties, Ltd.* (1) ([1957] 1 All E.R. 148) . . . I do not regard the provision of a new front of the kind contemplated in this case [and that means the new shop front] as an act of reconstruction, because it does not substantially affect the structure of the premises—it is more in the nature of a fitting annexed to or fitted into the structure. Again, a new floor is in the nature of a repair or a replacement and is not, in my view, a structural alteration much less a reconstruction. The roof over the yard and the adjoining part of the holding is a reconstruction, or more literally a work of construction, but I held that by itself or even in connexion with the other works proposed it did not amount to a reconstruction of a substantial part of the premises comprised in the holding; it was merely an auxiliary part of the work to be carried out."

Then finally the learned county court judge deals with the question whether there was an intention to carry out substantial work of construction, which he held was to be determined on the same grounds and for the same reasons in substance as determined his view as to reconstruction, which I have just read. Again it will be observed that he omits altogether in his enumeration of the several items of the work proposed any reference to the substitution of the existing east and west walls by rolled steel joists resting on pillars—work which I venture to think is certainly structural in the sense that it is an essential part of the structure, not only of the whole building, but (which is more important) of the holding of the tenant. On the whole, therefore, it seems to me that the learned judge has misdirected himself by giving too narrow a view of the meaning of the words in the paragraph. He has, if I may say so, emphasised that by his omission to take account of the work connected with the steel joists on the pillars.

In cases of this kind it is apt to be dangerous to take each individual item entirely in isolation, and then to say that each item so taken cannot itself be a work of reconstruction or a substantial work of reconstruction. One must look at the whole work which is proposed, and then say, in regard to it: Does it amount to a substantial work of reconstruction ? When one views in that way what is here proposed it does, I think, amount, within the meaning of the paragraph, to a work of reconstruction of a substantial part of the premises. I lay considerable emphasis on that part of the work which consists of the substitution of the transverse walls by the proposed girders resting on pillars; I also think, with respect to the learned county court judge, that he gave somewhat too little emphasis to the floor; because what is proposed is not merely the making of a new floor, but the sinking of the floor, not a great deal, but by a distance of some eight inches, which produces an appreciable increase in the total space of what was, and is at present, the tenant's holding.

I come back now to the citations which the learned county court judge made from *Percy E. Cadle & Co., Ltd.* v. *Jacmarch Properties, Ltd.* (1). That was a case in which the work the landlord intended to carry out consisted substantially of making internal staircases where previously there had been external means of access only, to the basement on the one hand and to the upper floor or floors on the other. The view that the learned county court judge had taken was that the putting in of an internal staircase was rather a matter of improvement than of reconstruction, that is to say, of interference with the structure as such, of the building. It is in that context that DENNING, L.J., used the phrase ([1957] 1 All E.R. at p. 149) with which HODSON, L.J., agreed (ibid., at p. 150) and which the learned county court judge quoted:

> "The word 'reconstruct' here is best expressed . . . by the synonym 'rebuild'."

When the facts of *Percy E. Cadle & Co., Ltd.* v. *Jacmarch Properties, Ltd.* (1) are considered, what the learned county court judge was intending to express will be apparent; the putting in of a staircase did not amount in any ordinary use of the phrase to any "rebuilding" of the premises. On the other hand, I think, with respect to the learned county court judge, that one does not fail to rebuild in the structural sense because one does not substitute for a wall another and different wall but leaves a space, as where girders resting on pillars are substituted for the wall and perform the structural function which the wall previously performed.

So far as the earlier case is concerned, I would respectfully adopt as being helpful in this case the rather more extensive exposition used by ORMEROD, L.J., which was also quoted by the learned county court judge in the present case. ORMEROD, L.J., said (ibid., at p. 150):

> ". . . the word 'reconstruct' . . . must mean, I think, in the first place, a substantial interference with the structure of the premises and then a rebuilding, in probably a different form, of such part of the premises as has been demolished by reason of the interference with the structure."

I have not in the present case said anything about demolition, or what the learned county court judge said about demolition, because I am content for my part to rest my conclusion on the other words in the paragraph, namely, that "the landlord intends to reconstruct a substantial part of the premises". In construing those words I adopt the language I have cited from ORMEROD, L.J.'s judgment. I think that what is here intended to be done does in a real sense involve an interference with the structure of the whole, or of a substantial part, of the premises, and involves a "rebuilding", in the ordinary sense of the word, of the premises or a substantial part, by substituting structurally something different from that which was there before.

I think, therefore, that the learned judge should have decided the present case, as I gather he would have liked to have done, in the landlord's favour. We are not in so finding departing from the rule that we cannot interfere with a judge who, as a matter of fact in these cases, reaches a conclusion, for example, whether what is proposed is "substantial". The learned county court judge was constrained, however, by the interpretation that he gave to s. 30 (1) (f) of the Landlord and Tenant Act, 1954, and by the view which he took of *Percy E. Cadle & Co., Ltd.* v. *Jacmarch Properties, Ltd.* (1), to give, in my judgment, too narrow a meaning to para. (f) and thus he has misdirected himself. In those circumstances, therefore, I am of the opinion that this appeal must be allowed.

ROMER, L.J.: I agree, and I have only a word or two to add on this. It seems to me that the proper way of ascertaining whether what is proposed to be done will be work of "reconstruction" of premises is to look at the position as a whole and compare the results on the premises of carrying out the proposed work with the condition and state of the premises before the work was done; in other words, you want to regard the whole position as one total or entire picture.

One of the criticisms which has been levelled against the learned county court judge is that he did not make that approach to the matter, but that he really took each item of work which was involved in the proposed alterations and said: "This is not reconstruction; that is not reconstruction; this is mere improvement", and so on; and in so doing, as LORD EVERSHED, M.R., pointed out, he does appear to have overlooked, or at all events under-emphasised the importance of, the substituted means of support which was going to be introduced by the demolition of the walls and the introduction in their place of the girders. If that criticism be justified, as in my view it is, it means that the learned county court judge has really gone wrong in law in this matter, because he has not construed s. 30 (1) (f) of the Landlord and Tenant Act, 1954, in the way in which it should be construed. When one looks, as I think one should look, at the position as it will be when all the proposed work as been done, I for my part am satisfied that it will result in the reconstruction of the tenant's premises within the meaning of the language of Ormerod, L.J., in *Percy E. Cadle & Co., Ltd.* v. *Jacmarch Properties, Ltd.* (1) ([1957] 1 All E.R. 148), which Lord Evershed, M.R., has cited. Indeed, it is difficult to imagine any way in which the premises could be reconstructed if the proposed works fall short of that expression. I am clear that in fact every single feature of the premises is going to be radically altered, and the result on the whole will be the provision of entirely new premises differing in every material respect from those which the tenant now occupies. Accordingly I agree with Lord Evershed, M.R., that this appeal should be allowed.

ORMEROD, L.J.: I agree, and there is very little that I wish to add. In *Percy E. Cadle & Co., Ltd.* v. *Jacmarch Properties, Ltd.* (1) ([1957] 1 All E.R. 148), the real issue was whether the fact that the identity or character of the premises had been entirely changed amounted to a reconstruction of the premises, although the actual structural work which had to be done was very little indeed, being little more than the putting in of an internal staircase. The court in that case came to the conclusion that the mere changing of identity or character of the premises was not in itself a reconstruction. In the present case, of course, the intention is undoubtedly to change the identity or character of the premises by changing this holding from a small shop with two storage rooms into part of a large hall intended to become an amusement arcade. It does appear that in order to do this a considerable amount of alteration will have to be done, consisting, as has already been said, of demolishing walls which serve as partitions, and also serve to support the ceiling above, and putting in their place other forms of support which require considerable structural work to be done.

In these circumstances it would appear to me that if I had to decide this case on those facts, I should have probably come to the conclusion that there was here a reconstruction of a substantial part of the premises. That, of course, is a question of fact for the learned judge, but it has been argued here that the learned judge has misdirected himself on the proper construction of s. 30 (1) (f) of the Act of 1954. I agree that he has so misdirected himself. He has taken certain parts of the work which are to be done, such as the putting in of a new shop front, and the alteration to the floor, and has decided that neither of these things in themselves amounts to reconstruction. But he appears to have failed to consider at all the demolition of the walls and the necessity to put new supports in their place, and as Romer, L.J., has said, he has failed to consider the effect of the work as a whole on the premises and the respects in which it could or might amount to a substantial reconstruction. In those circumstances, therefore, I agree that this is a case where we may, and should, interfere with the decision of the learned county court judge, and I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Hyde, Mahon & Pascall*, agents for *J. W. Mitchell, Dodds & Co.*, Newcastle-upon-Tyne (for the landlord); *Gibson & Weldon*, agents for *E. L. F. Bittermann & Wood*, North Shields (for the tenant).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

SYRETT *v.* EGERTON AND OTHERS.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Donovan and Havers, JJ.), October 15, 1957.]

Charge—Validity—Deed of covenant to pay annuity—Charge of "all income and estate" of covenantor with payment of the annuity—Whether charge enforceable.

Copyright—Charge—Deed charging all income of author—Subsequent mortgage by assignment of copyright royalties—Validity of charge.

By a deed of covenant the covenantor charged "all his income and estate from whatsoever source the same may be derived and of whatever nature respectively" with the payment of an annual sum to a trustee on behalf of a named beneficiary. The covenantor later specifically mortgaged certain copyright royalties. On the question whether the trustee or the mortgagees were entitled to certain moneys that subsequently became due on account of the copyright royalties,

Held: the charge effected by the deed of covenant was divisible between the income charged and the estate charged (*Re Clarke* (1887), 36 Ch.D. 348, applied), and the charge thereby effected of the covenantor's present and future income was sufficiently certain and was valid, whether or not a charge of a man's whole estate would be unenforceable in equity or as being against public policy; therefore the moneys due on account of the royalties should be paid to the trustee.

Appeal dismissed.

[As to the assignment of future property, see 11 HALSBURY'S LAWS (3rd Edn.) 459, para. 732; 4 HALSBURY'S LAWS (3rd Edn.) 493, para. 1019; as to assignments valid in equity, see 14 HALSBURY'S LAWS (3rd Edn.) 574, para. 1067.

As to agreements by deed unenforceable as contrary to public policy, see 11 HALSBURY'S LAWS (3rd Edn.) 326, para. 519, text and notes (a)-(c); and for cases on the subject, see 12 DIGEST (Repl.) 269-273, *2071-2097*, and 330, *2554*.]

Cases referred to:

(1) *Re Clarke, Coombe* v. *Carter*, (1887), 36 Ch.D. 348; 56 L.J.Ch. 981; 57 L.T. 823; 12 Digest (Repl.) 22, *8*.

(2) *Tailby* v. *Official Receiver*, (1888), 13 App. Cas. 523; 58 L.J.Q.B. 75; 60 L.T. 162; 20 Digest 334, *770*.

(3) *Re Kelcey, Tyson* v. *Kelcey*, [1899] 2 Ch. 530; 68 L.J.Ch. 742; sub nom. *Re Finn-Kelcey, Tyson* v. *Kelcey*, 81 L.T. 354; 35 Digest 266, *251*.

(4) *Re Turcan*, (1888), 40 Ch.D. 5; 58 L.J.Ch. 101; 59 L.T. 712; 40 Digest 516, *609*.

Appeal on interpleader issue.

This was an appeal by the respondents to an interpleader issue* (hereinafter called "the mortgagees"), being mortgagees under a mortgage dated Mar. 27, 1956, hereinafter mentioned, from an order of Master LAWRENCE dated May 27, 1957, allowing the claim of the claimant Reginald Alan Syrett on the interpleader issue to a sum of money paid into court by the applicants, Boosey & Hawkes, Ltd., on an interpleader summons on account of copyright royalties payable by them, but for claims of the claimant and mortgagees, to one Frederic Curzon.

By deed of covenant dated May 8, 1953, Frederic Curzon covenanted with the claimant and with a named beneficiary to pay to the claimant, as trustee, an annual sum of £1,000 by quarterly instalments. By cl. 2 Mr. Curzon charged "all his income and estate from whatsoever source the same may be derived and of whatever nature respectively" with the payment to the claimant of the annual sum. The deed of covenant was modified by a subsequent deed dated Apr. 8, 1954, made between the same parties, but the modifications were not material to the present case. By a mortgage dated Mar. 27, 1956, and made between Mr. Curzon and, among other parties thereto, the mortgagees, in consideration of moneys advanced or to be advanced by the mortgagees Mr. Curzon as beneficial owner thereby assigned to the mortgagees (among other property) the moneys accruing to him from the applicants on the interpleader summons by way of royalties for copyright in musical works which copyright Mr. Curzon had assigned to the applicants; the assignment was subject to the proviso that if the sum secured by the mortgage should be repaid with the interest due thereon the right of the mortgagees to receive the moneys accruing on account of the said royalties should cease. Notice of the deed of covenant and of the mortgage was given to the applicants in May, 1953, and April, 1956, respectively.

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* The interpleader summons was taken out by Boosey & Hawkes, Ltd. On that summons an order was made directing an interpleader issue between Mr. Syrett as claimant and the mortgagees as respondents. Boosey & Hawkes, Ltd., were dismissed from the proceedings after payment into court of the sum claimed.

The applicants, having in hand to the credit of Mr. Curzon £143 15s. royalties, for which the claimant and the mortgagees were making adverse claims, applied by originating summons dated Oct. 19, 1956, for interpleader relief. The claim of the claimant having been allowed by the order dated May 27, 1957, the mortgagees appealed on the ground, among others, that by reason of the mortgage of Mar. 27, 1956, they were entitled to the sum in question.

H. Lester for the appellants, the mortgagees.

M. E. I. Kempster for the respondent on the appeal, the claimant.

LORD GODDARD, C.J.: In the year 1953 Mr. Frederic Curzon entered into a deed of covenant with Mr. Syrett, who is the applicant in this interpleader issue (Mr. Syrett being a solicitor and trustee for a named beneficiary), under which Mr. Curzon covenanted with the trustee and the beneficiary that he and his personal representatives would pay to the trustee during the life of the beneficiary such a sum as after deduction therefrom of income tax at the current rate for the time being would amount to the clear quarterly sum of £250, such payments to commence as from the date of the deed and to be paid on each of the usual quarter days in advance and to be deemed to accrue from day to day. By the second clause of the deed, Mr. Curzon charged

> " all his income and estate from whatsoever source the same may be derived and of whatever nature respectively with the payment to the trustee of the payments."

This deed of covenant was altered in a material respect at a later date, simply with regard to the question of taxation. One of the sources of Mr. Curzon's income was the right to receive from the music publishers, Boosey & Hawkes, Ltd., royalties on certain compositions that they published, of which Mr. Curzon was the author. On Mar. 27, 1956, Mr. Curzon entered into a mortgage in which he, having borrowed sums of money, purported specifically to charge the royalties which he received from Boosey & Hawkes, Ltd., in favour of the lenders, who are the respondents on the interpleader issue. Mr. Curzon, having made default and there being due a sum of £143 15s. from Boosey & Hawkes, Ltd., the question is which of the claimants under these respective deeds is entitled to the money. Mr. Syrett claims as having the first charge on this income.

The point that is raised is that the charge in favour of Mr. Syrett as trustee is too vague to be enforced and, as it purports to be a charge on the whole of the income and assets (" estate " is the word used) of whatever nature, that is so wide that equity will not enforce it. It is also alleged to be against public policy, because it is said it might deprive a man of the whole of his assets and his power to maintain himself.

We have had cited to us several cases, including *Re Clarke, Coombe* v. *Carter* (1) ((1887), 36 Ch.D. 348) and especially *Tailby* v. *Official Receiver* (2) ((1888), 13 App. Cas. 523), a very well-known case. In my opinion, it is perfectly clear that equity will recognise a charge and enforce it if it is on identifiable property. As a matter of construction there is no doubt from the terms of this particular deed that Mr. Curzon was charging not only his present income but also his future income. In *Re Clarke, Coombe* v. *Carter* (1) the court considered whether the charge could be enforced and said that the assignment was divisible and there was no doubt that the charge, as they held, was effective on part of the property charged, although it was left open whether or not it was chargeable on the whole. Then in *Tailby* v. *Official Receiver* (2) that view of the Court of Appeal was upheld.

For my part, I find it enough to say here that where a man charges his present income and his future income and in addition the rest of all his estate, we need not decide the rather larger question, which never has been specifically decided, whether the charging of the whole of a man's property and estate may be regarded with such disfavour by equity that they will not enforce it. I can see no reason at all why a man is not entitled to charge his income. His income is distinct from the rest of his estate. It is part of his estate, no doubt, but it is a definite thing. It is that on which he pays tax, among other things. He pays tax on his income; he does not pay tax on the whole of his estate. In this case there can be no doubt that the royalties, which Mr. Curzon receives from Boosey & Hawkes, Ltd., are part of his income, and he has charged those with the payment of this annuity. It is interesting to notice that in the last of the cases which were cited to us, *Re Kelcey, Tyson* v. *Kelcey* (3) ([1899] 2 Ch. 530), KEKEWICH, J., pointed out that there was no decision to the effect that a general charge on the whole of a man's property could not create a specific lien of any sort or kind, and he says (and, if I may say so, I entirely agree with him) that that is a point which nowadays could only be decided by the House of Lords.

Some reliance was placed on an expression of LORD MACNAGHTEN in *Tailby* v. *Official Receiver* (2) (13 App. Cas. 523), but I think his speech, when it is understood, is a direct authority in favour of saying that if one can point a finger to a particular property and say " That property is charged ", the charge takes effect on it.

For these reasons, in my opinion the learned master came to a proper decision; and I would dismiss this appeal.

DONOVAN, J: Counsel for the appellants (who claim under the mortgage of Mar. 27, 1956) says that we should not treat this charge and the deed of covenant as divisible between income and estate. The word " estate ", of course, is wide enough to cover receipts of income as well as receipts of capital; but, in its context, the covenantor (Mr. Curzon) here clearly intended, in my view, to use the word " estate " as meaning capital. That is in contradistinction to the income which he had already specified. That being so, it seems to me it is just as proper to treat those two things separately for this purpose as it was to treat separately possible receipts under a will or a contract in *Re Clarke, Coombe* v. *Carter* (1) ((1887), 36 Ch.D. 348); separately, that is, from the other kinds of property which were specified in the assignment which included any property to which the mortgagor might thereafter become entitled. On that footing, the footing that it is proper to divide, it is not contended, as I understand it, that a man may not charge all his future income by way of mortgage without contravening public policy; and, of course, when the charge comes to be enforced, it should not be difficult to ascertain what his income is. So no question of vagueness will arise at the material time, which is the time when the charge comes to be enforced.

I agree with what LORD GODDARD, C.J., has said, that it is not necessary to decide the larger question in this case; and, for these reasons, I agree that the appeal should be dismissed.

HAVERS, J.: I agree. I do not think that it is necessary for us to decide the larger question raised by counsel for the appellants (who claim under the mortgage of Mar. 27, 1956) whether, when a man charges the whole of his income and assets present and future, such charge is void, either on the ground that it is contrary to public policy or because it is too wide to be enforceable by a court of equity. As Cotton, L.J., said in *Re Turcan* (4) ((1888), 40 Ch.D. 5 at p. 9):

> " The first point that was made before us was that the whole covenant was against public policy and void, as being a covenant to dispose of the covenantor's whole means of livelihood. We do not think that is so, there being no question of restraint of trade."

Nor was there any restraint of trade in this case.

> " But it is a different question whether the covenant is not so wide that a court of equity would refuse to enforce it, and would leave the trustees to prove against the estate of the covenantor for breach of the covenant like ordinary creditors. Possibly the court would refuse to enforce this covenant as a general covenant to assign all the settlor's property; but it is not necessary to decide that point, because another question arises here, namely, whether a court of equity will not enforce the covenant with regard to the policies on the ground that the covenant is divisible, and that the policies are within one of the classes of property specially mentioned. That is really the question in this case. It has been decided in *Tailby* v. *Official Receiver* (2) ((1888), 13 App. Cas. 523) approving the decision in *Re Clarke* (1) ((1887), 36 Ch.D. 348), that where a covenant is divisible, and the property in question can be brought within any particular class mentioned in the covenant, the covenant may be enforced as to that property, although it may not have been in existence at the time of making the covenant, and although it may not be assignable at law."

Here, in my view, the covenant is divisible, and it seems to me it is beyond dispute that the sum of money involved, £143 15s., was money payable by Boosey & Hawkes, Ltd., to Mr. Curzon and clearly came within the definition of " income " within the meaning of the covenant. In those circumstances, I think the learned master was right and that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Hall, Brydon, Egerton & Nicholas* (for the appellants); *Ernest W. Long & Co.* (for the respondent).

[*Reported by* E. Cockburn Millar, *Barrister-at-Law.*]

PAYNE *v.* COOPER.

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Ormerod, L.JJ.), October 14, 15, 1957.]

Rent Restriction—Possession—Unconditional order—Subsequent conditional order postponing date for possession and discharging original order on fulfilment of conditions—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5 *c.* 17), *s.* 5 (2), *as substituted by Rent and Mortgage Interest Restrictions Act,* 1923 (13 *&* 14 *Geo.* 5 *c.* 32), *s.* 4.

On Feb. 13, 1957, an unconditional order for delivering at a future date possession of a dwelling-house to which the Rent Restrictions Acts applied was made in the county court against the tenant on the ground of non-payment of rent. Before the date for delivering possession arrived the tenant made an application for the order to be varied, and on May 6, 1957, another county court judge, purporting to exercise the powers given to him by s. 5 (2)* of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as substituted by s. 4 of the Rent and Mortgage Interest Restrictions Act, 1923, made an order whereby the date of possession under the order of Feb. 13 was ordered to be postponed for twenty-eight days from May 6, 1957, on condition that before the expiry of the twenty-eight days the defendant should have paid all the arrears and the costs, and it was further ordered that on such payment the order for possession should be discharged. On an appeal by the landlord,

Held: the county court judge had jurisdiction to make the order of May 6, 1957, because

(i) under s. 5 (2) of the Act of 1920, as amended, it was within the competence of the court to convert an " absolute " order, which had not been executed, into a conditional order by making a subsequent order postponing the date of possession on conditions, and to discharge the original order for possession if the conditions were fulfilled (dicta of SIR RAYMOND EVERSHED, M.R., in *Mills* v. *Allen,* [1953] 2 All E.R. at p. 542, and in *Haymills Houses, Ltd.* v. *Blake,* [1955] 1 All E.R. at p. 598, applied); and

(ii) the order for this purpose might be one order, compendious in form, and it was not necessary for the tenant to have to obtain first an order imposing conditions and subsequently a further order discharging the original order (dicta of ROMER, L.J., in *Sherrin* v. *Brand* (*orse Phelps*), [1956] 1 All E.R. at pp. 206, 207, applied).

Appeal dismissed.

[For the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 5 (2), see 13 HALSBURY'S STATUTES (2nd Edn.) 990; and for cases on the subject, see 31 DIGEST (Repl.) 721, 722, *8048-8050*.]

Cases referred to:

(1) *American Economic Laundry, Ltd.* v. *Little,* [1950] 2 All E.R. 1186; [1951] 1 K.B. 400; 31 Digest (Repl.) 665, *7645*.

(2) *Mills* v. *Allen,* [1953] 2 All E.R. 534; [1953] 2 Q.B. 341; 3rd Digest Supp.

(3) *Haymills Houses, Ltd.* v. *Blake,* [1955] 1 All E.R. 592; 3rd Digest Supp.

(4) *Sherrin* v. *Brand* (*orse Phelps*), [1956] 1 All E.R. 194; [1956] 1 Q.B. 403; 3rd Digest Supp.

Appeal.

This was an appeal by the plaintiff from an order made by His Honour JUDGE BAXTER, at Brentford County Court on May 6, 1957, whereby it was ordered that the date for possession of the dwelling-house known as " The Elms ", Ruislip Road, Northolt, under an order of Feb. 13, 1957, be postponed for twenty-eight days from May 6, 1957, on condition that on or before that date the defendant should pay or should have paid all the arrears and the costs of the hearing on Feb. 13, 1957, and on May 6, 1957, and on such payment the order for possession should be discharged. A

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* The terms of the sub-section are printed at p. 337, letter C, post.

R. H. W. Dunn for the plaintiff, the landlord.
P. Back for the defendant, the tenant.

LORD EVERSHED, M.R.: Miss Ellen Payne, the plaintiff in these proceedings (and referred to hereinafter as " the landlord "), is the owner of certain premises in Northolt known as " The Elms ", Ruislip Road, of which the defendant (referred to hereinafter as " the tenant ") is the occupier. The landlord brought proceedings at the beginning of this year for possession of the premises, which admittedly were within the scope of the rent restriction legislation, alleging as the ground for jurisdiction being conferred on the court that, as was the fact, the tenant had fallen seriously in arrears in payment of his rent. The tenant appears to have supposed that one of the persons of whom the landlord is the personal representative, would give the premises to him by will, in which hope he had been disappointed, and, as a consequence, he appears to have adopted a somewhat bellicose attitude which clearly did not impress the deputy county court judge before whom the application came. We have not before us a copy of the order which the deputy county court judge made on that application. Its date was Feb. 13, 1957, and, though we have not the form of order before us, its content is clear and conceded. It was that the tenant should deliver up possession of "The Elms" at the expiration of one month, that is, on Mar. 13, 1957, and the order also included a judgment for the arrears of rent, amounting to £23 16s., and costs. The form of the order, therefore, was—to use the adjective which emerges in certain of the cases—" absolute " or " final ". It was an order that possession should be delivered up on or before a specific date. There was no condition on the performance of which the effect of the order might be suspended. B C D E

The possession date was, in fact, postponed as a result of an agreement which was reached between the parties; but nothing of any materiality turns on that fact. For present purposes, the order remained in form and intent an " absolute " order, in the sense in which I have used that word. As time passed, so apparently did the bellicosity of the tenant, who then was prudent enough to take advice. Before the date arrived when he should give up possession, he made an application in which he invoked the terms of s. 5 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as substituted by s. 4 of the Rent and Mortgage Interest Restictions Act, 1923, and asked that the order of Feb. 13, 1957, should be very substantially varied both in terms and character. He also paid into court the arrears of rent and the costs. F G

The matter came before the learned county court judge on May 6, 1957, and the order which he made was in these terms:

> " It is ordered that the date for possession of the premises known as ' The Elms ', Ruislip Road, Northolt . . . under the order of Feb. 13, 1957, be postponed for twenty-eight days from today on condition that on or before that date [which obviously means at the expiration of the twenty-eight days] the [tenant] shall pay or shall have paid the arrears of £23 16s. together with the other arrears accruing to today and the costs of the hearing on Feb. 13, 1957, and the costs of today assessed at £2 2s. and on such payment the order for possession shall be discharged." H I

It is plain enough that the learned county court judge took in May a much more favourable view of the tenant than had the deputy county court judge in February. In his judgment the learned judge stated in terms that he wished to exercise all the available powers to allow the tenant to remain in possession, provided that he paid the rent promptly. That view seems to have been based in part on the tenant's age—he is seventy-eight—and also perhaps on the fact that he is a keen gardener, and the learned county court judge may have thought of the famous essay* of FRANCIS BACON. We are, however, not concerned with the reasons. No question of that kind has come before us. The only matter with which we must deal is that of the jurisdiction of the judge to make the order which was made on May 6, as it is the contention of counsel for the landlord that it was ultra vires the sub-section invoked.

On a previous occasion† I am reported as having said that the language of s. 5 (2) of the Act of 1920, as substituted by s. 4 of the Act of 1923, is somewhat inelegant, and I find no reason to repent of that criticism. It may be that, as is not uncommon in this sort of legislation, Parliament sought to take into the scope of this sub-section a number of different conceptions, so that the result requires a little careful thought, to put it no higher. The language of the sub-section is as follows:

> "At the time of the application for or the making or giving of any order or judgment for the recovery of possession of any such dwelling-house, or for the ejectment of a tenant therefrom, or in the case of any such order or judgment which has been made or given, whether before or after the passing of this Act, and not executed at any subsequent time, the court may adjourn the application, or stay or suspend execution on any such order or judgment, or postpone the date of possession for such period or periods as it thinks fit, and subject to such conditions (if any) in regard to payment by the tenant of arrears of rent, rent, or mesne profits and otherwise as the court thinks fit, and, if such conditions are complied with, the court may, if it thinks fit, discharge or rescind any such order or judgment."

It is possible for present purposes somewhat to simplify that language, for the first three lines are concerned with powers given to the court at the time when the order for possession is made, and for present purposes we can exclude them from consideration. I will, however, read again such of the following language as I think is relevant, and my omissions will not in any way, in my judgment, invalidate the conclusions on construction which I eventually reach.

> ". . . in the case of any order [for the recovery of possession of a dwelling-house] which has been made . . . and not executed . . . the court may . . . suspend execution . . . or postpone the date of possession for such period . . . as it thinks fit, and subject to such conditions . . . as the court thinks fit, and, if such conditions are complied with, the court may . . . discharge . . . such order . . ."

That reading (if it is, as I hope, justified) starts with the required premise that there should have been an order under the Act for possession of a rent-controlled dwelling-house, which order had not been executed. That premise is satisfied in this case. On Feb. 13, 1957, there had been an order for possession, and it had not been executed.

That being so, at first sight it would appear to me that inevitably s. 5 (2) gives to the court, first, a power at some later date, on application, to suspend execution; second, a power to postpone the date of possession which the first order contains; third, in the latter event at any rate, a power to impose conditions for the postponement of possession as the court thinks fit; and, finally, a power (if those conditions so imposed are complied with) to discharge the original order. To dispose at once of one point, the last five words of the sub-section, "any such order or judgment", make it, as it seems to me, impossible to say other than that the order which may be discharged includes (or may include) the original order for possession, the making of which gave rise to the subsequent exercise of the powers.

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* "Of Gardens": Bacon's Works (Spedding Edn.) (1858), Vol. 6, p. 485.

† In *Haymills Houses, Ltd.* v. *Blake* (3), [1955] 1 All E.R. 592 at p. 597.

Counsel for the landlord has been faced with this difficulty. Once it has to A
be conceded that the first step—the first of the powers which I have enumerated
—is available, it becomes really impossible for him thereafter to stop. If it
is right, in other words, that in the case of an order for possession which has been
made and not executed, the court may, on a later application, suspend execution
or postpone the date of possession, it seems to me that an inevitable step has
been taken which leads inexorably to the final conclusion that all the other B
steps, all the other alternatives, are equally available. I, of course, fully agree
that, apart from that sub-section, it may well be that by the ordinary law, if a
court has made an order for possession to take effect, without qualification, on a
particular date, it would not be competent for the court thereafter to interfere
with that order; and it would also not be competent for the court to make an
order for possession, coupled with some indefinite term of postponement. C
We are, however, dealing here with the specific provisions of this legislation,
and at first sight, as a matter of construction of the sub-section, the conclusion
appears to me to be involved necessarily from the language that, where an order
for possession has been made but not executed, the court may, by a subsequent
order, postpone the fixed date on conditions, and thereafter may provide for the
discharge of the order if the conditions are satisfied. In using the word " there- D
after " I must not be taken to be indicating that a further order is required,
although that is a matter with which I must deal later in this judgment.

The effect, if that view is right, undoubtedly is that the court, by exercising
its powers, may convert what originally was—to use the same language already
used—an absolute or final order into a conditional one; and I agree that, on
the terms of s. 5 (2), Parliament has provided in its wisdom that the court may E
discharge an order which is conditional on satisfaction of the condition, but has
made no provision for the discharge of an absolute order as such.

The question which we are now called on to decide has not so far directly
been the subject of a decision; but, as counsel for the landlord pointed out, the
matter has been debated somewhat in the course of judgments recently before
the court under the Act, where the question not uncommonly, though not invariably, F
has been whether a member of the family of a tenant or an ex-tenant,
against whom a possession order has been made, is a person who otherwise
might qualify under the terms of s. 12 (1) (g) of the Act of 1920. Does such a
person become entitled to succeed to the tenant's occupancy? I am not going
to refer to all the cases. The first case to which I wish to refer when that precise G
point arose was *American Economic Laundry, Ltd.* v. *Little* (1) ([1950] 2 All E.R.
1186), which came before this court consisting of SOMERVELL, JENKINS and
BIRKETT, L.JJ., in 1950. In that case what I have called (and it will be a
sufficient definition) an " absolute " order for possession had been made against
a tenant. He had been ordered, that is to say, to give up possession on or
before a specified date, unconditionally. Owing to illness or other circumstances, H
applications had been made as a result of which the date for giving up possession
had been postponed, and when this matter came before the court, the date had
become finally fixed as Apr. 3, 1950. The tenant died before Apr. 3, 1950, and
the question was whether his daughter, who had lived with him for twelve years
on the premises, was entitled to remain in possession as a statutory tenant.
This court answered that question in the negative. The conclusion was put I
by SOMERVELL, L.J., on the ground that the order for possession, being in that
absolute and final or unconditional form, operated to put an end altogether to
any rights under the statute which the tenant had, at any rate on the date when
the order by its terms took actual effect, and there was nothing left to which the
daughter could succeed. JENKINS, L.J., put his decision on slightly different
grounds. He did not go so far as to say that the order had destroyed the statutory
rights of occupancy altogether. He put it on the ground that the daughter,

A if she could succeed at all, must succeed cum onere; she could take only whatever was remaining to her father when he died, and that, for actual purposes, was nothing at all, and at the date when the application came before the court was, in truth, nothing.

Before I leave that case, it is, I think, important to make two observations. The first is that SOMERVELL, L.J., at the end of his judgment ([1950] 2 All E.R. B at p. 1190) desired to make clear (and did make clear) that the view which he had taken of the destructive effect, quoad the tenant's rights, of the order for possession was not necessarily applicable in a case where the order for possession was conditional; and from that passage in the judgment the distinction between absolute and conditional orders may have arisen. In that case the respondent tenant was not represented by counsel, and the learned counsel who appeared C for the appellant landlord had the always slightly difficult task of putting arguments against himself. It was in reference to those arguments that SOMERVELL, L.J., said ([1950] 2 All E.R. at p. 1189):

> " The difference between those two kinds of order [absolute and conditional] is illustrated by the concluding words of s. 5 (2), where it is said in D reference to an order made subject to conditions: '. . . if such conditions are complied with, the court may, if it thinks fit, discharge . . . any such order . . ." That cannot be done when an absolute order has been made."

The learned lord justice was not, I think, laying down or purporting to lay down, the proposition that, if an absolute order had been made, nothing thereafter could alter its character—in particular, that it could not be converted into a E conditional order. That question was not before him, and indeed, had it been, I think that the lord justice would certainly have qualified his language. This brings me to the second matter which I want to mention. I have said that, after the original order had been made, further orders suspending execution had been superimposed on it. The validity of those later orders was not in terms discussed, but it is quite clear that their validity was accepted, not only F by counsel for the landlord in that case, but also by the lords justices who took part in the decision of the case. No one questioned that under the terms of s. 5 (2) the suspensions had been validly made, from which, of course, it follows inevitably that what I have called the first step under this sub-section must be treated in any case as available—the step, after an absolute order for possession, of later suspending its execution.

G The other two cases which I think I should mention on this point are both cases in which I took part, and from which citations have been made. The first was *Mills* v. *Allen* (2) ([1953] 2 All E.R. 534). That case depended on its own very special facts. An order had been made, not under the Rent Restrictions Acts, but under the Small Tenements Recovery Act, 1838, and a warrant for possession had been issued but not acted on. The main question was whether H those orders had lapsed, but in the course of the case the question arose, supposing that they had, what were the rights, existing or reviving, of the tenant? It was, therefore, relevant to consider whether the making of an order for possession had the necessary effect of putting an end to all statutory rights. In that connexion reference was made to *American Economic Laundry, Ltd.* v. *Little* (1), and in the course of my judgment I said ([1953] 2 All E.R. at p. 542):

I

> ". . . I venture to indicate some difficulties in the way of what may appear at first sight, perhaps, to be the common-sense view of the so-called conditional form of order when the present problem arises (as it is apt to do though it may not frequently do so) on the death of the tenant leaving somebody who claims the benefit of the definition section. I begin by observing that, though the original order be absolute, nevertheless, as I read [s. 5 (2) of the Act of 1920], it may not only be discharged on application, but it may, in effect, be converted thereafter into a conditional order,

> for the language at the end of the sub-section seems to contemplate that possibility."

If I meant by that language to indicate that an absolute order might be discharged, without more, on some later application, I think that it is not right, and, indeed, I qualified it in the later case. At any rate, although not purporting to decide the point, I did there express the view (and Birkett and Romer, L.JJ., who were sitting with me, in no way dissented from it) that the terms of s. 5 (2) of the Act of 1920 comprehended the power to superimpose on an absolute order an order postponing possession on condition—in other words, power to convert an absolute order into a conditional order, with the consequence that the order, if the conditions were satisfied, could then be discharged.

The second case in which I also expressed views on this matter is *Haymills Houses, Ltd.* v. *Blake* (3) ([1955] 1 All E.R. 592). That again was a case which mainly turned on other questions, but I referred to what I had said in *Mills* v. *Allen* (2), and proceeded as follows ([1955] 1 All E.R. at p. 598):

> "That general observation [which I have already cited] may, I think now, require to be expounded. I still think it may well be that, if an absolute order for possession is made, then while it is not yet executed the court may under the sub-section make an order postponing the date of possession on conditions, and if the court did that, and if the conditions were performed, it may well be that the final words of the sub-section would give power to discharge the original order, even though absolute in form. If that is right, then it would justify the language I there used that an absolute order may be in effect converted into a conditional one so as to give rise to the power of discharge. But I am not saying anything which would conflict with Somervell, L.J.'s expression of opinion that an absolute order, as such, would not be liable to be discharged under the powers of the final terms of the sub-section. I prefer not to express further than I have already tried to intimate conclusions as to the general operation of this sub-section, but to confine myself, for the present at any rate, to the particular facts of this particular case, which is one in which there followed one after the other, as I understand them, two so-called conditional orders."

Again, my brothers in the court in *Haymills Houses, Ltd.* v. *Blake* (3), who were Jenkins and Morris, L.JJ., agreed with what I had said, adding nothing of their own. There has been, so far as is known, no adverse comment, or no contrary opinion expressed in any other case in this court; and, therefore, it seems to me that the view which was there intimated is one which should now be taken as acceptable. It obviously supports the view of the construction of the sub-section which I have already indicated.

Finding nothing which prevents the language having ordinary effect, it appears to me, therefore, to follow—now that the matter is directly before us for consideration—that it is within the competence of the court, when an absolute order (so-called) has been made, but not executed, to convert it in effect into a conditional order by the process (counsel for the landlord may call it a "device", but "process" perhaps is a better word) of making a subsequent order postponing the date of possession on conditions, and thereby inevitably, as I think, giving rise to the power contained in the last two lines of the sub-section, on satisfaction of the conditions, to discharge the original order for possession. I think, therefore, subject to one point which remains (and with which I will shortly deal) that the learned judge was entitled, as he thought that he was, and for the reasons which he stated, to make the order of May 6, which he made.

The remaining point is one of a strictly technical character, and it may be stated thus. The last two lines of s. 5 (2) are:

> "and, if such conditions are complied with, the court may, if it thinks fit, discharge . . . any such order . . ."

As a matter of English, at first sight it might be said with force that it is only when the conditions have been, in fact, complied with that that power arises and may be invoked. In the present case it will be recalled that the learned judge combined all the operations into one order. He added at the end:

> " and on such payment [that is to say, if such payment is made] the order for possession shall be discharged."

Counsel for the landlord, not unnaturally, was not very anxious to press this point because, if it were successful, the only possible consequence would be another application, the result of which would be inevitable, and costs would be expended to no useful purpose; but he has assisted the court by putting the point as I have tried to express it. On a very strict reading of the sub-section there is obviously much to be said for that view. I think, however, that the answer to it is that, in practice, the sanction of this court must now be taken to have given affirmation to the way in which the learned judge in this case exercised the power. For the practice, I turn to the County Court Forms, particularly Form 138*, in the COUNTY COURT PRACTICE, 1957, at p. 617. That form is an order for recovery of a certain sum of money for arrears of rent and judgment for possession not to be enforced for a certain period so long as punctual payment is made. At the end of the order we find:

> " And it is further ordered that the judgment(s) shall cease to be enforceable when the [arrears of rent, mesne profits and] costs referred to above are satisfied."

The form is slightly different from that in the present case, but the substance is the same—that is to say, by this form of order the court is proleptically exercising the power of discharge which the last two lines of s. 5 (2) confer. No suggestion has been made of any other source of the power contained in the last line of the order.

That form of order came before the court—not directly on this point, it is true, but it was considered—in *Sherrin* v. *Brand* (*orse Phelps*) (4) ([1956] 1 All E.R. 194), the court consisting of BIRKETT and ROMER, L.JJ., and myself. In the judgment of ROMER, L.J., reference was made to this aspect of the order. He said (ibid., at p. 206):

> " In my opinion, the result of these two orders† is to qualify the immediate operation which the preceding adjudications would otherwise have had by suspending their enforcement in the manner and on the terms therein prescribed. An absolute stay was imposed on the judgment for possession for twenty-eight days. Thereafter the judgment should not be enforced (which means that it should be unenforceable) so long as the defendant punctually paid [a certain weekly amount] . . . By the third and concluding order it was provided that on payment of the arrears of rent and costs, the judgment should cease to be enforceable altogether. In my opinion, the meaning and effect of this judgment, when taken as a whole, and especially in view of the concluding paragraph, is that the defendant might remain on as tenant of the premises so long as he performed the conditions . . ."

ROMER, L.J., went on to say (ibid., at p. 207):

> " That being, as I think, the object and effect of the order, the next question is whether the judge had power to make it. A sufficient affirmative

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* Form 138 is entitled " Order for recovery of land suspended under Rent and Mortgage Interest Restrictions Acts, 1920 to 1939 ". After two paragraphs of adjudication (the first, for the possession of the land, and the second for the payment of certain sums as arrears of rent and costs), there follow (i) an order that judgment for possession is not to be enforced for a certain period so long as punctual payment is made; (ii) an order that the judgment for arrears and costs shall not be enforced so long as certain instalments are paid; and (iii) an order that the judgment shall cease to be enforceable when the arrears and costs are satisfied.

† The first two orders referred to in the footnote supra.

> answer to this question is perhaps afforded by the fact that the form of order is that which is contained in the Appendix to the rules [County Court Rules]. Apart altogether from that, it is clear that the order is within the authority of [s. 5 (2) of the Act of 1920, as substituted by s. 4 of the Act of 1923]."

In face of that expression of opinion (and there was no dissent at all from either of my Lords present), it seems to me that it would be an altogether unwarranted technicality to press the strict language of the sub-section to a conclusion contrary to that which my brother has expressed, namely, to hold that it is necessary formally to get another order discharging the original order.

No doubt, it will be relatively rare, when an absolute order for possession has been made, for another judge then to convert it into something quite different, not only in language, but also in intent. The present case is, I think, somewhat exceptional. I have already said that the learned judge plainly took a somewhat different view of the tenant and his conduct from the view which the deputy judge had taken. I think that the power under this sub-section to convert an order made by a competent court into something really different in intent and scope is a power which will naturally be somewhat sparingly exercised. In this case no point is taken on that matter. The question being strictly and exclusively one of jurisdiction, I have given my reasons for thinking that the learned county court judge had jurisdiction to make this order, and I therefore would dismiss the appeal.

I should add that the effect of discharging the order is that the tenant's situation is that which it was immediately before the order of Feb. 13, 1957, namely, that he is a statutory tenant. I think that that must follow and should be stated; and if authority again were needed for that, I would rely on the language of ROMER, L.J., in *Sherrin* v. *Brand* (4).

ROMER, L.J.: I agree. It seems to me clear that the question of the validity of the order of May 6, 1957, against which this appeal has been brought, essentially depends on the meaning and effect to be given to the language of s. 5 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as substituted by s. 4 of the Rent and Mortgage Interest Restrictions Act, 1923. LORD EVERSHED, M.R., has analysed that language, and I do not propose to analyse it again. It is, I think, clear that on analysis one finds that, according to the ordinary language of the sub-section, the order which the learned county court judge made did not go outside the authority conferred by its provisions.

Counsel for the landlord sought to escape from that conclusion by, in effect, submitting that the final provision of the sub-section authorising the discharge or rescission of an order applies only to cases where the original order was not absolute, but was in a suspended or conditional form. I can see no warrant for that view. The language is perfectly general, and is expressed to be applicable to the case of any order for the recovery of possession of a dwelling-house. To cut that down so as to interpret it as referring only to an order which, in its original form, was a conditional one, is to narrow the effect of the language which the legislature has thought proper to use, in order to arrive at a result which is inconsistent with the language of the sub-section. Although the language has been described as inelegant, which, indeed, it is, nevertheless, taking the language as I find it, I have no doubt that it fully justified the order which the learned county court judge made.

It is quite true, as SOMERVELL, L.J., said in *American Economic Laundry, Ltd.* v. *Little* (1) ([1950] 2 All E.R. 1186), that the discharge provision at the end of the sub-section is applicable only to a conditional order, and is not applicable in its terms to an absolute order; but nowhere in his judgment in that case does SOMERVELL, L.J., either say or suggest that an original unconditional order cannot subsequently, by virtue of this sub-section, be made conditional and then subsequently discharged.

Counsel for the landlord placed some reliance on a passage from the judgment of JENKINS, L.J., in the same case where the learned lord justice, after considering the position of a statutory tenant against whom an order for recovery of possession has been made, followed by a period at the end of which actual possession is to be given up, said in regard to such a tenant ([1950] 2 All E.R. at p. 1190):

> " He has nothing left but the limited interest granted to him by what may be described as the indulgence of the court pursuant to s. 5 (2). In effect, he has a period of grace."

Counsel for the landlord said (and, I think, with some force) that the words: " In effect, he has a period of grace " show that JENKINS, L.J., had not in contemplation the possibility of an order for possession being entirely discharged, the period of grace merely involving a period of delay before possession was given up. I do not think that JENKINS, L.J., was applying his mind to a position such as the present; and it is to be observed that the language immediately preceding that phrase which he used was quite general in its character; he said, in effect, that such a tenant was entitled to the indulgence of the court under s. 5 (2), without in any way qualifying the indulgence or suggesting that such a tenant was entitled only to some part of it. Also, it is further to be noticed, as LORD EVERSHED, M.R., has pointed out, that in that very case (*American Economic Laundry, Ltd.* v. *Little* (1)) an original absolute order had, in fact, been watered down, if one may use that expression, by subsequent successful applications under the sub-section for suspension; and all the members of the court apparently (as well as counsel) assumed without any question that such suspensions were not open to impeachment or suggestion of invalidity in any way.

Therefore, there is nothing in *American Economic Laundry, Ltd.* v. *Little* (1), as I read it, which is at all destructive of the construction of the sub-section which I believe to be the true construction; and no other authority was brought to our attention which could be said to have that effect. On the other hand, LORD EVERSHED, M.R., in the two cases to which he has referred in his judgment —*Mills* v. *Allen* (2) ([1953] 2 All E.R. 534) and *Haymills Houses, Ltd.* v. *Blake* (3) ([1955] 1 All E.R. 592)—indicated, without any dissent from the other members of the court, the view which the learned county court judge has adopted and applied in the present case; and, as I have already said, I am quite satisfied, if I may respectfully say so, that that view is correct. Therefore, when one finds that the construction of s. 5 (2), if taken by itself, leads to a certain result, that that result has already, on two occasions at all events, received the provisional approval of LORD EVERSHED, M.R., and that no authority can be cited against it, it necessarily follows that the prima facie construction, as I think it is, of the sub-section should be applied, and that the learned county court judge was quite right in applying it.

Counsel for the landlord submitted certain propositions in support of his contention, with many of which I think I should agree. Especially would I mention his submission that the court should not accept a construction of the sub-section which would result in an absolute order for possession being subsequently made conditional, and then discharged, unless the language of the sub-section were sufficiently clear to warrant such a course. That, and the other propositions on which counsel for the landlord relied, are, however, displaced by the fact that, in my opinion, unsatisfactory in some respects as the language of s. 5 (2) certainly is, it does show clearly (or sufficiently clearly) that an original order for possession can be the subject of a subsequent order staying or suspending execution, or postponing the date of possession on terms; and that, if those terms are complied with, the court may discharge or rescind the original absolute order.

I agree with what LORD EVERSHED, M.R., has said in regard to the form of order which the learned county court judge made in the present case in which he resorted to the compendious form of order directing that, on fulfilment of conditions, the original order should be discharged, instead of merely making an order imposing conditions, and then waiting to see whether the conditions had been performed, and, if they had been performed, then making another order. I agree with Lord Evershed, M.R., in thinking that there is nothing wrong, or beyond the power of the court, in making an order in that compendious form, and I do not really think that counsel for the landlord placed much reliance on that point. For all the reasons which Lord Evershed, M.R., has already stated, and the reasons which I have given, I agree that this appeal should be dismissed.

ORMEROD, L.J.: I am in full agreement with the judgments delivered by Lord Evershed, M.R., and by Romer, L.J., and in the circumstances I have nothing to add. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Wilson A. L. Houlder & Co.*, Southall (for the landlord); *Parfitt, Cresswell & Williams* (for the tenant).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

DUNLOP & RANKEN, LTD. *v.* HENDALL STEEL STRUCTURES, LTD. (PITCHERS, LTD. Garnishees).

[Queen's Bench Division (Lord Goddard, C.J., Donovan and Havers, JJ.), October 17, 1957.]

Execution—Garnishee order—Building contract—Contractor to be paid on architect's certificate—Sub-contractor to be paid in accordance with the certificates—Whether sum payable by contractor to sub-contractor is debt owing or accruing until architect's certificate issued—R.S.C., Ord. 45, *r.* 1.

Judgment creditors of sub-contractors, nominated under cl. 21 of the conditions of a building contract in the R.I.B.A. form, obtained a garnishee order against the principal contractors under the building contract. Under cl. 21 of the contract no payment was due to a sub-contractor until receipt of the architect's certificate under cl. 24. The order for steelwork given by the principal contractors to the sub-contractors included a condition that payment was to be made " in accordance with the certificates and the times provided in the" building contract. When the garnishee order was made one final certificate had not been issued by the architect and under it, when issued, some payment to the sub-contractors would be directed. On appeal against the garnishee order,

Held: until the architect's certificate had been given there was no debt due to the sub-contractors and, as the certificate had not been given when the garnishee order was made, the order should not have been made.

Appeal allowed.

[**Editorial Note.** The judgments show that cl. 21 of the R.I.B.A. form of contract clearly contemplated there being a written contract between sub-contractors and principal contractors embodying the terms of cl. 21 (see p. 347, letter H, p. 348, letter I, to p. 349, letter A, post); such a contract would have made clear the position with regard to certificates, but in the present case there was not such a contract.

For the form of a R.I.B.A. contract, see 2 Ency. Forms & Precedents (3rd Edn.) 564.

As to the necessity for debts to be existing debts if they are to be attachable by garnishee proceedings, see 16 Halsbury's Laws (3rd Edn.) 81, para. 121; and for cases on the subject, see 21 Digest 621-624, *2085-2104*, 627-629, *2122-2129*.]

Case referred to:

(1) *O'Driscoll* v. *Manchester Insurance Committee*, [1915] 3 K.B. 499; 85 L.J.K.B. 83; 113 L.T. 683; 79 J.P. 553; 21 Digest 634, *2156*.

Appeal.

On June 2, 1955, the garnishees, Pitchers, Ltd., entered into a building contract with M.P.L. Investments, Ltd., in the standard R.I.B.A. form for the erection of factory premises. The judgment debtors, Hendall Steel Structures, Ltd., were nominated under cl. 21 of the contract as sub-contractors by the architects in charge of the building works. The sub-contractors were so nominated for supplying and erecting the steel work for the factory, and on May 27, 1955, in accordance with the architect's instructions, the garnishees placed an order with the judgment debtors for the supply and erection of the steel work, using an order form, the material terms of which were as follows:

> " Please execute the following order subject to the terms and conditions below which form part of this order:—
>
> STEELWORK
>
> Deliver to site and erect complete:—
>
> | | |
> |---|---|
> | Stancheons, trusses wind girders, lattice girders as described in your estimate to .. .. | £16,835. |
> | Pressed steel gutters all as described in estimate, fixed complete | £2,198. |
>
> Working details to be agreed with the architect.
> Prices subject to 2½% cash discount.
>
> Please:—
> (a) Submit your invoice in duplicate.
> (b) Quote this order number on your invoice.
> (c) Advise both us and the architect immediately of any increase or decrease in cost of labour and materials which may be adjustable under the terms of the contract.
>
> CONDITIONS
>
> 1. The party to whom this order is given shall observe and perform the conditions contained in the contract held by Pitchers, Ltd. (which can be inspected at their office), and this order shall be deemed to be supplemental thereto.
>
> 2. The dates for completion of the contract works by Pitchers, Limited is the . . . under penalties for any delay as stated in the contract. This order shall be completed by a date to be agreed between us, under payment of such proportion of the said penalties as shall be attributable to your delay and so certified by the architect. Such amount shall be payable as liquidated and ascertained damages.
>
> 3. Payment for this order is to be made—
> (a) As to the amount (if any) provided or specified in Pitchers' said contract for the works in this order; in accordance with the certificates and the times provided in the said contract . . .
> (b) . . ."

By cl. 24 of the building contract, the garnishees were to be paid on the interim certificates of the architects, and on the completion of the factory some sixteen interim certificates had been issued and payment made to the garnishees. Ten of these certificates included sums payable to the judgment debtors who had been paid in full. The final certificate had been applied for but had not been issued, but under it there would have been a sum due to the judgment debtors. On May 14, 1957, the judgment creditors, Dunlop & Ranken, Ltd., obtained judgment against the judgment debtors for £332 4s. 3d. together with costs of £10. On June 28, 1957, the judgment creditors obtained a garnishee order nisi against the garnishees for the £342 4s. 3d. being so much of the debt due from the garnishees to the judgment debtors as was sufficient to satisfy the judgment debt and costs, and on July 19, 1957, this order was made absolute.

The garnishees now appealed against that order on the ground that, at the date of the garnishee order nisi, there was no present debt due and owing by the garnishees to the judgment debtors capable of being garnisheed.

Frank Whitworth for the garnishees, the principal building contractors.
E. D. Sutcliffe for the judgment creditors.

LORD GODDARD, C.J.: This is an appeal against an order of the district registrar at Leeds, who made absolute a garnishee order nisi which had been obtained by the judgment creditors, Dunlop & Ranken, Ltd., against Hendall Steel Structures, Ltd., the judgment debtors, in respect of a sum of money which it is said was owed by Pitchers, Ltd., the garnishees, to the judgment debtors. The facts were that, under a building contract of June 2, 1955, the garnishees were the main contractors and the judgment debtors were nominated sub-contractors, and the debt that was alleged to be due from the garnishees to the judgment debtors was a debt for goods supplied by the judgment debtors who worked on the main contract.

The question is to be determined with reference to the well-known form of contract known as the R.I.B.A. form. This is a form which has constantly been before the courts and yet the precise point that arises in this case has never been decided, although the point is treated in the ANNUAL PRACTICE, and, I think, has generally been regarded in the profession, as one about which there is no doubt where the building owner and the main contractor are concerned. It is well known that garnishee proceedings, that is to say, execution by way of attachment for debts, only apply where there is a debt which is due or accruing due though it may not be immediately payable. It is very often difficult to distinguish between a case where a debt has not accrued and there is no actual debt, and the case where there is a debt debitum in praesenti solvendum in futuro. That point was dealt with by BANKES, L.J., in *O'Driscoll* v. *Manchester Insurance Committee* (1) ((1915), 113 L.T. 683 at p. 688) where he said:

> " It has long been established that the expression a debt owing or accruing includes a debt debitum in praesenti solvendum in futuro. The question which has to be considered in deciding whether any particular debt fulfils the description of a debt owing or accruing is well put at p. 808 of the ANNUAL PRACTICE, 1915, where the author says: ' But the distinction must be borne in mind between the case where there is an existing debt payment whereof is deferred and the case where both the debt and the payment rest in the future. In the former case there is an attachable debt; in the latter case there is not '. A case of the latter kind is where the amount is payable upon some contingency, and there it is not possible to say that there is a debt owing or accruing. But the mere fact that the exact amount of the debt has not been ascertained is no answer to the contention that there is a debt debitum in praesenti."

First of all we have to consider the form of contract which existed between the building owner and the contractor who, in this case, is the garnishee. By cl. 24 it is provided:

> " (a) At the period of interim certificates named in the appendix to these conditions interim valuations shall be made whenever the architect considers them necessary, and the contractor shall subject to cl. 21 of these conditions be entitled to receive within ten days of his written application for the same a certificate from the architect stating the amount due to the contractor from the employer, and shall on presenting any such certificate to the employer be entitled to payment therefor within the period named in the appendix."

I need not read the rest for this purpose. That is dealing with a case where there is a lump sum contract and interim payments are to be made. A contractor who has all the expense of the materials and labour wants money from time to time, and it is perfectly clear that, until the architect has given a certificate, the contractor has no right at all to receive any sum of money from his employer by what I may call a drawing on account. Until the contractor can produce to the building owner a certificate from the architect, the contractor cannot get anything. It is generally left entirely to the discretion of the architect to decide when he will certify, though some contracts provide that he shall certify at a particular time and for what amount he shall certify. Accordingly, there is the statement which appears in the ANNUAL PRACTICE, 1957, under the notes to Ord. 45, r. 1, on p. 811, where it says:

> "In the case, for example, of a building contract in the R.I.B.A. form, where the builder is paid on the certificate of the architect, it is plain that money in the hands of the building owner cannot be attached until a certificate is issued, and then only for the amount mentioned in that certificate."

In other words, the learned authors think and, as I think, rightly, that there is no doubt that, with regard to the relationship between the building owner and the main contractor, there is nothing due until the contractor has a certificate, and so no sum can be garnisheed until that has been obtained.

The point that arises in this case arises not between the building owner and the contractor but between the contractor and sub-contractor, and cl. 21 of the contract provides:

> "(a) . . . provided that no nominated sub-contractor shall be employed upon or in connexion with the works against whom the contractor shall make reasonable objection or (save where the architect and contractor shall otherwise agree) who will not enter into a sub-contract providing . . . (3) that payment in respect of any work, materials or goods comprised in the sub-contract shall not be due until receipt by the contractor of the architect's certificate under cl. 24 of these conditions which includes the value of such work, materials or goods, and shall when due be subject to a discount for cash of 2½ per cent."

Then cl. 21 further provides:

> "(b) The sums directed by the architect to be paid to nominated sub-contractors for work, materials or goods comprised in the sub-contract shall be paid by the contractor within fourteen days of receiving from the architect a certificate including the value of such work, materials or goods less only (i) any retention money which the contractor may be entitled to deduct, and (ii) a cash discount of 2½ per cent."

That clause contemplates that a written contract will be entered into between the contractor and the sub-contractor, but in this case there was no formal sub-contract in writing which incorporated in terms the provisions of cl. 21 and made the conditions clear with regard to certificates.

The garnishees sent to the judgment debtors an order form which read*:

> "Please execute the following order subject to the terms and conditions below which form part of this order."

Then they set out the goods which they wanted and the work which they required, and then:

> "Please:—(a) Submit your invoice in duplicate. (b) Quote this order number on your invoice. (c) Advise both us and the architect immediately of any increase or decrease in cost of labour and materials which may be adjustable under the terms of the contract."

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* The terms of the order form, so far as material, are fully set out at p. 345, ante.

That shows that the price which is quoted in this contract is not a firm price but depends on the rise or fall of prices both in the material and the labour market. Then there come the conditions, on the first of which counsel for the garnishees has attempted to rely, in my opinion, unsuccessfully, which reads:

> " The party to whom this order is given shall observe and perform the conditions contained in the contract held by [the garnishees] (which can be inspected at their office), and this order shall be deemed to be supplemental thereto."

That is obliging the sub-contractors to observe and perform the conditions in the contract. No question arises here whether they have performed or observed the conditions. What they are saying is: " So far as payment is concerned, pay us ". Then comes the question whether they are only to be paid in accordance with the terms of the contract, but that is not, I think, observing or performing the conditions. There is no question here about the work which they undertook to do and no suggestion that they have not performed it in accordance with the contract. Then there is the condition:

> " 3. Payment for this order is to be made—(a) As to the amount (if any) provided or specified in [the garnishees'] said contract for the works in this order [they are the works specified in the order and not extras]; in accordance with the certificates and times provided in the said contract . . ."

People engaged in these matters in the trade know the terms of these contracts quite well and, in my opinion, it is reasonably clear that the parties meant in this case to put the sub-contractors with regard to payment into the same position as the contractors, that is to say, they were to be paid on certificates and, for the reasons which I have tried to show with regard to the certificates which passed between the contractor and the building owner, there is a very good reason for it. This was a contract so far as the garnishees were concerned with the judgment debtors for steelwork costing some £19,000, and if the architect, making out his interim certificates as between the building owner and the contractor, included some of this steelwork in the certificates, the garnishees would have to pay the judgment debtors. Under this provision, in my opinion, it is clear that if the architect issued certificates from time to time and included this work, and showed, as he would have to show under the terms of the main contract, what was due to sub-contractors, the sub-contractors would be able to get the money. I think, therefore, that we ought to hold, and for myself I do hold, that the production or the granting of a certificate by the architect is just as much a necessity for investing a cause of action in the judgment debtors, the sub-contractors, as it is in regard to the garnishees, the main contractors, and I think this is not a case of debitum in praesenti solvendum in futuro. It is not a mere case of putting off payment; it is that the judgment debtors have not a right to be paid, and, therefore, that there is no debt, until there is a certificate certifying the amount which is to be paid for this steelwork which was the subject of the order which was given by the garnishees to the judgment debtors.

For these reasons, I am of opinion that the order of the district registrar was wrong, and this appeal must be allowed.

DONOVAN, J.: I agree and for the same reasons, to which I can add nothing.

HAVERS, J.: I agree. The real difficulty I think arises from the fact that the garnishees did not require the judgment debtors to enter into a written agreement with them as was clearly contemplated under cl. 21 of their building contract with the building owners. In my view, cl. 21 clearly contemplated

A that the sub-contractors would be required to enter into a contract. Instead of doing that, the garnishees used a form of order of their own, in which they said:

> " Please execute the following order subject to the terms and conditions below which form part of this order: . . . Deliver to site and erect complete . . .",

B and specifying what they are to do, at a price of £16,835. But under the heading " Please " are these words:

> " Advise both us and the architect immediately of any increase or decrease in cost of labour and materials which may be adjustable under the terms of the contract."

C It is clear, therefore, that both parties contemplated that that specified sum was not a fixed sum but might fluctuate up or down in accordance with the provisions for fluctuation in the contract. Then certain conditions are printed below, the first of which is:

> " The party to whom this order is given shall observe and perform the conditions contained in the contract held by [the garnishees] (which can be inspected at their office), and this order shall be deemed to be supplemental thereto." D

I share the doubts of my Lord whether that is sufficient in itself to incorporate the conditions with regard to the right to payment in cl. 21 between the contractors and the building owner; but the third condition is this:

> E " Payment for this order is to be made—(a) As to the amount (if any) provided or specified in [the garnishees'] said contract for the works in this order; in accordance with the certificates and the times provided in the said contract . . ."

F The real question, therefore, arises as to the true interpretation of those words " in accordance with the certificates ". I share the view of my brethren that those words really mean " if and when a certificate is given ". If that is the true construction, it is clear that there was no debt owing or accruing at the time the garnishee order nisi was made.

Appeal allowed.

Solicitors: *Clark, Patterson & Herring* (for the garnishees); *Haslewood, Hare & Co.*, agents for *R. C. Moorhouse & Co.*, Leeds (for the judgment creditors).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

R. *v.* THOMAS.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery and Donovan, JJ.), October 7, 21, 1957.]

Criminal Law—Appeal—Application for leave to appeal against conviction—List of previous convictions included in abstract of indictment handed to jury—Criminal Appeal Act, 1907 (7 *Edw.* 7 *c.* 23), *s.* 4 (1).

At the prisoner's trial on charges of false pretences and other offences the jury were handed an abstract of the indictment on the fourth and last page of which were particulars of the prisoner's previous convictions. Before the jury had looked at the fourth page the judge asked for the return of the document. From observations made by the judge to the jury and the prisoner, who was conducting his own defence, members of the jury might have suspected that the prisoner had previous convictions. The prisoner was convicted and applied for leave to appeal against conviction.

Held: assuming that the jury suspected, as a result of what passed between the judge and the prisoner, that the prisoner had previous convictions, yet the case was one in which there had been no substantial miscarriage of justice and an appeal would have been dismissed under the proviso to s. 4 (1) of the Criminal Appeal Act, 1907; therefore, leave to appeal was refused.

R. v. *Flower* ((1956), 40 Cr. App. Rep. 189) distinguished.

[**Editorial Note.** In the present case the prisoner defended himself. As regards the consequences of counsel's not applying promptly for the jury to be discharged, where evidence of previous convictions has emerged wrongly, see *R.* v. *Cutter* ([1944] 2 All E.R. 337).

As to the court's dismissing appeals where no substantial miscarriage of justice has occurred, see 10 HALSBURY'S LAWS (3rd Edn.) 535, 536, para. 985 note (q); and for cases on the subject, see 14 DIGEST (Repl.) 667-670, *6737-6787*.

As to the jury's knowledge of previous convictions constituting miscarriage of justice, see 10 HALSBURY'S LAWS (3rd Edn.) 538, 539, para. 988 note (s).

For the Criminal Appeal Act, 1907, s. 4 (1), see 5 HALSBURY'S STATUTES (2nd Edn.) 929.]

Cases referred to:

(1) *R.* v. *Flower,* (1956), 40 Cr. App. Rep. 189.
(2) *R.* v. *Smith,* (1956), Unreported.
(3) *R.* v. *Williams & Woodley,* (1920), 89 L.J.K.B. 557; 123 L.T. 270; 84 J.P. 90; 14 Cr. App. Rep. 135; 14 Digest (Repl.) 667, *6749*.
(4) *R.* v. *Lane,* (1920), 15 Cr. App. Rep. 26; 14 Digest (Repl.) 637, *6460*.

Application for leave to appeal.

The applicant, Bernard Isaiah Thomas, was convicted at Leicester Assizes on May 30, 1957, of false pretences, fraudulent conversion and obtaining credit as a bankrupt, and was sentenced to four years' imprisonment. He gave notice of appeal against conviction on June 7, 1957, stating by his amended notice of appeal dated July 22, 1957, as a ground of his appeal that he did not have a fair trial since in the course of the trial a copy of the abstract of the indictment, which contained a list of his previous convictions, was handed to the jury: he stated further that, by reason of the discussion which ensued the jury must or might have come to the conclusion or suspected that the applicant was a person who had been previously convicted; and that the judge should have ordered a new trial before a different jury. On Oct. 7, 1957, the Court of Criminal

Appeal refused leave to appeal and reserved the statement of the court's reasons to a later date.

W. A. L. Raeburn, Q.C., and *H. H. Harris* for the applicant.

Cur. adv. vult.

Oct. 21. **DONOVAN, J.**, read the following judgment of the court: We now proceed to give our reasons for refusing this applicant leave to appeal.

He was convicted at Leicester Assizes in May last of various offences of false pretences, fraudulent conversion, and obtaining credit without disclosing that he was an undischarged bankrupt, and was sentenced by HALLETT, J., to four years' imprisonment in all. He conducted his own defence. The case was begun on Thursday, May 23. The summing-up began on May 29 and concluded on May 30. The jury considered their verdict for twenty-seven minutes before finding the prisoner guilty on all counts. On the second day of this seven-day trial the jury was handed an abstract of the indictment. It consisted of four pages, and on the fourth page were particulars of the prisoner's previous convictions. Counsel for the prosecution, when the fact came to his notice, very properly drew the attention of the learned judge to the matter. The learned judge then asked the jury to return the document to him saying: "You have given it back to me open at p. 3; may I take it you did not turn on to the next page ?", to which the foreman of the jury replied: "I had charge of the document and I did not look at p. 4". The prisoner then asked to see the document and the learned judge said to him:

> "They have satisfied me they have not seen it. The document was given to one member of the jury and I observed where he opened it—to the count we were dealing with, which was count eight on the third page. I observed he had not turned over to the next page, and he assures me he did not do so. I think I am entitled to act upon that as it confirms both my own observation and that of counsel prosecuting. What was on p. 4 was a matter they ought not to have seen."
>
> The prisoner: "May I see the document at some time ?"
>
> HALLETT, J.: "You may see the fourth page, certainly. Nothing that appears on p. 4 is relevant for the present purposes and if I had any idea they had seen what was on there this case would have had to be tried again by another jury."

The prisoner: "According to this information, I am very concerned with the information passing—."

> HALLETT, J.: "You had better be careful what you say. What is on that sheet is no concern of the jury, and they will never know anything about it until after they have returned their verdict. That I shall be careful of. If they had known about it I should have had to take a different step, and the less we say about it the better."

The trial then proceeded without further discussion of the matter and concluded some six days later.

The prisoner now contends that accepting that the jury did not see p. 4 of the abstract, nevertheless the replies of the learned judge above set out must have caused the jury to suspect that he had previously been convicted: and as he did not put his character in issue, that the conviction should accordingly be quashed. He stresses particularly the remark: "They will never know anything about it until after they have returned their verdict".

One cannot of course be sure what significance the jury attached to this remark. As laymen there were other conclusions which they might have drawn, for example, that p. 4 simply recited his antecedents without there being any previous convictions, or that it referred to further charges to be preferred against the prisoner and tried on the conclusion of the present case, if need be. On the other hand it may be that one or more of the jury suspected, as a result of A the colloquy between the learned judge and the prisoner, that the prisoner had previous convictions. Assuming for the moment the existence of such a suspicion the question would obviously arise on any appeal whether the court would apply the proviso to s. 4 (1) of the Criminal Appeal Act, 1907, for the case against the prisoner was overwhelming. It was argued that the court should not do so, having regard to the decision in *R.* v. *Flower* (1) ((1956), 40 Cr. App. B Rep. 189). There the jury were handed the indictment and retired with it in their possession. On the back of it appeared the prisoner's previous convictions. There could hardly be room for doubt, therefore, in that case, that the jury knew of them before arriving at its verdict. The conviction was quashed; and though the court apparently thought that there was no miscarriage of justice, there is no discussion in the judgment as to applying the C proviso to s. 4 (1). In fact it was not applied.

On the other hand in the recent but unreported case of *R.* v. *Smith* (2) a somewhat similar situation arose. There the appellant was tried at Essex quarter sessions on a charge of receiving stolen property, and did not put his character in issue. Three other men tried with him at the same time did so. Two of these three had previously been convicted and accordingly their previous D convictions were put to them. In summing-up the chairman, per incuriam, said to the jury: " The defendant Hilton is brought before you as a person of clean upright and sound character. Unfortunately, in a way, the other defendants are brought before you as persons who have been in trouble before ". This should not have been said of Vello Smith who had previous convictions, but who had not put his character in issue. It was not certain whether the jury E in fact drew an inference from this remark adverse to Vello Smith, but the Lord Chief Justice, giving the judgment of the court, dismissing Vello Smith's appeal on the point said this:

> " . . . the case was an overwhelming one, and if we thought the point ought to be decided in favour of the prisoner, it is certainly a case in which we should apply the proviso." F

There are two earlier similar cases, one where the court applied the proviso and one where it did not. See *R.* v. *Williams & Woodley* (3) ((1920), 14 Cr. App. Rep. 135), and *R.* v. *Lane* (4) ((1920), 15 Cr. App. Rep. 26).

There is thus no hard and fast rule on the matter. Each case has to be separately considered. In the present case, if we were to conclude that the G jury suspected from what was said that Thomas had previous convictions we should certainly apply the proviso.

Application refused.

Solicitors: *Lesser & Co.*

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

JOHN WALSH, LTD. *v.* SHEFFIELD CITY COUNCIL AND TRANTER (VALUATION OFFICER). TRANTER (VALUATION OFFICER) *v.* SHEFFIELD CITY COUNCIL.

[Court of Appeal (Jenkins, Parker and Pearce, L.JJ.), October 9, 1957.]

Rates—Valuation list—Proposal for alteration—Power to make—Proposal for insertion of assessment in list—Rating authority's power to make—Local Government Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 26), *s.* 40 (1) (*b*).

A rating authority has no power under s. 40 (1) (b) of the Local Government Act, 1948 (as distinct from s. 40 (2A)), to make a proposal for inserting in the valuation list a hereditament which has been omitted therefrom, since s. 40 (1)* applies only where a hereditament has been included in the list.

Appeal allowed.

[**Editorial Note.** Although it is now held that rating authorities (and, semble, private individuals) have no power to make a proposal for the alteration of the valuation list by inserting therein a new assessment of a hereditament under s. 40 (1) (b) of the Local Government Act, 1948, they (but not private individuals) may do so under s. 40 (2A) of the Act, as added by s. 2 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, subject to the conditions there laid down (see p. 356, letter I, to p. 357, letter A, post). This amendment of the law became operative on Apr. 1, 1956. A valuation officer may make a proposal for any alteration of the list without restriction under s. 40 (2) (see p. 356, letter D, post).

For persons authorised to make proposals for the alteration of the valuation list, see 27 Halsbury's Laws (2nd Edn.) 484, para. 913 and Cumulative Supplement; and for cases on the subject, see 38 Digest 602-604, *1298-1309.*

For s. 40 (1) of the Local Government Act, 1948, see 20 Halsbury's Statutes (2nd Edn.) 234.]

Case referred to:

(1) *Kirkness* v. *Hudson* (*John*), *Ltd.*, [1955] 2 All E.R. 345; [1955] A.C. 696; 36 Tax Cas. 28, 57; 3rd Digest Supp.

Case Stated.

The ratepayers were the occupiers of a hereditament comprising a large departmental store in High Street, Sheffield. The hereditament had been demolished by enemy action during the war, and its assessment had been deleted from the valuation list by the assessment committee. It had been rebuilt and had been re-occupied during the rating year ending on Mar. 31, 1954. On Mar. 27, 1954, the respondent rating authority, as a party stated to be aggrieved by statements made or omitted to be made in the valuation list with respect to the hereditament, made a proposal for the inclusion in the list of an assessment in which the hereditament was described as shop, stores and appurtenances and was assessed at £21,500 gross value, £17,913 rateable value. The ratepayers and the appellant valuation officer objected to the proposal and the rating authority appealed against the objections. On Mar. 29, 1954, the valuation officer himself made a proposal for the insertion of a new assessment of the hereditament in the valuation list at £10,250 gross value, £8,380 rateable value, which figures had been agreed with the ratepayers. No objection was made to the proposal and the valuation list was altered in accordance therewith.

At the hearing of the rating authority's appeal arising out of its proposal before a local valuation court of the West Riding of Yorkshire (South) Local Valuation Panel, both the valuation officer and the ratepayers submitted that the proposal was invalid on the ground that the rating authority had no power to make a proposal for the insertion of a new assessment in the valuation list under s. 40 (1) of the Local Government Act, 1948. The local valuation court upheld the contention of the rating authority that it was entitled to make the proposal and directed that an assessment of £19,000 gross value, £15,830 rateable value, be entered in the valuation list. On appeals by the ratepayers and the valuation officer, the president of the Lands Tribunal made an order under r. 37 of the Lands Tribunal Rules, 1949*, for a preliminary hearing of the point of law in issue. On Nov. 5, 1956, the tribunal (ERSKINE SIMES, ESQ., Q.C.) gave its decision on the preliminary point of law in favour of the rating authority, holding that the authority was entitled to make the proposal ((1957), 1 R.R.C. 152). The valuation officer appealed to the Court of Appeal.

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* The text of s. 40 (1) is printed at pp. 354, 355, post.

G. D. Squibb, Q.C., and *P. R. E. Browne* for the valuation officer.
Michael Rowe, Q.C., and *W. B. Harris* for the rating authority.

JENKINS, L.J.: This is an appeal by the valuation officer from a decision of the Lands Tribunal on a preliminary question of law raised in two appeals from the decision of a local valuation court for the West Riding of Yorkshire. The question of law, as stated in para. 2 of the Case, is

> " whether under s. 40 (1) (b) of the Local Government Act, 1948 (11 & 12 Geo. 6 c. 26), a proposal made by the respondents the Lord Mayor, aldermen and citizens of the city of Sheffield (acting by the council of the said city) and the said council on Mar. 27, 1954, for the inclusion in the valuation list for the city of Sheffield of the hereditament, occupied by the appellants, John Walsh, Ltd., described as shop, stores and appurtenances at High Street, Sheffield, with gross value £21,500, rateable value £17,913, is a valid proposal."

The point is whether a rating authority such as the present respondents was entitled, on the true construction of s. 40 (1) of the Local Government Act, 1948, to make a proposal to the effect that a hereditament wholly excluded from the valuation list should be included therein. The Lands Tribunal, in the person of Mr. ERSKINE SIMES, Q.C., has decided this preliminary point in favour of the rating authority, holding that, on the true construction of s. 40 (1), read in conjunction with the definition of the word " alteration " in s. 144 (9) of the Act of 1948, s. 40 (1) did extend to a proposal by the rating authority for inclusion in the list of a hereditament wholly omitted. It was argued, quite properly, as a question of construction, and Mr. ERSKINE SIMES accepted the view that the construction which he adopted was, as a matter of common sense, the proper construction, and that it was possible to get that construction out of the language used.

This is the shortest of short points, but, in order to deal with it, I must refer to certain provisions of the Local Government Act, 1948. Section 33 (1) provides:

> " Valuation lists shall, instead of being prepared and amended by the bodies [charged with that duty previously], be prepared and amended by valuation officers of the Commissioners of Inland Revenue . . ."

Section 33 (1) (b) says:

> " save as hereafter provided in this Part of this Act, rating authorities shall have no functions in relation to the preparation and amendment of valuation lists."

Section 40 says:

> " (1) Any person who is aggrieved—(a) by the inclusion of any hereditament in the list; or (b) by any value ascribed in the list to a hereditament or by any other statement made or omitted to be made in the list with

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* Now superseded by r. 44 of the Lands Tribunal Rules, 1956.

> respect to a hereditament; or (c) in the case of a building or portion of a building occupied in parts, by the valuation in the list of that building or portion of a building as a single hereditament, may at any time make a proposal for the alteration of the list so far as it relates to that hereditament.
>
> "(2) The valuation officer may at any time make a proposal for any alteration of a valuation list."

Then one has to look at some definitions. Section 144 (1) provides, inter alia, that "hereditament" has the meaning assigned to it by s. 68 of the Rating and Valuation Act, 1925. In s. 68 (1) of the Rating and Valuation Act, 1925, "hereditament" is defined as meaning

> "any lands, tenements, hereditaments or property which are or may become liable to any rate in respect of which the valuation list is by this Act made conclusive."

Section 144 (9) of the Act of 1948, to which considerable importance—indeed, primary importance—was attached by Mr. ERSKINE SIMES, reads:

> "Any reference in this Act to the alteration of a valuation list or draft valuation list includes a reference to the insertion in the list or draft list, or the omission from the list or draft list, of any hereditament, and references to the alteration of the valuation list with respect to a hereditament shall be construed accordingly."

Returning to s. 40 (1), and bearing in mind those definitions, I must now apply myself as best I can to the language of that sub-section itself. It begins: "Any person who is aggrieved". It is not in dispute that, for the purposes of this section, the rating authority here could be a person aggrieved, and therefore a person entitled to make a proposal in any case falling within the terms of the sub-section. Then sub-s. (1) goes on to state the grievances with which the section is dealing, and sub-para. (a) says "by the inclusion of any hereditament in the list." That is the first subject of grievance stated. If the sub-section had been intended to cover the omission of any hereditament from the list, it seems to me plain that the framers of the enactment could not have failed to insert "or by the omission of any hereditament from the list." Inclusion being expressly referred to, it cries out for there being an express reference to exclusion if exclusion is to be covered by the sub-section at all. Then (b) is:

> "by any value ascribed in the list to a hereditament or by any other statement made or omitted to be made in the list with respect to a hereditament."

To my mind, particularly when it is looked at in the light of the immediately preceding reference to "the inclusion of any hereditament in the list", that relates to the various particulars stated in the list with respect to a hereditament which is included in the list.

In that connexion, we were shown the form annexed to the Rating and Valuation Act (Form of Valuation List) Rules, 1932, and that, I think, well brings out the point. The form of valuation list is a form with eleven columns, beginning with "Assessment No.", and then "(2) Name of the occupier", "(3) Name of the owner", "(4) Description of property", "(5) Name or situation of property", and "(6) Estimated extent". Then there are columns (7) to (11), dealing with the question of value.

It seems to me that s. 40 (1) (b) is directed to cases in which the hereditament is included in the list, but the statements in the list about that hereditament are said to be inaccurate, or some statements about that hereditament being a hereditament in the list have been omitted to be made. I do not think that the circumstance that the definition of "hereditament" in s. 68 (1) of the Act of 1925 includes

> "hereditaments or property which are or may become liable to any rate in respect of which the valuation list is by this Act made conclusive"

is of any assistance to the rating authority here. To my mind, it is clear that, to bring s. 40 (1) into action, there must be a hereditament which is not only *liable* to be included in the list but *has been* included in the list.

Sub-paragraph (c) relates to buildings occupied in parts. I do not think I need trouble with that, except to point out that it clearly refers to a building actually in the valuation list, because the person referred to has to be aggrieved by the valuation in the list of the building concerned as a single hereditament. It is if, and only if, those conditions have been fulfilled—i.e., if, and only if, the person making the proposal can show himself to be aggrieved by matters included in one or other of sub-paras. (a), (b) and (c)—that he can propose an alteration. To my mind, as I have endeavoured to state, the grievances all relate quite clearly to matters of the kinds described concerning hereditaments in the valuation lists, and, when there is a grievance of any of those kinds with respect to such a hereditament, the condition precedent is fulfilled. Given the fulfilment of that condition, and not otherwise, an alteration can be proposed.

The concluding words of the sub-section, which I will read again, are:

> " may at any time make a proposal for the alteration of the list so far as it relates to that hereditament."

The list must relate to that hereditament; that means, as I take it, that the hereditament must be in the list. Then the proposal which can be made is a proposal for an alteration of the list so far as it relates to that hereditament. One may contrast with sub-s. (1) of s. 40 the unrestricted power of making a proposal for any alteration of a valuation list conferred on the valuation officer by sub-s. (2).

At this point, the argument for the rating authority dependent on s. 144 (9) of the Local Government Act, 1948, comes into play. Sub-section (9) provides:

> " Any reference in this Act to the alteration of a valuation list or draft valuation list includes a reference to the insertion in the list or draft list, or the omission from the list or draft list, of any hereditament, and references to the alteration of the valuation list with respect to a hereditament shall be construed accordingly."

It is said (and Mr. Erskine Simes accepted the argument) that, reading into s. 40 (1) that definition of " alteration ", it follows that it is open to the person aggrieved to propose the inclusion of a hereditament wholly excluded. I cannot agree. I should have thought that the whole of the definition section, s. 144 of the Act of 1948, is subject to the overriding consideration stated in the first part of that section:

> " In this Act, except so far as the contrary is expressly provided or the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them . . ."

It is true that, as a matter of strict construction, those words do not in terms govern sub-s. (9). Nevertheless, I think effect must be given to that principle, and in this context, for the reasons I have endeavoured to state, I cannot regard the right of the person who is aggrieved as extending, on the strength of the meaning of "alteration" as set out in the definition, to a proposal for inclusion in the list of a wholly omitted hereditament.

There was a subsidiary argument for the valuation officer based on the amendment of s. 40 of the Act of 1948 which is effected by s. 2 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. Section 2 (1) provides:

> "In s. 40 of the Act of 1948 (which enables proposals to be made for the alteration of valuation lists) the following sub-section shall be inserted after sub-s. (2):—' (2A) Without prejudice to any right exercisable by rating authorities by virtue of sub-s. (1) of this section, where—(a) it appears to a rating authority that a hereditament in their area, which is not included in the list, ought to be included therein, and (b) the valuation officer gives

notice in writing to the rating authority that he does not intend to make a proposal for inserting that hereditament in the list, the rating authority, at any time within twenty-eight days after the date on which that notice was given, may make a proposal for the alteration of the list by the insertion of that hereditament therein': Provided that this sub-section shall not apply for the purpose of altering any valuation list in force at the passing of this Act."

I do not think that I need refer to sub-s. (2).

That amendment, or that addition to s. 40 of a new sub-s. (2A), owing to the dates, does not apply to the valuation list actually in question in the present case. It is argued for the valuation officer, however, that this new sub-section throws light on the construction of s. 40 as it was originally framed. It is said that, if rating authorities already have power under s. 40 to propose the inclusion of an omitted hereditament in the valuation list, there could be no object in putting in the new sub-s. (2A), and it is consistent, and consistent only, with the supposition that the legislature recognised that there was this omission from s. 40. There are many cases dealing with the question of the extent to which subsequent legislation on a given subject-matter can be used as an aid to the construction of previous enactments. We were referred to the discussion on this topic in the House of Lords in *Kirkness* v. *John Hudson, Ltd.* (1) ([1955] 2 All E.R. 345). There have been many other cases bearing on the point. The effect of those cases is that it is only legitimate to call in aid later legislation to resolve some real ambiguity in the enactment which falls to be construed. Even then, even when it is legitimate to look at such legislation, no assistance can be derived from it unless it can really be said that the provisions of the subsequent legislation would be wholly otiose and inept unless a particular view of the earlier legislation was taken. I do not think that this case is one in which, on those principles, any assistance can be derived from the provisions of s. 2 of the Act of 1955.

I return to the language of s. 40 (1), and, although I appreciate the possible inconvenience to rating authorities of the construction for which the valuation officer contends, I am constrained, by what I take to be the clear and unambiguous meaning of the language used, to hold that the construction placed on this section by counsel for the valuation officer is the right construction. That being so, in my judgment, this appeal should be allowed.

PARKER, L.J.: This is a very short point, and I so entirely agree with what my Lord has said, and with his reasoning, that to give a separate judgment would be merely repetition. I would only observe that, in my judgment, s. 40 (1) of the Local Government Act, 1948, is perfectly clear and unambiguous, and I find it quite unnecessary—and, indeed, it would be wrong—to consider the later amendment in 1955.

PEARCE, L.J.: I agree. Under s. 40 (1) of the Local Government Act, 1948, the possession of one out of several grievances is a condition precedent to the making of any proposal for the alteration of the list. Section 144 (9) does not purport to enlarge the range of grievances; it merely enlarges the alterations which may be made. Since the list of grievances does not embrace the grievance in this case, namely, the omission of a hereditament, I am reluctantly compelled to the conclusion that the rating authority cannot make the proposal which it desired to do in this case.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Solicitor of Inland Revenue* (for the valuation officer); *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Sheffield (for the rating authority).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

NOTTINGHAM AREA No. 1 HOSPITAL MANAGEMENT COMMITTEE *v.* OWEN.

[Queen's Bench Division (Lord Goddard, C.J., Donovan and Havers, JJ.), October 15, 16, 1957.]

Nuisance—Statutory nuisance—Premises occupied for the public service of the Crown—Hospital transferred to Minister under National Health Service Act, 1946*—Whether justices had jurisdiction to hear complaint—Public Health Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8 *c.* 49), *s.* 106.

National Health Service—Hospital—Statutory nuisance—Smoke nuisance—Hospital occupied for the public service of the Crown—Whether justices had jurisdiction to hear complaint—Public Health Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8 *c.* 49), *s.* 106.

The appellants, a hospital management committee, allowed smoke, amounting to a smoke nuisance within s. 101 of the Public Health Act, 1936, to be emitted from a chimney of the hospital that they administered. The local authority having made a complaint to the justices in respect of the nuisance, the appellants contended that by virtue of s. 106 of the Act of 1936 the justices had no jurisdiction, as the hospital was occupied for the public service of the Crown. Under the National Health Service Act, 1946, it was the duty of the Minister of Health to promote a health service and, for that purpose, to provide hospital accommodation, and this hospital had been transferred by that Act to the Minister and was held by him in trust for the Crown.

Held: the hospital was occupied for the public service of the Crown within s. 106 of the Public Health Act, 1936, as the appellants were carrying out duties which were part of the services that it was the Minister's duty under the National Health Service Act, 1946, to provide; therefore, the justices had no jurisdiction to hear the complaint against them.

Dictum of Lord Westbury, L.C., in *Mersey Docks* v. *Cameron* ((1865), 11 H.L. Cas. at p. 504) applied.

Appeal allowed.

[**Editorial Note.** Sections 101-106 of the Public Health Act, 1936, are prospectively repealed by the Clean Air Act, 1956, s. 35 (1), which has not, however, been brought into operation in relation to this repeal at the date of this report (see the Clean Air Act, 1956 (Appointed Day) Order, 1956, S.I. 1956 No. 2022). Section 22 of that Act governs its application to Crown premises and under it two conditions have to be satisfied before premises qualify as Crown premises under s. 22 (1) (a) and (c), viz., that (i) they are under the control of a government department and (ii) they are occupied for the public service of the Crown etc. Section 106 of the Public Health Act, 1936, does not contain words analogous to (i), and in considering the application of the present decision to comparable powers under the Clean Air Act, 1956, regard should be had to (i) and to such provisions as s. 12 (2) of the National Health Service Act, 1946, by which, subject to directions, etc., the duty of controlling and managing a voluntary hospital is expressly conferred on the hospital management committee, though acting on behalf of the regional hospital board, who in turn act on behalf of the Minister. Section 22 (1) (b) of the Clean Air Act, 1956, which is concerned with the emission of smoke from Crown premises within smoke control areas, came into force on Dec. 31, 1956, by virtue of S.I. 1956 No. 2022.

As to smoke nuisances generally, see 24 Halsbury's Laws (2nd Edn.) 65, para. 104; and as to smoke nuisances on Crown property, see ibid., p. 71, para. 116.

A As to the Crown not being bound by statute unless expressly named, see 7 HALSBURY'S LAWS (3rd Edn.) 246, para. 536.

For the Public Health Act, 1936, s. 106, see 19 HALSBURY'S STATUTES (2nd Edn.) 386.]

Case referred to:

B (1) *Mersey Docks* v. *Cameron, Jones* v. *Mersey Docks*, (1865), 11 H.L. Cas. 443; 35 L.J.M.C. 1; 12 L.T. 643; 29 J.P. 483; 11 E.R. 1405; 38 Digest 466, *286*.

Case Stated.

This was a Case Stated by justices for the City of Nottingham, in respect of their adjudication as a magistrates' court sitting at Nottingham on Mar. 15, C 1957. On Mar. 1, 1957, the respondent, Thomas Joseph Owen, town clerk of the City of Nottingham, acting on behalf of the Council of the City, which was the local authority, preferred a complaint (under s. 103 of the Public Health Act, 1936) against the appellants, the Nottingham Area No. 1 Hospital Management Committee (hereinafter referred to as the hospital management committee), in the following terms:—

> D " that on July 12, 1955, a notice under the provisions of the Public Health Act, 1936, to abate a nuisance arising at the General Hospital Nottingham, from a chimney (not being a chimney of a private house) emitting black smoke in such quantity as to be a nuisance, was duly served on the Nottingham Area No. 1 Hospital Management Committee of the General Hospital Nottingham, being the person by whose default the said nuisance arose. E And that the said Nottingham Area No. 1 Hospital Management Committee have made default in complying with the requirements of the said notice. And the complainant now applies that the Nottingham Area No. 1 Hospital Management Committee shall be summoned to answer the said complaint and to show cause why an order should not be made requiring the Nottingham Area No. 1 Hospital Management Committee to comply with the requirements F of the said notice or otherwise to abate the said nuisance and to execute any works necessary for the purpose and prohibiting a recurrence of the said nuisance."

The complaint was heard on Mar. 15, 1957, when the hospital management committee made a preliminary submission that the justices had no jurisdiction G to hear the complaint. They contended that, under the National Health Service Act, 1946, the hospital was Crown property and occupied for the public purposes of the Crown, that they were agents of the Sheffield regional hospital board who themselves were agents of the Minister of Health (by virtue of s. 12 of the Act of 1946), and were financed by money received from Parliament, and that s. 106 of the Public Health Act, 1936, dealt specifically with a smoke H nuisance on premises occupied for the public service of the Crown and provided a special procedure therefor which must be followed by the local authority. For the respondent, it was contended that the complaint was not issued against the Crown but against the hospital management committee who, under s. 13 of the National Health Service Act, 1946, were liable as principals in respect of liabilities incurred in the exercise of their functions, and who were the I occupiers of the hospital for the purposes of the hospital management committee; and further, under s. 93 of the Act of 1936, the primary duty to abate a nuisance was on the person whose act or default caused it, and that the default in the present case was that of the hospital management committee.

The justices decided that they had jurisdiction to hear the complaint, and found the following facts. A serious nuisance existed owing to the emission of black smoke from the chimney of the hospital. Notice to abate the nuisance was served on the hospital management committee who knew that the nuisance had existed for more than seven years. The nuisance was caused by the failure to install suitable and sufficient boilers and grit arresting plant and to keep the steam load within the rated capacity of the boilers.

The justices came to the conclusion that the complaint was true and ordered the hospital management committee to execute all works necessary to abate the nuisance within four months of service of the order on them. The question for the court was whether the justices had jurisdiction to hear the complaint.

Rodger Winn for the appellants, the hospital management committee.
Elson Rees for the respondent.

LORD GODDARD, C.J., having referred to the terms of the complaint made against the appellant hospital management committee, and the findings of the justices continued: The question that is raised by the Case Stated is whether or not the justices had jurisdiction to hear the complaint in view of the provisions of s. 106 of the Public Health Act, 1936. I am bound to say that it is with some regret I have come to the conclusion that the justices had not jurisdiction and that this appeal will have to be allowed. I say that because it is quite clear that if this hospital had remained a voluntary or municipal hospital and had not become, by virtue of the National Health Service Act, 1946, a hospital under the Minister of Health, the procedure provided under the Act of 1936 for the abatement of smoke nuisance would have been appropriate. It is a cheap, quick and simple method of providing for the abatement of nuisance and does away with the necessity of having to bring long and expensive actions; but the Minister of Health has chosen to take this point, and we have therefore to decide it.

It is submitted here that the hospital, being a hospital which is now vested in the Minister, constitutes premises occupied for the public service of the Crown, and we have, therefore, to see whether that is a well-founded submission. Before we consider the provisions of the National Health Service Act, 1946, it is necessary to look at the provisions of the Public Health Act, 1936. Certain sections in the Act of 1936 set out matters which were known as statutory nuisances. It was not every nuisance brought before justices in respect of which they had authority to make abatement orders, but there were certain nuisances which were prescribed by statute as being fit matters for this summary jurisdiction. Among them was what was known as smoke nuisance, that is to say the emission of large quantities of black smoke so as to be a nuisance and deleterious to the health of the neighbourhood. Certain provisions with regard to smoke nuisances are made by ss. 101 to 106 of the Public Health Act, 1936, where it is provided that if, in the opinion of the proper authority, a smoke nuisance exists by the emission of black smoke from chimneys which are not chimneys of private houses, proceedings can be taken before the justices and an application can be made for an order compelling the owner of the chimney to abate the nuisance. Section 106 of the Public Health Act, 1936, enacted a provision which did not appear there in the statute book for the first time but which is in the previous Public Health Acts, in substantially the same terms. It provides:

> "If it appears to a local authority that a smoke nuisance within, or affecting any part of, their district exists on any premises occupied for the public service of the Crown, they shall report the circumstances to the appropriate government department, and, if the Minister responsible for that department is satisfied after due inquiry that such a nuisance exists, he shall cause such steps to be taken as may be necessary to abate the nuisance and to prevent a recurrence thereof."

Therefore, it seems clear under that section that the simple and speedy procedure which can be taken against private persons in respect of a smoke nuisance cannot be taken in respect of the emission of smoke from premises which are occupied for the public service of the Crown. The duty is then on the local authority to report the matter to the Minister, and it is left to the Minister, if he is satisfied that a nuisance exists, to take such steps as may be necessary to abate the nuisance; but it does seem that this only applies to summary proceedings taken under the Act of 1936, and does not prevent the local authority bringing an action for an injunction or the abatement of a nuisance, though it is not necessary to decide this. Thus, the question which we have to decide is whether this hospital comes within the expression "premises occupied for the public service of the Crown."

The National Health Service Act, 1946, s. 1, provides:

> "It shall be the duty of the Minister of Health (hereafter in this Act referred to as 'the Minister') to promote the establishment in England and Wales of a comprehensive health service designed to secure improvement in the physical and mental health of the people of England and Wales and the prevention, diagnosis and treatment of illness, and for that purpose to provide or secure the effective provision of services in accordance with the following provisions of this Act."

One of the services that has to be provided is hospital accommodation and hospital treatment, and s. 3 (1) of the Act of 1946 provides:

> "As from the appointed day, it shall be the duty of the Minister to provide throughout England and Wales, to such extent as he considers necessary to meet all reasonable requirements, accommodation and services of the following descriptions, that is to say:—(a) hospital accommodation . . ."

Section 6 of the Act of 1946 provides for the transfer of hospitals to the Minister, who becomes the owner of the hospitals; by s. 7 (3) of the Ministry of Health Act, 1919, it is provided:

> "For the purpose of acquiring and holding land, the Minister for the time being shall be a corporation sole by the name of the Minister of Health, and all land vested in the Minister shall be held in trust for His Majesty for the purposes of the Ministry of Health."

So once this hospital was transferred to the Minister under the National Health Service Act, 1946, it seems to be clear that he held it in trust for the Crown.

The Act of 1946 then goes on to provide how the Minister is to carry out his duties, and different provisions apply to teaching hospitals from those applying to general hospitals but, without going into it in too great detail, it is provided by s. 11 (1) of the Act of 1946, that the Minister "shall by order constitute, in accordance with Part 1 of Sch. 3 to this Act, boards, to be called regional hospital boards . . ." These boards have functions with respect to hospitals and specialist services, and by s. 11 (3) it is provided:

> "Every regional hospital board shall, within such period as the Minister may by direction specify, submit to the Minister a scheme for the appointment by them of committees, to be called hospital management committees, for the purpose of exercising functions with respect to the management and control of individual hospitals or groups of hospitals, other than teaching hospitals, providing hospital and specialist services in the area of the board."

It is not disputed that in Nottingham, for the administration of the present hospital, there is a Nottingham hospital management committee. By Part 4 of Sch. 3 to the Act of 1946 both the regional board and the appellant hospital management committee are made corporations, so that they carry out the administration of this hospital as corporate bodies, subject of course to the control of the Minister, and carry it out on behalf of the Minister, whose duty it is to provide hospital accommodation.

When one comes to s. 106 of the Public Health Act, 1936, the first thing that is to be noted is that the section applies to premises occupied for the public service of the Crown and not to the occupiers; that is to say, it does not matter who occupies the premises. If they are occupied for the public service of the Crown the section applies, and there is no doubt that the occupiers of these premises were the hospital management committee. As the hospital management committee, they are carrying on the duties which are imposed on the Minister, and I should find it very difficult to say that considering that this service, the hospital service, is a service which is provided by the Minister in pursuance of his duty to carry out the provisions of the National Health Service Act, 1946, that this is not a public service of the Crown. At a late stage in this case counsel for the hospital management committee called our attention to an authority which seems to be of assistance. It is a quotation from the speech of LORD WESTBURY, L.C., in *Mersey Docks* v. *Cameron* (1) ((1865), 11 H.L. Cas. 443 at p. 504), where he said:

> "At last in the case of the *Tyne Improvement Comrs.* v. *Chirton** the Court of Queen's Bench recurred to that which is in my opinion the true principle, namely, that the only ground of exemption from the statute of Elizabeth† is that which is furnished by the rule, that the Sovereign is not bound by that statute, and that consequently when valuable property (that is, property capable of yielding a net rent above what is required for its maintenance), is sought to be exempted on the ground that it is occupied by bare trustees for public purposes, the public purposes must be such as are required and created by the government of the country, and are therefore to be deemed part of the use and service of the Crown."

These premises are such as are required and created by the Act of 1946 for the government of the country, and are deemed to be part of the use and service of the Crown. In my opinion it would be impossible to say that the provision of hospitals for the purposes of the National Health Service Act, 1946, and the carrying on of a hospital is not for the public service of the Crown, and, therefore, I think that these premises are occupied for the public service of the Crown. As I say, I have some regret in this matter. This nuisance has been going on for a very long time. If the hospital had remained as it was before the Act of 1946, there is no question but that the justices would have had jurisdiction to act in the way they did, and I can well understand their believing that the hospital management committee were amenable to their jurisdiction but, for the reasons I have endeavoured to state quite shortly I am of opinion they were not, and therefore this appeal must be allowed.

DONOVAN, J.: I agree. I think that the provisions of s. 106 of the Public Health Act, 1936, apply, and they are too strong in their terms for the respondent.

HAVERS, J.: I agree.

Appeal allowed.

Solicitors: *Solicitor, Ministry of Health* (for the appellants, the hospital management committee); *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Nottingham (for the respondent).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

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* (1859), 1 E. & E. 516.

† 43 Eliz. c. 2.

A

STRATFORD *v.* SYRETT.

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Ormerod, L.JJ.), October 10, 1957.]

Rent Restriction—Possession—House required by landlord—Landlord a beneficiary under will whereby house was devised on trust for sale—Trustees permitted beneficiary to use or let house—Beneficiary sole party to letting—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 20), *s.* 29 (2)—*Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 *&* 24 *Geo.* 5 *c.* 32), *Sch.* 1, *para.* (*h*). B

Rent Restriction—Tenancy by estoppel—Whether tenancy within Rent Acts.

C Under the will of a testatrix who died in 1938 a dwelling-house to which the Rent Restriction Acts applied was held by trustees on trust for sale, the plaintiff being given the beneficial interest for life. The trustees allowed the plaintiff to have possession of and to manage the dwelling-house, and in 1939, the plaintiff let the dwelling-house at a weekly rent to the defendant who had since continued in possession. The plaintiff now claimed possession of the dwelling-house under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sch. 1, para. (h), on grounds that would entitle her thereto if she were the defendant's landlord. On appeal from a decision that the plaintiff was not the defendant's landlord, D

Held: as the plaintiff had been allowed to have the possession and the management of the dwelling-house a valid contractual tenancy had been created between her and the defendant, and the plaintiff was now entitled to an order for possession. E

Parker v. *Rosenberg* ([1947] 1 All E.R. 87) distinguished; observations of LORD THANKERTON in *J. & F. Stone Lighting & Radio, Ltd.* v. *Levitt* ([1946] 2 All E.R. at p. 655) explained.

Per CURIAM: there was no reason why a landlord by estoppel should not be a landlord for the purposes of the Rent Acts (see p. 365, letter E, and p. 367, letter B, post). F

Appeal allowed.

[For the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sch. 1, para. (h), see 13 HALSBURY'S STATUTES (2nd Edn.) 1060.]

Cases referred to:

G (1) *Parker* v. *Rosenberg*, [1947] 1 All E.R. 87; [1947] K.B. 371; [1947] L.J.R. 495; 176 L.T. 170; 31 Digest (Repl.) 708, *7956*.

(2) *Stone (J. & F.) Lighting & Radio, Ltd.* v. *Levitt*, [1946] 2 All E.R. 653; [1947] A.C. 209; [1947] L.J.R. 65; 176 L.T. 1; 31 Digest (Repl.) 722, *8055*.

H **Appeal.**

This was an appeal by the plaintiff from a judgment of His Honour JUDGE LAWSON CAMPBELL at Luton County Court on May 2, 1957, whereby he dismissed the plaintiff's action for possession of the dwelling-house known as and situate at No. 10, Markham Road, Streatley, Luton, in the county of Bedford. The plaintiff had given notice to quit the dwelling-house expiring on Feb. 11, 1957.

I *F. M. Drake* for the plaintiff, the landlord.

H. W. Sabin for the defendant, the tenant.

LORD EVERSHED, M.R.: The premises, No. 10, Markham Road, Streatley, Luton, with which we are concerned, appear to have belonged to the plaintiff's aunt, prior to her death in 1938. By her will the aunt left the premises to trustees, who are not parties to these proceedings, on trust for sale, the beneficial interest being for the plaintiff for life and subject thereto for the plaintiff's daughter absolutely. After the aunt's death it is plain that as a matter of fact the plaintiff was put into possession of the property; that is to say, she was allowed to deal with it as she, the person entitled to the rents and profits, wished. So far as the evidence goes, the trustees were more or less passive, and permitted the plaintiff to deal with the property as she chose. In 1939 the plaintiff let the premises to the defendant on the terms of an ordinary weekly tenancy at a rent. I think that the tenancy was entirely informal and was oral. However that may be, the defendant went into possession under the contract, and remained in possession from 1939 until the present time, paying the contractual rent. It appears that then the daughter, who was absolutely entitled subject to the plaintiff's life interest under the aunt's will, married; and the plaintiff came to the conclusion that it would be right for her, if she could, to obtain possession of this property for the daughter and her husband and family, if any, to live in. In consequence, the proceedings were started, and the plaintiff put her case forward as one coming within the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sch. 1, para. (h), that is to say, as a case of what is called " greater hardship ".

On that matter of greater hardship no question now arises, for the learned judge, having gone into the questions of fact, concluded that the plaintiff had established her case; prima facie, therefore, he would have made an order for possession in the plaintiff's favour. Then the question arose as regards the title to these premises, and the learned judge came to the conclusion that he was bound by authority to hold that no question of estoppel could be asserted by the landlord against the tenant, as might be applicable in the case of an ordinary lease outside the Rent Acts, and that as a result of a decision of this court in *Parker* v. *Rosenberg* (1) ([1947] 1 All E.R. 87), which he thought was on all fours with the present case, he was bound to refuse relief to the plaintiff. In my judgment, with all respect to the learned judge, he fell into error in both those matters.

I can shortly dispose of *Parker* v. *Rosenberg* (1). It was a case in which the tenancy had been granted by trustees for sale, and proceedings were brought by the trustees and a beneficiary to recover possession. It was sought to show there that greater hardship was established on the part of the beneficiary. The court came to the conclusion that the trustees, being the landlords, could not show or indeed assert a case of greater hardship seeing that they themselves of course had no beneficial interest whatever in the property, and that, as the beneficiary was not a party to the contract, she was not competent to assert any right against the tenant. Having said that much, I think it is clear that so far from being on all fours with the present case, *Parker* v. *Rosenberg* (1), if I may respectfully say so, had no bearing on it.

As regards the estoppel point, the learned judge's conclusion that the well-known doctrine of estoppel* which applies between lessor and lessee has no application in a Rent Act case, was founded by the learned judge on a sentence in the speech of Lord Thankerton in *J. & F. Stone Lighting & Radio, Ltd.* v *Levitt* (2) ([1946] 2 All E.R. 653). Neither that case nor the passage from Lord Thankerton's speech has any bearing on the question with which we are concerned. It was a case in which, as a result of earlier proceedings between the two parties, J. & F. Stone, Ltd., the landlords, and Mr. Levitt, an order had been made that the statutory rent which the tenant ought to pay was 10s. a week, and so for a time matters continued. The tenant remained in occupation, paid 10s. a week, and the plaintiffs accepted it. Further proceedings were then brought, the landlords saying in effect that since 10s. a week was less than the requisite fraction of the relevant rates, the case was outside the Rent Acts altogether. The only point at which estoppel came in was that it was suggested that it was not competent for the landlords to assert that the tenancy was outside the Rent Acts because of what had occurred and of the order made in the previous proceedings; it was said that they were estopped from so asserting. All that LORD THANKERTON's observation amounted to was that you cannot give to the court a statutory jurisdiction by estoppel: whether or not there is a statutory jurisdiction depends on the parliamentary language. What LORD THANKERTON said in the passage relied on was this (ibid., at p. 655):

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* The doctrine of estoppel to which the learned county court judge particularly referred in his judgment before citing the case of *J. & F. Stone Lighting & Radio, Ltd.* v. *Levitt*, supra, was that by which a tenant may not question his landlord's title. The learned county court judge referred to it as described by Harman, J., in *E. H. Lewis & Son, Ltd.* v. *Morelli* ([1948] 2 All E.R. at p. 1024). It was invoked in the present case by the plaintiff to counter the defendant's denial that she was his landlord.

> " From these facts it appears clear to me that, however bad in law the judgment on the counterclaim may now be demonstrated to be on the ground that it was without jurisdiction in view of s. 12 (7) of the [Increase of Rent and Mortgage Interest (Restrictions) Act, 1920], the fact remains that the parties, by their actions, were agreed that the ' rent payable in respect of the tenancy ' at the material date was 10s. per week. Having reached this conclusion in fact, it is idle to suggest that either estoppel or res judicata can give the court a jurisdiction under the Rent Restrictions Acts, which the statutes say it is not to have."

In my judgment the facts of the present case, as I have tried to state them, show that that speech has no bearing on the problem with which we are concerned. Indeed, if it be necessary so to determine, I cannot, as at present advised, see any reason why the ordinary incidents, so far as they may be relevant in a particular case, of the old established relationship between lessor and lessee should not apply in Rent Act cases, including matters of estoppel, save to the extent that the statute expressly modifies or varies them. In the present case, in my judgment, no such question arises; the matter, on examination, resolves itself into a short and simple point which only admits of one answer.

In the present case a valid contract of tenancy was made between the plaintiff on the one side and the defendant on the other; by virtue of that contract the defendant went into possession and remained in possession for eighteen years or thereabouts—he was in truth the tenant of the plaintiff. The tenancy was a contractual tenancy and as such was plainly, as I think, a tenancy within the contemplation of the Rent Acts. As a result the defendant was able, when the plaintiff sought to determine the tenancy, to rely on any provisions in the Rent Act which he could successfully invoke. He did resist the claim based on hardship, but that resistance was unsuccessful; he now seeks to turn round, so far as I understand it, and say that the plaintiff is not the landlord at all vis-à-vis himself within the Act or otherwise.

The argument which counsel for the defendant put forward in a gallant attempt to support the view of the learned judge, rests on s. 29 of the Law of Property Act, 1925. By that section it is provided that the trustees for sale may delegate to the tenant for life their powers of leasing, subject to certain restrictions as set out in the section. One is that the delegation should be in writing; another is that the delegated power if exercised should be exercised by the tenant for life, or beneficiary, in the names of, and on behalf of, the trustees. Counsel, therefore, suggested that in the circumstances it must be assumed that the trustees intended to exercise the powers under s. 29, and that the plaintiff, although she did not in fact exercise the power, if it was so delegated, in the names of the trustees at all, must be taken to have done so; with the result that, according to his argument, his real landlords were or must be taken to be the trustees.

The plain answer to that argument is that the trustees are not his landlords; they were not parties to the contract. It may be that some person (e.g., the remainderman) at some date (e.g., after the death of the present plaintiff) may challenge the validity of what the plaintiff did, just as a mortgagee might be able to assert some title paramount against a tenant who had been given, as

A between himself and his landlord, a perfectly valid tenancy; but no question of that sort now arises, or could arise. The plaintiff is alive; she is in fact entitled to the rents and profits, although that is not really a matter with which the tenant is concerned. The vital thing is that by the contract of tenancy which is in suit she became the defendant's landlord. For my part I can see no possible answer to that simple proposition; being the defendant's landlord she has sought B to determine the contract of tenancy, and she has succeeded in establishing a ground which entitles the judge to make an order for possession*. In the circumstances, therefore, it seems to me that this appeal must be allowed; I think that the judge, having found as he did, should have made an order in the landlord's favour for possession, and I would so order here.

C **ROMER, L.J.:** I agree, and if I add a few words of my own, it is only because we are differing from the learned judge.

Counsel supported the defendant's case before us on grounds which were different from those on which the learned judge decided in the defendant's favour. He said that s. 29 of the Law of Property Act, 1925, provides that under certain conditions and subject to certain formalities trustees for sale, D who, by reason of s. 28 of the Act, have all the powers of a tenant for life in regard to management and so on of real estate, can delegate those powers, the powers of leasing and management, to income beneficiaries, and the income beneficiary in this case under the trust was the plaintiff. By s. 29 (2) it is provided:

> "Any power so delegated shall be exercised only in the names and on behalf of the trustees delegating the power." E

He said that s. 29 was not complied with, because even assuming that the trustees executed a delegation in the plaintiff's favour in writing, the plaintiff did not exercise the power of letting this property in the name of, and on behalf of, the trustees. I think that is right, but there is no reason whatever to suppose that F the plaintiff in granting this tenancy in 1939 to the defendant was acting under s. 29 at all. The position, as the learned judge has found, was that the trustees authorised the plaintiff on her aunt's death in 1938 to manage this property and to let it, and it was in pursuance of that authority from the trustees, I suppose, that she granted the tenancy to the defendant which is in question, and the defendant accepted it. The action of the trustees may have been a breach G of trust, but that was no concern of the defendant at all, and I cannot for my part see why, apart altogether from s. 29, which does not come into it, a perfectly valid contract of tenancy was not created as between plaintiff and defendant. Section 29, in my opinion, is directed to cases where an income beneficiary of a life tenant wants to grant a long lease, which cannot normally be done, because the power to grant such a lease is vested in the trustees for sale. If, for example, H she had purported to grant a twenty-one year lease under s. 29, but without seeing to it that the formalities under that section were complied with, and then she had died, that lease would not be binding on the trustees for sale or on the remainderman; but if the formalities were so complied with, the lease would have been just as valid and binding on the trustees and the remainderman as though it had been granted by the trustees themselves. The position, as I see it, is that I this is a perfectly valid contract entered into between the plaintiff and the defendant, and I cannot see why as between those two persons a valid tenancy was not created.

The learned judge was of the opinion that he was unable to hold that the plaintiff was entitled to commence these proceedings because of the decision of this court in *Parker* v. *Rosenberg* (1) ([1947] 1 All E.R. 87). LORD EVERSHED,

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* The county court judge found that the plaintiff's case, in so far as it depended on "greater hardship" within para. (h) of Sch. 1 to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, was made out; see p. 364, letter D, ante.

M.R., has dealt fully with that case, and has made it plain that in truth the decision has nothing whatever to do with the position in the present case; and indeed counsel for the defendant found himself unable to say that that case had the effect which the learned judge attributed to it. On that view, therefore, I agree with LORD EVERSHED, M.R., that no question of estoppel arises. Had it arisen, I am bound to say for my part that I can see no ground whatever why the plaintiff should not be regarded as a landlord for all purposes as between himself and the defendant by virtue of the doctrine of estoppel, including the purposes of the Rent Acts. Nothing could be clearer than that, inasmuch as the plaintiff let the defendant into possession in 1939 in pursuance of a contract for tenancy and the defendant remained in possession for eighteen years, paying the rent to the plaintiff or her agent, at common law a tenancy by estoppel was created; nothing could be clearer than that, and I can see no reason why the landlord under such a tenancy is not a landlord for the purposes of the Rent Acts. There is no definition of " landlord " in any of the Acts which excludes such an idea, and were it necessary to decide it, my strong feeling at the moment is that I should have held that the plaintiff was a landlord for the purposes of the Act if she were driven, as in my opinion she is not, to rely on a tenancy by estoppel. For those reasons I agree that this appeal should be allowed.

ORMEROD, L.J.: I agree. Counsel for the defendant in his argument relied very strongly on s. 29 of the Law of Property Act, 1925. He argued that if the trustees wished to allow the tenant for life to exercise any of the powers which they had of letting and so on, it should be done in accordance with the provisions of s. 29. He relied particularly on the effect of s. 29 (2) which says that any power so delegated should be exercised only in the names of, and on behalf of, the trustees delegating the power. I think counsel's argument was really that as that is the procedure which ought to have been followed, it must be taken that it was followed. That, of course, is far from the truth. There is no evidence at all that delegation of powers under s. 29 was ever considered by the trustees or anybody else. The learned judge has found that the plaintiff had been allowed by the trustees to deal with the premises, and was entitled to the rents and profits, and to live in the premises or let them. That appears to be a clear finding that the plaintiff had been let into possession of this property by the trustees, and whether or not they had power to do that is not a matter as between the plaintiff and the defendant. But, the plaintiff having been let into possession, the trustees had allowed her to let, and in fact she did let, and thereby acted as the defendant's landlord.

In view of those clear findings of fact, it appears to me that there was a contract creating a relationship of landlord and tenant, and it seems idle at this late stage, after the tenant has been in possession for some eighteen years, and particularly has paid rent to the plaintiff, that he should be able to say that in fact he was not the tenant of the plaintiff at all, because she could never have been the landlord of the premises. I agree that this appeal should be allowed.

Appeal allowed; judgment for defendant set aside; order for possession.

Solicitors: *Beachcroft & Co.*, agents for *Neve, Son & Co.*, Luton (for the plaintiff); *Turner & Evans*, agents for *John Q. Clayton & Co.*, Luton (for the defendant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

A

NOTE.

GOUGH *v.* NATIONAL COAL BOARD.

[SHROPSHIRE ASSIZES (Salmon, J.), June 19, 20, 21, 1957.]

B

Coal Mining—Statutory duty—Breach—Security of working place—Fall of stone from coal face—Duty to make " secure " sides of a working place—Whether duty is applicable to coal face—Whether breach of statutory duty by not setting holing props or sprags—Coal Mines Act, 1911 (1 *&* 2 *Geo.* 5 *c.* 50), *s.* 49, *s.* 50 (2).

C

[**Editorial Note.** The Coal Mines Act, 1911, was repealed (except as respects Northern Ireland) from Jan. 1, 1957, by the Mines and Quarries Act, 1954, s. 189, s. 194, and Sch. 5 (34 HALSBURY'S STATUTES (2nd Edn.) 646, 649 and 659), and the provisions of the Act of 1911 were superseded by those of the Act of 1954 or by regulations made under the latter Act (see note at p. 370, post). Section 49 of the Act of 1911 is replaced by s. 48 (1) of the Act of 1954, but the terms of the two enactments are somewhat different, although each deals with the duty to make " secure " the working places in a mine. Under s. 48 (1) of the Act of 1954, for example, the duty of the manager of a mine includes taking " such steps by way of controlling movement of the strata in the mine . . . as may be necessary for keeping the . . . working place secure . . ."

D

For the Coal Mines Act, 1911, s. 49 and s. 50 (2), see 16 HALSBURY'S STATUTES (2nd Edn.) 133; for the Mines and Quarries Act, 1954, see 34 HALSBURY'S STATUTES (2nd Edn.) 514.

E

For the Coal and Other Mines (Support) Order, 1956, see 14 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 57.]

Cases referred to:

(1) *Edwards* v. *National Coal Board*, [1949] 1 All E.R. 743; [1949] 1 K.B. 704; 2nd Digest Supp.

F

(2) *Walsh* v. *National Coal Board*, [1955] 3 All E.R. 632; [1956] 1 Q.B. 511; 3rd Digest Supp.

Action.

The plaintiff, Richmond Gough, an underground worker employed by the defendants, the National Coal Board, claimed damages for personal injuries which he alleged were due to breaches by the defendants of their statutory duty under s. 49 and s. 50 (2) of the Coal Mines Act, 1911, or alternatively, to negligence on the part of the defendants.

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The plaintiff was employed as a ripper in the defendants' coal mine at Granville Colliery. On Dec. 2, 1955, the date of the accident, he was working on a coal face which was one hundred and fifty yards long and about six feet high, and which was being worked on the long-wall system. Until the accident the system was worked with three shifts. During the first shift, a cut by mechanical cutter was made into the face of the seam, to a depth of about four and a half feet, about six inches from the ground. The function of the second shift was " filling-off ", that is to say, their job was to win and bag the coal cut by the first shift. The third shift had the job of advancing the rails and the roof and generally clearing up after the second shift. The plaintiff was a member of the third shift. On the morning of Dec. 2, 1955, owing to a fault in the conveyor, the second shift had not completed the task of filling-off the coal. Mr. Reece, the deputy in charge of the third shift, decided to complete that task and detailed the plaintiff, among others, to go along the coal face and help fill-off the coal. When the plaintiff had gone some fifty yards along the face, walking at a distance of about four feet from the face, a piece of coal, about twelve feet long and two feet six inches thick, came away from the top of the coal face at a point two feet

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A six inches from the roof, and he was buried under it. As a result of the accident the plaintiff was seriously injured.

A. E. James and *I. J. Black* for the plaintiff.

G. K. Mynett for the defendants, the National Coal Board.

SALMON, J., stated the facts and said: The first breach of statutory duty B which the plaintiff seeks to make out is a breach of s. 49 of the Coal Mines Act, 1911. That section reads thus:

> "The roof and sides of every travelling road and working place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel on or work in any travelling road or working C place which is not so made secure."

It is established that the duty imposed by that section is an absolute duty. That was decided in *Edwards* v. *National Coal Board* (1) ([1949] 1 All E.R. 743). The plaintiff says, in effect, that the coal face is a side of a working place; that a piece fell off the working face and injured him; that the fact that it fell off makes it obvious that the working face, or side, was not secure: and that, D therefore, unless there is some escape for the defendants under s. 102 (8) of the Act of 1911, they are liable to him for the damage which he has suffered in this way.

An interesting point arises whether or not s. 49 has any application to the facts of this case. There is no dispute that the point at which the plaintiff was working was a working place. The question is whether or not the coal face is E the side of a working place within the meaning of that section. It was said with great force—and, I think, quite rightly—that the words used in the section were quite wide enough to cover a working face, or the face of the coal seam, and that there was no reason why a side of a working place should not be formed by the face of the seam. I agree that the words in s. 49 are wide enough to cover the coal face.

F The defendants, on the other hand, submitted that it was quite impossible to construe s. 49 as meaning that the side of the working place there referred to was, or could be, the face of the seam. The words might be wide enough, said counsel for the defendants, but they should be given a narrower construction, because, if they were given the widest construction that they could bear, the result would be an absurdity. The way in which the case was put on behalf of G the defendants was this. It was said that "secure" in s. 49, meant, in relation to a side or a roof, "in such a condition that it shall not fall down, nor shall any part of it fall down", and that, in relation to a side in particular, perhaps it meant that the side, and all parts of it, should stand firm. It was then contended that, since the whole object of mining was to take down the working face, it would make nonsense of the section if it were read as referring to the working H face.

Another point, perhaps, that could be made on behalf of the defendants is that the words in s. 49,

> ". . . a person shall not, unless appointed for the purpose of exploring or repairing . . . work in any . . . working place which is not so made secure"

I do not appear to be very apt in their application to a working face. It might be said that the words "exploring" and "repairing" are not applicable to a working face and, therefore, if there was a working face which was in an insecure condition, every man who went there to make it secure would be contravening s. 49, and the defendants would be contravening the section in allowing him to go there. I am not sure that that point has quite as much force as I at one time thought that it had, having regard to the decision of the Court of Appeal in *Walsh* v. *National Coal Board* (2) ([1955] 3 All E.R. 632).

A The main point, however, remains that s. 49 of the Act of 1911 cannot be intended to apply to the coal face because the whole object of mining is to take down the coal face, and, therefore, a section which refers to an obligation to make secure the sides of a working place, and prohibits anyone from working in such a place which has not been so made secure, cannot, in my judgment, be intended to apply to the coal face itself. May I say that, if the word "safe" had been substituted for the word "secure", I should have decided this point B the other way. The difficulty arises because "secure" and "safe" are sometimes used as synonymous, but I do not think that I should be justified in reading the word "secure" here as if it meant "safe", and the whole difficulty in construing this section, in my view, turns on the word "secure". If the word "secure" means what I think it does, then it would be impossible, and I so find, to hold that s. 49 applies to the coal face. C

[HIS LORDSHIP then dealt with the allegation that the defendants were in breach of their statutory duty under s. 50 (2)* of the Coal Mines Act, 1911, as amended by reg. 1 of the Coal Mines (Support of Roof and Sides) General Regulations, 1947 (S.R. & O. 1947 No. 973), in that they had failed to observe the Support Rules† in regard to the secure spragging of all overhanging coal and the cutting of holing blocks at specified intervals. HIS LORDSHIP held that the D term "overhanging coal" in the relevant Support Rule did not apply to all coal that had been under-cut, and that the duty to sprag, under the rule, arose only where the seam leant forward to some appreciable degree. Having reviewed the evidence, HIS LORDSHIP found that holing blocks were inserted as required by the Support Rules; that any overhanging coal or stone was supported by sprags; and that the deputies had fulfilled their duties properly and in accordance E with mining practice; and he held that the defendants were not in breach of s. 50 (2) of the Act of 1911. He found also that the fall of coal was due to a fault known as "slickenside", which was parallel with the surface and at a depth into the face of just over two feet, and which was, for all practicable purposes, undetectable; that there was no evidence that the defendants knew, or ought to have known, before the accident that slickenside was to be expected F in this particular coal face; and he held that there was no negligence on the part of the defendants.]

Judgment for the defendants.

Solicitors: *Hooper & Fairbairn*, Dudley (for the plaintiff); *F. W. Dawson*, Dudley (for the defendants).

[*Reported by* GWYNEDD LEWIS, *Barrister-at-Law.*] G

H * By s. 50 (2) of the Act of 1911 (as amended), holing props or sprags must be set as soon as practicable and in the manner specified in the Support Rules. By s. 50 (4) of the Act of 1911, as amended by the Regulations of 1947, the manager of a mine was required to make the Support Rules in relation to the mine. Section 50 of the Act of 1911 has been replaced with amendments, by s. 49 and s. 54 of the Mines and Quarries Act, 1954.

† The relevant Support Rules which the plaintiff alleged had been contravened read "All overhanging coal or stone shall be securely spragged (stakered) as soon as practicable until it is got down" and "The man in charge of the coal cutting machine shall see that holing blocks are put in the cut at intervals not exceeding five feet." I

These Support Rules were made under s. 50 (4) of the Coal Mines Act, 1911, as amended by the Regulations of 1947 mentioned above. Section 50 is repealed by the Mines and Quarries Act, 1954, but rules made under s. 50 of the Act of 1911 continue in force under s. 49 (5) of the Act of 1954 by virtue of s. 191 (1) of that Act. Certain provisions of s. 50 of the Act of 1911 (as amended by the Regulations of 1947 and by later regulations) and of the Regulations of 1947 are re-enacted with modifications, in the form of regulations, in Sch. 1 to the Coal and Other Mines (Support) Order, 1956 (S.I. 1956 No. 1763); 14 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 57.

Re HASLUCK (*deceased*).

SULLY AND OTHERS *v.* DUFFIN AND OTHERS.

[CHANCERY DIVISION (Wynn-Parry, J.), October 3, 4, 1957.]

Town and Country Planning—Unexpended balance of established development value—Whether additional one-seventh to be regarded as interest—Town and Country Planning Act, 1954 (2 *&* 3 *Eliz.* 2 *c.* 72), *s.* 17 (2).

Settlement—Capital or income—Tenant for life and remainderman—Sale of land—Purchase price quantified under Town and Country Planning Act, 1954, *and including unexpended balance of established development value—Whether the additional one-seventh involved in computing that balance to be regarded as interest—Town and Country Planning Act,* 1954 (2 *&* 3 *Eliz.* 2 *c.* 72), *s.* 17 (2).

By an agreement dated Jan. 31, 1955, trustees of a testator's will agreed to sell to the H. County Council land subject to the will at a price which was to be quantified in a manner which would result in there being included in the price the amount of the " original unexpended balance of established development value of the land " as defined in s. 17 (2) of the Town and Country Planning Act, 1954. By that enactment this balance was equal to eight-sevenths of the aggregate value of claim holdings attributable to the land. This was computed in the aggregate at £18,300 and the amount of the eighth seventh, one of the eight-sevenths before referred to, was £2,614 5s. 9d. Under the testator's will his daughter, E., had a life interest in and a testamentary power of appointment over a half share of his residuary estate. E. died on May 2, 1955. By her will she exercised the testamentary power of appointment given to her by the testator and bequeathed, by a separate bequest, her own property. The sale to the H. County Council was completed on Feb. 28, 1956. On the question whether E.'s half share of the eighth seventh (the £2,614 5s. 9d.) should be treated as interest referable to the period from July 1, 1948, the date on which the Town and Country Planning Act, 1947, came into operation, until Jan. 1, 1955, when the Act of 1954 came into operation, and thus would form part of her own estate at her death,

Held: the eighth seventh (i.e., the £2,614 5s. 9d.), part of the " original unexpended balance of established development value of the land ", should not be treated as interest because s. 17 (2) of the Town and Country Planning Act, 1954, did not provide that the eighth seventh therein referred to should be treated as interest, and, in the present case, the parties to the contract of sale had not therein agreed that the eighth seventh should be so treated; therefore E.'s share of the £2,614 5s. 9d. formed part of the property subject to the power of appointment conferred by the testator's will.

[As to the unexpended balance of established development value, see 10 HALSBURY'S LAWS (3rd Edn.) 114, para. 189.

For the Town and Country Planning Act, 1954, s. 17, see 34 HALSBURY'S STATUTES (2nd Edn.) 937.]

Adjourned Summons.

This originating summons was issued by the plaintiffs, Alfred Victor Sully, Peter Silvester Edgson and John Arthur Raisen, as the trustees of the will and codicil of the testator, Percy Pedley Hasluck, who died on Oct. 28, 1920. Under the testator's will, which was dated June 14, 1906, and in the events which had happened, the trustees were to hold one half of his residuary estate on trust to pay the income thereof to his daughter, Edith Margaret Eleanor Hasluck, during her life, and, after her death, on trust for such persons and in such manner as she should appoint.

By her will, dated Sept. 27, 1954, Miss Hasluck gave a number of specific and pecuniary legacies and an annuity out of the property to which she was absolutely entitled, and, by cl. 10 of the will, she exercised the power of appointment conferred on her by the testator's will in these terms:

> " . . . I hereby appoint that all that my one equal half part or share . . . in the residuary estate of my . . . father and the investments for the time being representing the same shall from and after my decease be held upon the trusts following . . . (a) As to both capital and income of such part thereof as shall at the date of my decease consist of a share and interest of and in the proceeds of sale and income until sale of real estate but not so as to include the proceeds of sale of any real estate sold before my decease and not at the date of my decease reinvested . . ."

on trusts for the benefit of her nieces, Mrs. Angela Joyce Duffin (the first defendant) and Edith Philippa Hasluck (the second defendant).

Clause 10 continued: " (b) As to both capital and income of the rest and residue thereof in trust for " Kenneth Rust Burt and Richard Mark Eyre Nesbitt (the third and fourth defendants), in equal shares. By cl. 11 of her will Miss Hasluck devised and bequeathed the rest and residue of her estate to her trustees on trust for sale and conversion, and, after directing the payment thereout of her funeral and testamentary expenses, debts, the legacies bequeathed by the will, and the estate duty on certain gifts, she disposed of the ultimate residue. She died on May 2, 1955. After the property specifically devised and bequeathed by the will had been set aside, the remainder of her estate would be insufficient to meet in full the pecuniary legacies, testamentary expenses, and the annuity given by the will. The annuitant, Mrs. Gwendoline Alice Wall, was made a defendant to the summons (being the fifth defendant).

The trustees of the testator's will took out this summons to determine the destination of the items of property which were vested in them or due to them at Miss Hasluck's death and which were subject to the general power of appointment conferred on her. The items were set out in a schedule to the summons. Question 1 of the summons dealt with the items set out in Part 1 of the schedule, items No. 1-No. 7 inclusive, which included a half share of certain freehold properties and stocks. Question 2 and question 3 of the summons dealt with the items set out in Part 2 of the schedule, namely, items No. 8 (a) and No. 8 (b), and items No. 9 (a) and No. 9 (b). Item No. 8 (a) was a half share of the principal amount of the payments made under Part 1 of the Town and Country Planning Act, 1954, in respect of freehold land compulsorily acquired pursuant to compulsory purchase orders dated May 5, 1949, Sept. 7, 1949, and June 7, 1950, and item No. 8 (b) was a half share of the interest payment under s. 14 of the Act of 1954 on such principal amounts from July 1, 1948, until some day after Miss Hasluck's death. Item No. 9 (a) was a half share of certain land which, at the time of Miss Hasluck's death, was in the process of being acquired by Hertfordshire County Council under an agreement dated Jan. 31, 1955, or of the compensation, amounting to £24,484 5s. 9d., received for the land and assessed under Part 3 of the Town and Country Planning Act, 1954. In para. 22 of the affidavit in support of the summons, it was stated that the agreed price of £24,484 5s. 9d. was made up as follows :

" Existing use value (£1,500 on Jan. 6, 1947, but increased by 1955)	£1,977 0s. 0d.
Timber	£1,593 0s. 0d.
Development value	£18,300 0s. 0d.
One seventh in lieu of interest	£2,614 5s. 9d."

The sale was completed on Feb. 28, 1956, by a conveyance of that date made between the then trustees of the testator's will, of the one part, and Hertfordshire County Council, of the other part. It was also stated that negotiations in regard to the price took place in November, 1954, and agreement was then reached although the actual figure was not mentioned until later.

Item No. 9 (b), in Part 2 of the schedule to the summons, was:

> " Half share of the sum of £2,614 5s. 9d., being part of the said compensation of £24,484 5s. 9d. and calculated as follows:—The said compensation includes 'the unexpended balance of the established development value', see s. 31 [of the Town and Country Planning Act, 1954]. The original unexpended balance of the established development value consisted of £18,300, the appropriate fraction of the value of the claim holding plus (under s. 17 [of the Act of 1954]) one seventh (namely the said sum of £2,614 5s. 9d.). The seventh is or might be claimed to be in lieu of the interest allowed by s. 14 [of the Act of 1954]."

The report deals only with the question whether item No. 9 (b) belonged beneficially to Miss Hasluck and, accordingly, on her death, passed under cl. 11 of her will, or whether it passed under cl. 10 of her will by which she exercised the power of appointment conferred by the testator's will.

Section 17 of the Town and Country Planning Act, 1954, reads:

> " (1) For the purposes of this Act land shall be taken to have an unexpended balance of established development value immediately after the commencement of this Act if there are then subsisting one or more claim holdings whose area consists of that land, or includes that land together with other land, and there is not then subsisting any claim holding whose area consists of part only of that land, whether with or without other land.
>
> " (2) Where sub-s. (1) of this section applies, there shall be attributed to the land referred to in that sub-section—(a) the value of any claim holding having an area consisting of that land; and (b) such fraction of the value of any claim holding whose area includes that land as attaches to that land; and the unexpended balance of established development value of that land immediately after the commencement of this Act (hereafter in this Act referred to in relation to that land as its 'original unexpended balance of established development value') shall be taken to have been an amount equal to eight-sevenths of the amount or aggregate amount so attributed."

A. A. B. Fuller for the plaintiffs, the trustees of the testator's will.

Milner Holland, Q.C., and *P. W. E. Taylor* for the first and second defendants (the appointees under cl. 10 (a) of Miss Hasluck's will).

J. A. Plowman, Q.C., and *E. I. Goulding* for the third and fourth defendants (the appointees under cl. 10 (b) of Miss Hasluck's will).

C. D. Myles for the fifth defendant, an annuitant under Miss Hasluck's will (representing the pecuniary legatees under the will).

WYNN-PARRY, J., having disposed of question 1 of the summons, held on question 2 that item No. 8 (a), in Part 2 of the schedule to the summons, passed under cl. 10 (b) of Miss Hasluck's will, and that item No. 8 (b) belonged beneficially to Miss Hasluck and passed under cl. 11 of her will. Dealing with items No. 9 (a) and No. 9 (b), HIS LORDSHIP said: The land in question was the subject of a contract for sale and it is clear from the terms of that contract that it was a voluntary contract entered into between the Hertfordshire County Council and the then trustees, and that the contract provided machinery by which the price to be paid by the county council was to be ascertained*. It is clear from the evidence, which I do not propose to review in any detail, that the price was, in fact, quantified by using the provisions of s. 17 of the Town and Country Planning Act, 1954. Section 17 (2) provides that what is defined in the section as the " unexpended balance of established development value " " shall be taken to have been an amount equal to eight-sevenths of the amount or aggregate amount so attributed ". That factor, it is quite clear, was taken into consideration in quantifying the price under the agreement.

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* By cl. 1 of the agreement dated Jan. 31, 1955. the then trustees agreed to sell the land " at a price (representing present use value plus development value) to be agreed or failing agreement to be settled by arbitration under the Acquisition of Land (Assessment of Compensation) Act, 1919, as modified by the Town and Country Planning Act, 1947, and the Lands Tribunal Act, 1949, or any statutory amendment or modification thereof in the same manner as if the necessary steps for acquiring such interest compulsorily had been taken under the Education Acts, 1944 to 1953, and the Acquisition of Land (Authorisation Procedure) Act, 1946, and a notice to treat had been served on the date of this agreement."

Two points have been sought to be made by counsel for the fifth defendant. The first is that, assuming that s. 17 applies, in the sense that it governs the parties whether they wanted it to or not, the eighth seventh is to be treated as interest when received by the trustees. That conclusion, if it be a sound conclusion, can only be arrived at by a study of the Act itself. It does appear that there was, as counsel put it, a gap of nearly seven years from July 1, 1948*, until the Act of 1954 came into operation, and it may well be that the intention of the framers of the Act of 1954 in producing this fraction of eight sevenths was to compensate by the eighth seventh the person interested in the land for the period of nearly seven years. That, however, is not what the Act of 1954 by its language (see s. 17 (2)), does: it merely says that, where s. 17 (1) of the Act applies and the unexpended balance of the established development value of the particular land has to be ascertained, then it is to be ascertained in the manner provided by s. 17 (2). Where the legislature in this Act designs to provide for the payment of interest, it clearly knows how to do so, because there is an express provision for the payment of interest on a capital sum in s. 14 of the Act. Section 17, as has been admitted, is of general application throughout the Act, and it seems to me, therefore, that the argument that one can extract from the language of the Act that the eighth seventh is to be treated as interest is not a sound argument.

I then turn to the second point, which is that, when the agreement of Jan. 31, 1955, treated as a voluntary agreement, is fairly construed in the light of the surrounding circumstances as proper to be taken into consideration, the conclusion must be that, of the price, this one-seventh, one of the eight sevenths representing the factor of unexpended balance of established development value, should be regarded as interest. It is first relevant to observe that no such express provision is to be found in the agreement, and that the only reference to interest is the provision in cl. 4 that

> " Interest is to be paid on the purchase price as agreed or awarded at the rate of 4½ per cent. per annum (less tax) from the date of such entry [the council's entry on the land] until the completion of the purchase . . ."

Therefore, pausing there, I have no material as yet on which I could properly as between capital and income, split up this price and attribute part of it to those interested in income.

Counsel for the fifth defendant then submitted that there was evidence that it was the intention of the then trustees, in entering into this contract, that the one-seventh in question should be treated as being paid in lieu of interest, and he referred to para. 22 of the first affidavit made by the present trustees in support of the summons. In the course of that paragraph, it is said:

> " The price was agreed at £24,484 5s. 9d. made up as follows:—Existing use value [and the amount is stated] Timber [at the amount stated] Development value—£18,300. One-seventh in lieu of interest—£2,614 5s. 9d."

I, for my part, cannot regard that as satisfactory evidence on which I could act, but, even if it were, even if it did amount to satisfactory evidence, I come back to the agreement, and the only conclusion at which I can arrive is that, however it may

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* The Town and Country Planning Act, 1947, came into operation on July 1, 1948, and the Act of 1954 came into operation on Jan. 1, 1955.

A have been a matter of indifference to the county council how the price was expressed, and however interested the then trustees may have been in seeing that there was a differentiation so that those entitled to income would receive an amount equal to the one-seventh in question, that has not been provided in the contract. Much as I may sympathise with those interested in income, there is no ground on which I can interfere with the plain language of the contract. B I propose to make the necessary declaration accordingly.

[HIS LORDSHIP then held that what was eventually received under the agreement of Jan. 31, 1955, passed under cl. 10 (b) of Miss Hasluck's will, and that the whole of the costs of the originating summons should be treated as testamentary expenses in the administration of her estate.]

C Solicitors: *Pedley, May & Fletcher* (for the plaintiffs and the third and fourth defendants); *Waltons & Co.* (for the first and second defendants); *Peacock & Goddard* (for the fifth defendant).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

D

JONES *v.* MERSEY RIVER BOARD.

[COURT OF APPEAL (Jenkins, Parker and Pearce, L.JJ.), October 8, 1957.]

E *Land Drainage—River board—Cleansing watercourse—Dredgings deposited on adjoining land—Exclusion of compensation where matter so removed deposited on the banks of the watercourse—Meaning of "banks"—Construction of enactment—Land Drainage Act,* 1930 (20 *&* 21 *Geo.* 5 *c.* 44), *s.* 38 (1).

Section 38 (1) of the Land Drainage Act, 1930, provides that " A drainage board, without making payment therefor or giving compensation in respect F thereof, may appropriate and dispose of any . . . matter removed in the course of the execution of any work for widening, deepening or dredging any watercourse, and may deposit any matter so removed on the banks of the watercourse or use it in any other manner for the maintenance or improvement of those banks or for the purposes of the execution of any other work which the drainage board have power to execute: . . ." By s. 81 of G the Act, unless the context otherwise requires, the expression "'Banks' means banks, walls, or embankments adjoining or confining, or constructed for the purposes of or in connexion with, any channel or sea front, and includes all land between the bank and low-water mark ".

A river board in exercise of powers conferred by s. 34 (1) of the Land Drainage Act, 1930, widened and improved the course of a river. The H board deposited the soil over an area, which was alleged to exceed two and a quarter acres, of agricultural land adjoining the river. The landowner claimed compensation under s. 34 (3)* of the Act, and the question arose whether the board were exempted from paying compensation by s. 38 (1) of the Act. On appeal and cross-appeal, by Case Stated, from the Lands Tribunal on the construction of s. 38 (1),

I **Held:** (i) the word " banks " in s. 38 (1) meant so much of the land adjoining or near to a river as performed or contributed to the performance of the function of containing the river (see p. 380, letter D, and p. 382, letter I, post).

Dicta of CURTIS, J., in *Howard* v. *Ingersoll* ((1851), 54 U.S. at p. 427), and of MARTIN, B., in *Monmouthshire Canal & Ry. Co.* v. *Hill* ((1859), 28 L.J.Ex. at p. 285) adopted.

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* Section 34 (3) is printed in full at p. 377, letter H, post, in the judgment of JENKINS, L.J.

(ii) compensation for the material removed in the course of the board's work on the river was excluded by s. 38 (1), but any right to compensation which might arise from the action of the board in depositing or using the material so removed was not excluded (see p. 381, letter F, and p. 383, letter C, post).

(iii) the depositing of soil on the banks of a watercourse which was permitted by the words " any may deposit . . . on the banks of a watercourse " was limited to a deposit for the maintenance or improvement of those banks (see p. 382, letter C, and p. 383, letter E, post).

Appeal and cross-appeal allowed.

[As to disposal of spoil by a drainage board, see 30 Halsbury's Laws (2nd Edn.) 89, para. 167.

For the Land Drainage Act, 1930, s. 34, s. 38 (1), s. 81, see 13 Halsbury's Statutes (2nd Edn.) 583, 587, 618.]

Cases referred to:

(1) *North Level Comrs.* v. *River Welland Catchment Board*, [1937] 4 All E.R. 684; [1938] Ch. 379; 107 L.J.Ch. 178; 158 L.T. 107; 102 J.P. 82; Digest Supp.

(2) *Cheshire Lines Committee* v. *Heaton Norris Urban District Council*, [1913] 1 K.B. 325; 81 L.J.K.B. 1119; 107 L.T. 348; 76 J.P. 462; 26 Digest 568, *2612*.

(3) *Howard* v. *Ingersoll*, (1851), 54 U.S. 381.

(4) *Hindson* v. *Ashby*, [1896] 1 Ch. 78; 73 L.T. 468; *revsd.* C.A., [1896] 2 Ch. 1; 65 L.J.Ch. 515; 74 L.T. 327; 60 J.P. 484; 32 Digest 433, *1063*.

(5) *Monmouthshire Canal & Ry. Co.* v. *Hill*, (1859), 4 H. & N. 421; 28 L.J.Ex. 283; 33 L.T.O.S. 111; 23 J.P. 679; 157 E.R. 903; 38 Digest 415, *1036*.

Case Stated.

This was a Case Stated by the Lands Tribunal (Erskine Simes, Q.C.) pursuant to s. 3 (4) of the Lands Tribunal Act, 1949, on certain points of law which, pursuant to an order of the tribunal dated Sept. 24, 1956, and made by consent, were decided at a preliminary hearing of a claim for compensation made by Albert Jones, of Orrell Hill Farm, Hightown, near Liverpool, the owner of land adjoining and to the south of the River Alt in the district of the Mersey River Board. The board in the course of widening and improving the course of the river had removed soil which the board had dredged and had deposited the spoil on the landowner's land covering an area which the landowner alleged was something over two and a quarter acres of good agricultural land. The board acted under powers conferred by the Land Drainage Act, 1930, s. 34 (1) and the landowner claimed compensation from the board under s. 34 (3) of that Act. The board denied liability to pay compensation and relied on s. 38 (1) of the Act. The questions of law argued before the Lands Tribunal were—(a) whether the words " without making payment therefor or giving compensation in respect thereof " in s. 38 (1) of the Land Drainage Act, 1930, only governed the words immediately following as far as the words " dredging any watercourse " or whether they governed all that followed; that is to say, whether s. 38 (1) entitled the board without paying compensation only to appropriate and dispose of material removed and did not entitle them to deposit it on the bank without paying compensation for any injury caused to the landowner; (b) the meaning of the word " banks " in s. 38 (1) of the Land Drainage Act, 1930, in view of the landowner's contention that the place on which the spoil had been deposited could not be described as " banks " and that the meaning of " banks " was one of fact and degree dependent on the circumstances of the case; and (c) whether the word " other " in the phrase " or in any other manner for the maintenance and improvement of those banks " in s. 38 (1) of the Land Drainage Act, 1930, A implied that a deposit of spoil etc., must be made for purposes of maintenance and improvement of those lands and for no other purpose.

The tribunal decided on question (a) that the words " without making payment therefor or giving compensation in respect thereof" governed all the powers that followed in s. 38 (1) and that the board were not liable, therefore, to pay compensation in respect of the deposit of material on the banks of the river. On B point (c) the tribunal decided that the power of the board to deposit material on the banks of a watercourse was not limited to cases in which by so doing they would maintain or improve those banks. On point (b) the tribunal decided that the word " bank " had in its natural connotation the idea of a slope and that the word " banks " in s. 38 (1) should be given this limited sense, and that accordingly the board had no right under the sub-section to deposit material removed on the C adjoining fields but only on what may properly be termed the banks within this limited meaning.

The board appealed against the decision of the tribunal on point (b) and the landowner cross-appealed against the decision of the tribunal on points (a) and (c). The question stated for the Court of Appeal was whether the decision of the tribunal on the questions of law was correct.

D

G. D. Squibb, Q.C., and *K. W. Dewhurst* for the landowner.
Michael Rowe, Q.C., and *R. H. Mais* for the Mersey River Board.

JENKINS, L.J., stated the facts and continued: I will refer as briefly as I can to the pertinent provisions of the Land Drainage Act, 1930. Under that Act, the land drainage system of the country was re-organised, and the organisa- E tion comprised drainage boards and catchment boards. The functions of the catchment boards have been transferred by the River Boards Act, 1948, to river boards, of which the Mersey River Board is one.

It is only necessary to refer to two or three sections of the Land Drainage Act, 1930. Section 34 provides:

> F " (1) Every drainage board [that, for the purposes of the present case, must be taken as meaning a river board] acting within its district shall have power—(a) to maintain existing works, that is to say, to cleanse, repair or otherwise maintain in a due state of efficiency any existing watercourse or drainage work; (b) to improve any existing works, that is to say, to deepen, widen, straighten or otherwise improve any existing watercourse, or remove G mill dams, weirs or other obstructions to watercourses, or raise, widen, or otherwise improve any existing drainage work; (c) to construct new works, that is to say, to make any new watercourse or drainage work or erect any machinery or do any other act not hereinbefore referred to, required for the drainage of the area comprised within their district . . .
>
> " (3) Where injury is sustained by any person by reason of the exercise H by a drainage board of any of its powers under this section, the board shall be liable to make full compensation to the injured person, and in case of dispute the amount of the compensation shall be determined in the manner in which disputed compensation for land is required to be determined by the Lands Clauses Acts."

I need not go into the legislation whereby the function of determining com- I pensation in such cases was transferred to the Lands Tribunal.

Then by s. 38 (1) it is provided:

> " A drainage board, without making payment therefor or giving compensation in respect thereof, may appropriate and dispose of any shingle, sand, clay, gravel, stone, rock or other matter removed in the course of the execution of any work for widening, deepening or dredging any watercourse, and may deposit any matter so removed on the banks of the watercourse or use it in any other manner for the maintenance or improvement

> of those banks or for the purposes of the execution of any other work which the drainage board have power to execute." A

Then there is a proviso which is not material.

In s. 81 there is a definition of " banks " which is this:

> " ' Banks ' means banks, walls, or embankments adjoining or confining, or constructed for the purposes of or in connexion with, any channel or sea front, and includes all land between the bank and low-water mark." B

The points of law raised before the Lands Tribunal concern the construction of s. 38 (1) of the Act. The first point was:

> " (a) whether the words ' without making payment therefor or giving compensation in respect thereof ' in s. 38 (1) of the Land Drainage Act, 1930, only govern the words immediately following up to ' dredging any watercourse ' or whether they govern the whole of the remainder of the subsection, i.e., does the protection given by the sub-section merely extend to the actual appropriation and disposal of the spoil." C

That question the tribunal decided against the landowner. Then, taking them out of their order, the third point, (c), was: D

> " whether the word ' other ' in the phrase ' or in any other manner for the maintenance or improvement of those banks ' in s. 38 (1) of the Land Drainage Act, 1930, implies that a deposit of spoil, etc., is to be made for those purposes (i.e., maintenance and improvement) and for no other purpose."

That point also the tribunal decided against the landowner. E

I now come to the second point in order. There was a fourth point, with which we are not now concerned, but the second one was this:

> " (b) The meaning, effect and interpretation of the word ' banks ' in s. 38 (1) of the Land Drainage Act, 1930."

That second question the tribunal answered by placing a limited construction on the word " banks " which satisfied the landowner but which by no means satisfied the board. In those circumstances the board now appeals from the decision on point (b), whereas the landowner cross-appeals on points (a) and (c). F

As to the board's appeal, there is very little in the Act to aid the court in coming to a conclusion as to the meaning of the word " banks ". There is, indeed, nothing except the circumstance that the word " banks " appears in the context of an Act concerned with land drainage, and except that the definition in s. 81 says: G

> " ' Banks ' means banks, walls, or embankments adjoining or confining, or constructed for the purposes of or in connexion with, any channel or sea front, and includes all land between the bank and low-water mark."

The point is one which, for my part, I regard as unsuitable for determination as a preliminary point. The question whether a given piece of land near to or adjoining a river was part of the river bank must be a question very largely of fact to be decided in each particular case by reference to the size and habits of the river, the geological composition of the land, and the level of the land as compared with the river, and, no doubt, other circumstances of that kind. However, the tribunal found it possible to deal with this question of the meaning of the word " banks " more or less, one might say, in vacuo, and the matter has been debated before us. Therefore, I think it right that we should express an opinion on it, while administering the caution that the matter is, in the last resort, very largely a matter of fact. H I

Mr. Erskine Simes, in his decision, said:

> "What is meant by the ' banks ' in the sub-section is far from clear. The definition in s. 81 of the Act affords little or no assistance in construing

> the sub-section. I was referred to *North Level Comrs.* v. *River Welland Catchment Board* (1) ([1937] 4 All E.R. 684), as showing that some limitation must be put upon the word, but I find no assistance therein in arriving at the answer to the question before me. In *Cheshire Lines Committee* v. *Heaton Norris Urban District Council* (2) ([1913] 1 K.B. 325), where the meaning of 'bank' in s. 30 of the Public Health Acts Amendment Act, 1907, was under consideration, DARLING, J., said (ibid., at p. 334): 'I am very much inclined to think that the " bank " mentioned in s. 30 is not what we usually call the bank of a river, as when we say a person lives on the banks . . . of the Thames, or that he keeps his flocks on the banks of the Danube, or anything of that kind . . . If one speaks of the bank of the river in that sense, it is a much wider thing; I think it would go beyond the footpath and it might go a mile inland; the bank cannot be limited to the little strip between the footpath and the river' . . . I was also referred to the dictum of CURTIS, J., in *Howard* v. *Ingersoll* (3) ((1851), 54 U.S. 381 at p. 427) before the Supreme Court of the United States, cited with approval by ROMER, J., in *Hindson* v. *Ashby* (4) ([1896] 1 Ch. 78 at p. 84): 'That the banks of a river are those elevations of land which confine the waters when they rise out of the bed . . .' This seems to me to be as accurate a definition as possible of what is generally understood to be the bank in its limited sense. The word 'bank' has in its natural connotation the idea of a slope, and I have formed the view that in this sub-section, limiting as it does the general right to compensation under s. 34 (3), the word 'banks' should be given this limited sense, and that accordingly the board have no right under the sub-section to deposit material removed upon the adjoining fields, but only upon what may properly be termed the bank within this limited meaning."

With respect to the tribunal, I am left in doubt as to the exact effect of the conclusion reached on the meaning of " banks ". There is the reference to the American case, *Howard* v. *Ingersoll* (3) for the proposition that (54 U.S. at p. 427) " the banks of a river are those elevations of land which confine the waters when they rise out of the bed ", but that seems to be restricted by the introduction of the idea of a slope, which is not an essential feature of that which the term " bank " conveys in its natural connotation when used in relation to a river.

Counsel for the board argued that the definition adopted by the tribunal has the effect of limiting the banks of a river, for the purposes of the Act, to the face of the land actually on the margin of the river—the face of the land rising at an angle, or even vertically, from the river bed. Counsel points out the impossibility of applying that definition as a practical matter. He says it would mean that the employees of the board, when they dredged the river and had occasion to put spoil on the banks, would be under the necessity of confining their operations to the actual face of the bank, rising perhaps steeply or even vertically from the river, and he says that this cannot possibly be right. I agree that, if the decision of the tribunal did in truth involve that conclusion, it could not stand for a moment; but I do not read the decision as narrowing quite to that extent the meaning of the word " banks ". The meaning adopted by the tribunal was, I think, in reality, the definition given in the American case, with a qualification in the shape of the introduction of the conception of a slope as an essential element. I think that apart from the introduction of that idea, both sides would substantially agree that the definition given in the American case was satisfactory.

We were referred to a number of authorities, but I confess that I have not derived any real assistance from any of them, with the possible exception of certain observations of MARTIN, B., in *Monmouthshire Canal & Ry. Co.* v. *Hill* (5) ((1859), 28 L.J.Ex. 283). In that case

> " A local Act for the formation of a canal empowered the owner of any lands through which it was made, to erect and use any wharves . . . in

> or upon their lands adjoining or near to the canal, and to land any goods upon such wharves, etc., or upon the banks lying between the same and the canal . . ." A

A question in the case was the meaning of the word "banks". MARTIN, B., said (ibid., at p. 285):

> "I am of the same opinion, and I will treat the case as the plaintiffs' counsel has treated it, putting it upon its true footing, namely, the construction of the Act of Parliament. When you speak of the banks of a canal, you mean the land on either side of the canal which confines the water. There are banks of the canal therefore on both sides of it, and when you speak of the banks, you mean the substantial soil which confines the water . . ." B C

Those observations of MARTIN, B., accord with the view taken in *Howard* v. *Ingersoll* (3). So far as it is possible to decide a question of this sort save in the light of all the relevant facts, in the particular case under consideration I would adopt in substance the definition in *Howard* v. *Ingersoll* (3) and the view expressed to the same effect by MARTIN, B., and hold that the expression "banks" in s. 38 (1) means so much of the land adjoining or near to a river as performs or contributes D to the performance of the function of containing the river. I think that is as good a definition as it is possible to provide in vacuo; but I emphasise that its application in any particular case must depend to a great extent on the particular facts of the case—the character of the river, the character of its surroundings, and, no doubt, other considerations as well.

I am fortified, in adopting the construction I have stated, by the circumstance E that the expression "banks" which we have to construe does appear, as I have already said, in the context of a land drainage Act. When a land drainage Act refers to the banks of a river, one supposes that the banks referred to are those banks which are material from the land drainage point of view, that is to say, the banks which contain the river. Once one comes to that conclusion, obviously the word "banks" cannot be limited to the slope or vertical face where those F banks actually meet the river, but must include, as I have said, the land adjoining or near to the river, to the extent to which it serves to contain the river. In the end, I do not think there was really much difference between the parties as to the meaning of the word "banks": I think that they both were disposed, or nearly disposed, to adopt the definition I have given. It follows, therefore, that the appeal of the board succeeds. What the consequence, in the circumstances, G should be as to costs I will leave for later debate.

Next I come to the points (a) and (c), which are the subject of the landowner's cross-appeal. I will read them again:

> "(a) whether the words 'without making payment therefor or giving compensation in respect thereof' in s. 38 (1) of the Land Drainage Act, 1930, only govern the words immediately following up to 'dredging any watercourse' or whether they govern the whole of the remainder of the sub-section, i.e., does the protection given by the sub-section merely extend to the actual appropriation and disposal of the spoil, etc." H

It seems to me that the words "without making payment therefor or giving compensation in respect thereof" in s. 38 (1) manifestly govern everything that I follows, with the result that if this exclusion of compensation is properly to be construed as an exclusion of compensation in respect of any of the acts referred to in s. 38 (1), I should have thought that all the acts therein enumerated would be in the same case as regards exclusion of compensation; but, in my judgment, on the true construction of s. 38 (1), the words "without making payment therefor or giving compensation in respect thereof" relate, and relate only, to the material (i.e., shingle and so forth) with which the section is concerned. I will refer to it again: "A drainage board, without making payment therefor"—

and "therefor", I think, means "without making payment for the material hereinafter mentioned"—"or giving compensation in respect thereof"—that is to say, in respect of that material—

> "may appropriate and dispose of any shingle, sand, clay, gravel, stone, rock or other matter removed in the course of the execution of any work for widening, deepening or dredging any watercourse . . ."

Prima facie, the matter in respect of which compensation is excluded seems to me quite clearly to be the physical materials removed in the course of the execution of the work referred to, and nothing else. Then come these words:

> "and may deposit any matter so removed on the banks of the watercourse or use it in any other manner for the maintenance or improvement of those banks . . ."

I think that in dealing with the passage beginning "and may deposit" one must go back to the opening words, and, doing so, one gets this: "A drainage board, without making payment" for "or giving compensation in respect" of any materials of the kinds already referred to which have been removed in the course of any work of those kinds, "may deposit any matter so removed on the banks of the watercourse". It seems to me reasonably clear that there again the exclusion of compensation relates to the "matter so removed". Then come the words "or use it in any other manner for the maintenance or improvement of those banks": "it", of course, means the matter so removed. Again, that seems to me to be qualified by the exclusion of compensation at the beginning of the section, which, however, relates, and relates only, to the material removed.

It seems to me that any doubt on this question is really set at rest when one comes to the concluding words of the sub-section, "or for the purposes of the execution of any other work which the drainage board have power to execute". That does not mean that, without paying any compensation at all for their action, the board may use the material in question for the purposes of the execution of any other work which they have power to execute. In my judgment, it can only mean that they may use the materials so removed for those purposes, without making or giving any payment or compensation for the materials so used, the ordinary right to compensation being excluded only so far as the materials used are concerned.

This point was taken by counsel for the landowner when he first addressed us, but was not fully developed until his reply. That being so, it seemed to us that counsel for the board might not have fully appreciated until that late stage the way in which counsel for the landowner sought to put this part of the case, and, accordingly, we gave him a further opportunity of arguing the point, but nothing he then said has sufficed to displace my conclusion that this argument of counsel for the landowner is well founded.

It seems to me that, if the section is not so construed, somewhat surprising results might ensue. It would mean, as far as I can see, that, by the terms of s. 38 (1), if any work whatsoever, no matter on whose land, was carried out by the board with the material excavated or dredged up from the river, the right of compensation would be wholly excluded in such case owing to the circumstance that the matter used was dredged from the river. That would be a wholly irrelevant circumstance in the perfectly possible case of material being dredged up from A's part of the river and used in executing some work on B's part of the river. Counsel for the board sought to escape that conclusion, but it seems to me to be really inescapable. The difficulty arises so soon as one construes s. 38 as excluding compensation for the operations mentioned as distinct from the material used. Accordingly, in my view, the cross-appeal should succeed on point (a).

Then comes point (c):

> " whether the word ' other ' in the phrase ' or in any other manner for the maintenance or improvement of those banks ' in s. 38 (1) of the Land Drainage Act, 1930, implies that a deposit of spoil, etc., is to be made for those purposes (i.e., maintenance and improvement) and for no other purpose."

That argument is based on what may be loosely described as a variant of the ejusdem generis principle, and it turns on the words " or use it in any other manner for the maintenance or improvement of those banks ". It is said, taking the words " and may deposit any matter so removed on the banks of the watercourse or use it in any other manner for the maintenance or improvement of those banks ", that the reference to the deposit on the banks, followed by the reference to using it " in any other manner for the maintenance or improvement of those banks ", has the effect of limiting the permitted deposit to a deposit which in fact contributes to the maintenance or improvement of those banks. I think that submission should succeed.

A particular operation affecting the banks, namely, the deposit of matter on the banks, is referred to in general terms, and that is immediately followed by the words " or use it in any other manner for the maintenance or improvement of those banks." I think that indicates that the section is treating the first operation mentioned, the deposit, as being " for the maintenance or improvement of the banks ", and as being one of several possible means of maintenance or improvement.

In view of the opinion I have formed on the other point, this point does not seem to me to be of great practical importance. The importance, from counsel for the landowner's point of view, of narrowing down this part of the section really depends on acceptance of the other view about the exclusion of compensation. However, I think, as a matter of construction, that his argument is right. Accordingly, in my view, the cross-appeal succeeds on this point also.

PARKER, L.J.: I have come to the same conclusion, and I will state my views in a very few words. So far as regards the question with which the appeal is concerned, namely, the meaning to be given to the word " banks " in s. 38 of the Land Drainage Act, 1930, I share my Lord's regret that this point was ever stated as a preliminary point. I confess I am surprised that the Mersey River Board should have been parties to that agreement when their counsel at the hearing had to take the point that whether a bit of land comprised the bank of a river must be largely a question of fact, and ought not to be decided until all the evidence had been heard. However, the matter was argued before the Lands Tribunal, and has been argued in this court, and it is only right that we should express a view on it.

My Lord has referred to the section, and it is enough for me to say that, in my view, it is far easier to say what does not comprise a bank than what does. A bank is not used in a drainage Act in the sense in which it is often used, e.g., grazing your sheep or cattle on the banks of a river, nor can it be confined to the skin of soil, or slope, or vertical part which abuts on the river. It must be something more than that, depending on all the circumstances of the case. For myself, I get help from the decision of CURTIS, J., in *Howard* v. *Ingersoll* (3) ((1851), 54 U.S. 381 at pp. 426-428) in the Supreme Court of the United States, to which my Lord has referred, and from the judgment of MARTIN, B., in *Monmouthshire Canal & Ry. Co.* v. *Hill* (5) ((1859), 28 L.J.Ex. 283). I could not do better than adopt the tentative definition given by my Lord—a definition which, incidentally, I do not believe either side in these appeals would make much pother about. The trouble, I think, on this point arises because nobody really knows what the Lands Tribunal meant to decide on this point. On one view, the tribunal were merely adopting the words of CURTIS, J., in *Howard* v. *Ingersoll* (3) in the Supreme

Court of the United States. On another view, they were narrowing that definition by introducing, as an essential element, the idea of a slope. Both counsel before us quite rightly, I think, agreed that that conception is not essential in either case.

So far as the points raised before the tribunal are concerned, the first was originally in this form, that the qualification " without making payment therefor or giving compensation in respect thereof " only qualified the words down to " dredge any watercourse ". Indeed, the question for the decision of the tribunal was stated in that form. Moreover that was the point argued at, and decided by, the Lands Tribunal. I think it is clear that that construction is plainly wrong. As a matter of grammar, those words " without making payment therefor or giving compensation in respect thereof ", whatever they may mean, run right through the section.

Before this court, counsel for the landowner took a point which I confess I did not appreciate at an early stage in the argument when he said the question was: what did the words " therefor " in connexion with payment and " thereof " in respect of compensation qualify ? Were they excluding payment of compensation in respect of the physical material thereafter referred to ? I confess that that is a point on which I have come to the same conclusion as my Lord. It seems to me that, on a proper reading of this section, one can only treat " therefor " and " thereof " as referring to the material thereafter set out, and not the operation.

So far as point (c) is concerned, namely, the effect of the words " in any other manner " that seems to me to be largely an academic point now, because, if the compensation is not excluded under this sub-section in respect of the deposit on the bank, then the compensation will have to be paid in any event unless the deposit has caused no injury. However, I agree with my Lord that, on the proper reading of these words, the deposit there referred to is intended to be a deposit which in nearly every case, no doubt, will be for the maintenance or improvement of the banks.

In saying this, I do not base it on the ejusdem generis principle, which I think has no application as a principle in such a case as this but must be strictly confined to cases where general words follow specific works out of which a genus can be constructed. However, I think that the association of the words "in any other manner ", following the previous words, do indicate that the deposit should be " for the maintenance or improvement of the banks."

For these reasons, I have come to the same conclusion as my Lord.

PEARCE, L.J.: I agree.

Appeal and cross-appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Ellis & Fairbairn* (for the landowner); *Norton, Rose & Co.*, agents for *Clerk of the Mersey River Board*, Warrington.

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

MONMOUTHSHIRE COUNTY COUNCIL *v.* BRITISH TRANSPORT COMMISSION. A

[Court of Appeal (Jenkins, Parker and Pearce, L.JJ.), October 17, 1957.]

*Highway—Repair—Bridge carrying road over railway—New stretches of road
joining existing road to bridge carried along embankment—Embankment
slipping into railway cutting—Extent of liability of railway company's* B
*successors to repair embankment and road—Railways Clauses Consolidation
Act,* 1845 (8 *&* 9 *Vict. c.* 20), *s.* 46.

*Railway—Bridge carrying road over railway—" Immediate approaches " of
bridge—Extent of liability to repair road and embankment—Railways
Clauses Consolidation Act,* 1845 (8 *&* 9 *Vict. c.* 20), *s.* 46.

In 1847 a railway company were authorised to construct an extension C
to their railway by a private Act which incorporated the Railways Clauses
Consolidation Act, 1845. The extension crossed a turnpike road, now a
county highway, and the company, in accordance with s. 46* of the Act of
1845, built a bridge to carry the road over the railway; it was also necessary
to construct new stretches of road on either side of the bridge to join the
turnpike road to it, and these stretches of road were carried along an embank- D
ment formed by the railway cutting. A part of the embankment, which
was about a quarter of a mile away from the bridge was falling into the
cutting and thereby causing damage to the road. Under s. 46, where a rail-
way company built a bridge to carry a turnpike road over a railway, " such
bridge, with the immediate approaches, and all other necessary works
connected therewith, shall be executed and at all times thereafter maintained E
at the expense of the company ".

Held: the defendants were not liable to repair that part of the embank-
ment and road which were in disrepair because these were not part of "the
immediate approaches " of the bridge within s. 46 of the Act of 1845; the
diversion road was simply a diversion of the old road made in the course of
constructing the railway and the fact that at one end it joined the bridge F
did not convert the diversion road into "immediate approaches" of, or
"necessary works connected with", the bridge within s. 46 (see p. 389,
letter G, post).

Dictum of Fry, L.J., in *Bury Corpn.* v. *Lancashire & Yorkshire Ry. Co.*
((1888), 20 Q.B.D. at p. 490) explained (see p. 389, letter I, to p. 390, letter
A, post). G

Per Parker, L.J.: "necessary works connected therewith" are really
matters such as buttresses and revetments and the like, which are directly,
and not indirectly, connected with the structure of the bridge (see p. 390,
letter G, post).

Decision of Lord Goddard, C.J. ([1957] 1 All E.R. 662) affirmed.

[As to the maintenance of railway bridges carrying highways, and of the H
approaches thereto, see 27 Halsbury's Laws (2nd Edn.) 45, 46, para. 94; and
for cases on the subject, see 38 Digest 271-274, *118-137*.

For the Railways Clauses Consolidation Act, 1845, s. 46, see 19 Halsbury's
Statutes (2nd Edn.) 616.]

Cases referred to:

(1) *North Staffordshire Ry. Co.* v. *Dale*, (1858), 8 E. & B. 836; 27 L.J.M.C. 147; I
120 E.R. 312; 38 Digest 271, *122*.

(2) *Waterford & Limerick Ry. Co.* v. *Kearney*, (1860), 12 I.C.L.R. 224; 3 L.T. 90; 38 Digest 278, *m*.

(3) *Fosberry* v. *Waterford & Limerick Ry. Co.*, (1862), 13 I.C.L.R. 494; 38 Digest 270, *112i*.

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* Section 46 of the Act is printed at p. 386, letter H, post, in the judgment of Jenkins, L.J.

(4) *London & North Western Ry. Co.* v. *Skerton*, (1864), 5 B. & S. 559; 33 L.J.M.C. 158; 10 L.T. 648; 28 J.P. 518; 122 E.R. 940; 38 Digest 270, *112*.

(5) *Bury Corpn.* v. *Lancashire & Yorkshire Ry. Co.*, (1888), 20 Q.B.D. 485; *affd.* H.L. sub nom. *Lancashire & Yorkshire Ry. Co.* v. *Bury Corpn.*, (1889), 14 App. Cas. 417; 59 L.J.Q.B. 85; 61 L.T. 417; 54 J.P. 197; 42 Digest 668, *785*.

Appeal.

This was an appeal by the highway authority for the County of Monmouth, the Monmouthshire County Council, against the decision of LORD GODDARD, C.J., dated Feb. 13, 1957, and reported [1957] 1 All E.R. 662, dismissing their action for (i) a declaration that the British Transport Commission, as successors in title of the Newport, Abergavenny and Hereford Railway Company*, were liable, on the true construction of s. 46 of the Railways Clauses Consolidation Act, 1845, to maintain a bridge over the railway and a diversion road which ran along an embankment on each side of the bridge at Maesycwmmer in the county of Monmouth, and (ii) an order directing the British Transport Commission, forthwith and at their own expense, to carry out, on the diversion road, any works required for the reconstruction and reinstatement of the embankment and any supplementary works necessary to repair and maintain the road and footpath on the embankment.

The facts appear in the judgment of JENKINS, L.J.

Harold Williams, Q.C., and *H. Marnham* for the Monmouthshire County Council, the highway authority.

Geoffrey Cross, Q.C., and *H. E. Francis* for the British Transport Commission, the successors to the railway company.

JENKINS, L.J.: This is an appeal by the highway authority for the County of Monmouth, the Monmouthshire County Council, the plaintiffs in the action, from a judgment of LORD GODDARD, C.J., in favour of the defendants, the British Transport Commission, in an action brought for the purpose of determining the extent of the liability of the British Transport Commission for repairs or maintenance in relation to a bridge over a railway. The railway in question was constructed under the Newport, Abergavenny and Hereford Railway (Extension to Taff Vale Railway) Act, 1847, by the company of that name, which was a predecessor in title of the British Transport Commission. The operations of the Newport, Abergavenny and Hereford Railway Company were subject to the provisions of the Railways Clauses Consolidation Act, 1845, and the British Transport Commission succeeded to its obligations under those provisions.

The extension of the railway, which is in Wales, included a section running eastwards from a place called Maesycwmmer, which is in the county of Monmouth. The land on which this section of the railway was to be constructed sloped considerably downwards from east to west, and at the eastern end of the section with which we are concerned it entered a tunnel. The proposed line of the railway for some distance from Maesycwmmer ran to the north of an existing road, and further on the line of that existing road actually coincided for a considerable distance with the proposed line of the railway. The fall of the ground demanded that the railway should be run in a cutting, and it was obviously necessary to provide an alternative site for the road, inasmuch as the cutting was for a considerable part of its length actually to be on or include the site of that road.

In these circumstances, the railway company executed works of the following nature. They made a diversion of the existing road by substituting a new section of road which (considered from east to west) ran for some distance, approximately four hundred yards, from the point at which it left the old road, A westwards and to the north of the railway, and then turned south, crossing the railway at an angle by means of the bridge with which this case is concerned, and then, turning west again, rejoined the old road. The railway being, as I have said, in a cutting, the diversion road ran along the top of the embankment of that cutting, and the matter which is complained of by the highway authority is that parts of this embankment towards the eastern end of the diversion road B (i.e., the end furthest from the bridge) are beginning to give way, and it is said that this is, or will become, a source of danger to the road.

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* For the British Transport Commission's succession to the liabilities and obligations of railway companies, see Transport Act, 1947, s. 14 (4); 19 HALSBURY'S STATUTES (2nd Edn.) 1034.

The question in the case is whether, having regard to the terms of the relevant provisions of the Railways Clauses Consolidation Act, 1845, these defects in the embankment fall within the British Transport Commission's liability for the maintenance of the bridge or of the approaches to or other works connected C with the bridge, to put the matter at this stage in a neutral form. The Lord Chief Justice took the view, having considered the relevant enactments, that the want of repair complained of was outside the scope of the British Transport Commission's liability to maintain bridges and connected works. On the other hand, it is contended by the highway authority that the diversion road was part of the work of constructing the bridge and its approaches, as it was a necessary D incident of the bridge in the sense that access would be had to the bridge by passing along it. That is the nature of the dispute between the parties, and I should next refer to some of the provisions of the Act of 1845.

The first of the sections to which we were referred was s. 16, which has the sidenote " Works to be executed ", and provides that:

> " Subject to the provisions and restrictions in this and the special Act E . . . it shall be lawful for the company, for the purpose of constructing the railway, or the accommodation works connected therewith, hereinafter mentioned, to execute any of the following works . . .";

then the company is authorised, inter alia, to construct in under or over, inter alia, any roads such inclined planes, tunnels, embankments, bridges, roads and ways F as they think proper. Next the section deals with the alteration of course of rivers, etc., and under that part of the section the company may alter the course of any rivers, streams or watercourses, and may

> ". . . divert or alter, as well temporarily as permanently, the course of any such rivers or streams of water, roads, streets, or ways . . ."

as they may think proper. That section, therefore, gives a general power to divert G roads as well temporarily as permanently. Then s. 46, which is the one on which this case really turns, is in these terms. The sidenote is " Crossing of roads—Level crossings ", and the section provides:

> " If the line of the railway cross any turnpike road or public highway, then (except where otherwise provided by the special Act) either such road shall be carried over the railway, or the railway shall be carried over such H road, by means of a bridge, of the height and width and with the ascent or descent by this or the special Act in that behalf provided; and such bridge, with the immediate approaches, and all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the company: provided always, that, with the consent of two or I more justices in petty sessions, as after mentioned, it shall be lawful for the company to carry the railway across any highway, other than a public carriage road, on the level."

The provision about crossing on the level does not enter into this case, but I should say that the road here in question was admittedly a turnpike road at the time when the bridge was constructed, and is now route A.472 in the modern road classification. Section 50 contains further provisions about the construction of bridges carrying roads over highways. It provides:

> "Every bridge erected for carrying any road over the railway shall (except as otherwise provided by the special Act) be built in conformity with the following regulations; (that is to say,) There shall be a good and sufficient fence on each side of the bridge of not less height than four feet, and on each side of the immediate approaches of such bridge of not less than three feet."

There is a provision about width, and there is a provision about ascent, that is to say, the gradient of the road as it rises to the level of the bridge. Then s. 53 provides that if in the exercise of any of the relevant powers

> ". . . it be found necessary to cross, cut through, raise, sink, or use any part of any road . . . so as to render it impassable for or dangerous or extraordinarily inconvenient to passengers or carriages, or to the persons entitled to the use thereof, the company shall, before the commencement of any such operations, cause a sufficient road to be made instead of the road to be interfered with, and shall at their own expense maintain such substituted road in a state as convenient for passengers and carriages as the road so interfered with, or as nearly so as may be."

Finally, s. 56, which has the sidenote "Roads interfered with to be restored, or others permanently substituted, within a limited time", provides:

> "If the road so interfered with can be restored compatibly with the formation and use of the railway, the same shall be restored to as good a condition as the same was in at the time when the same was first interfered with by the company, or as near thereto as may be; and if such road cannot be restored compatibly with the formation and use of the railway, the company shall cause the new or substituted road, or some other sufficient substituted road, to be put into a permanently substantial condition, equally convenient as the former road, or as near thereto as circumstances will allow; and the former road shall be restored, or the substituted road put into such condition as aforesaid, as the case may be, within the following periods after the first operation on the former road shall have been commenced . . ."

Those are, I think, all the sections to which we were referred, and it may be said that on one view of the case the question here is whether the diversion road, which was constructed at the time when the bridge was built, was a substituted road within s. 56; that is to say, was it the case that the company found it necessary to substitute a new road for the old one? If so, then the company's liability to maintain that substituted road came to an end when the road put into permanently substantial condition was made available for the public. Or, on the other hand, is this diversion road part of the relevant works connected with the bridge so as to fall within s. 46 of the Act, that is to say, is it part of "such bridge, with the immediate approaches, and all other necessary works connected therewith"? If it falls within the language of s. 46, then the liability for maintenance imposed on the company with respect to the bridge must extend to the repair of the embankment of the cutting where its condition imperils the diversion road.

The question is one on which there is remarkably little authority. We are referred by counsel for the highway authority to a number of cases, beginning with *North Staffordshire Ry. Co.* v. *Dale* (1) ((1858), 8 E. & B. 836). The decision in that case was to the effect that the roadway over a bridge was part of the bridge, so that the railway company was obliged not only to maintain the structure of the bridge, but also the road surface going across it. Then there were two Irish cases, *Waterford & Limerick Ry. Co.* v. *Kearney* (2) ((1860), 12 I.C.L.R. 224), and *Fosberry* v. *Waterford & Limerick Ry. Co.* (3) ((1862), 13 I.C.L.R. 494). Both these cases dealt with bridges which crossed over the road, so they were the converse of the present case. The upshot of them, with a dissent by HAYES, J., in *Waterford & Limerick Ry. Co.* v. *Kearney* (2), was that A the obligation to repair did not extend to the roadway passing under the bridge. Then there was *London & North Western Ry. Co.* v. *Skerton* (4) ((1864), 5 B. & S. 559), which was to the same effect as the Irish cases, that is to say, to the effect that a railway company who, in carrying a railway over a highway by a bridge, lowered the level of the highway, were not bound to keep the slope of the road in repair as being a part of the approaches on each side of the bridge. Then in B *Bury Corpn.* v. *Lancashire & Yorkshire Ry. Co.* (5) ((1888), 20 Q.B.D. 485), the Court of Appeal followed *Dale's* case (1), the decision being to the effect that where a railway crosses a highway, and the road is carried over the railway by means of a bridge, the railway company are bound to keep in repair the roadway on the bridge, such roadway being part of the bridge which, by the section, the company are to maintain. That gives the approval of the Court of Appeal C to the view of LORD CAMPBELL, C.J., in *Dale's* case (1).

None of these cases, of course, touched the present case, because this is not a case where the road goes under the railway, nor is the dispute confined to the question whether the company's liability for maintenance includes, or does not include, the actual roadway passing over the bridge. However, perhaps some assistance is to be derived from these observations in the judgments of LORD D ESHER, M.R., and FRY, L.J., in the *Bury Corpn.* case (5). The Master of the Rolls said (20 Q.B.D. at p. 488):

> " The substance of their view [that is the view of the court in *North Staffordshire Ry. Co.* v. *Dale* (1)] was this: here is a section dealing with certain specified cases in plain language, and, if that section is to be looked at alone, according to the plain meaning of the words, there could not be a doubt as E to its effect: but then astute counsel suggested that it must be read in conjunction with other sections, and so endeavoured to bring a fog over its meaning. The court said that that was not the way to construe it; that, dealing specifically with particular cases, it must be taken by itself."

Then comes this important passage: F

> " One thing is quite clear, that, whatever works the section compels the railway company to execute, it likewise compels them to maintain for ever. The question is, therefore, what are they bound to execute under the section? The section does not refer to all bridges which they may have to make, but only to certain bridges, which they have to make under certain specified circumstances." G

Then FRY, L.J., said this (20 Q.B.D. at p. 490):

> " So, again, the expression ' all necessary works connected therewith ', must mean works necessary in the same sense as approaches are necessary. Approaches are necessary that vehicular traffic may use the bridge; and so all necessary works mean all works necessary to make the bridge an effective and useful part of the highway." H

The Lord Chief Justice, after considering the various sections, and in particular s. 46, came to the conclusion, in effect, that this claim that the British Transport Commission were liable for the maintenance of the diversion road at the point where the alleged want of repair has arisen was not warranted by s. 46, the point in question being too remote from the bridge to make it reasonably possible to I say that what is demanded was repairs either to such bridge or to its immediate approaches, or that this part of the road fell within the description of "all other necessary works connected therewith ", that is to say, connected with the bridge. He said this at the conclusion of his judgment ([1957] 1 All E.R. at p. 664):

> " I do not think that the part of the road and embankment with which I am concerned in this case come within s. 46. I cannot say that work done to prevent the embankment falling into the cutting is necessary work connected with the bridge, or with the approaches to the bridge. The

> embankment is there for the protection of the cutting; it is not there for the protection of the bridge."

There were a number of other authorities to which counsel for the highway authority referred us, but none of them, I think, really advances the argument one way or another. The question whether s. 46 applies in any particular case seems to me to a great extent to be a question of fact and degree.

Counsel for the British Transport Commission puts his argument in this way. He says that liability to maintain under s. 46 is confined to works done under the section. He says that the new road and the cutting alongside which it ran were not works done under s. 46 at all, and that the works in the cutting, such things as retaining walls, were put there for the purpose of securing the banks of the cutting, and had nothing whatever to do with the bridge. He says, therefore, that the works in question obviously not being works forming part of the bridge itself, were not other necessary works connected with the bridge. He further maintains, that one could not reasonably hold that the part of the diversion road with which this case is concerned was part of the immediate approaches to the bridge. He suggests that the immediate approaches to the bridge comprehend nothing further from the bridge itself than the points at which the roadway begins to ascend on to the bridge, or at which the passenger going over the bridge once more reaches the general level of the road having descended from the bridge. I cannot, I confess, entirely follow that last argument, which is weakened in the present case by the circumstance that there are no points of ascent or descent at all. I should note, however, that it is to some extent supported by an interlocutory observation by MELLOR, J., in *London & North Western Ry. Co.* v. *Skerton* (4) (5 B. & S. at p. 564) to which the Lord Chief Justice referred ([1957] 1 All E.R. at p. 664) with approval.

For my part, I prefer to found myself simply on the express terms of s. 46, and to say that on the facts of the case, having regard to the relative positions geographically of the bridge itself and of the diversion road, it cannot possibly be said without abuse of language that the relevant part of the diversion road was part of the immediate approaches to the bridge. The Lord Chief Justice called in aid s. 50 of the Railways Clauses Consolidation Act, 1845, which imposes certain obligations as to fencing. I have already read the section and I will not read it again, but I think there is force in his view that it can hardly have been intended that, in connexion with the erection of a bridge such as the bridge in the present case, the railway should be under a special obligation to fence the whole length of the diversion road.

The point is, when one reaches it, really a short point of construction, and I cannot usefully say any more than that in my view the proposed diversion road was, for the purposes of these statutory provisions, simply a diversion of the old road in the course of constructing the railway, and the fact that the diversion road at one end of its length joined the bridge over the railway cannot have the effect of converting for the purposes of the Act what was simply a diversion of the road into the " immediate approaches " of the bridge or into necessary works connected with the bridge. Of course, it is true that if there had been no diversion road, and if the old road had simply been got rid of, and the bridge had been built with no road across it at all, then no traffic would have been able to reach the bridge, so that reading, without regard to its context, the language of FRY, L.J., in *Bury's* case (5) (20 Q.B.D. at p. 490):

> " Approaches are necessary that vehicular traffic may use the bridge; and so all necessary works mean all works necessary to make the bridge an effective and useful part of the highway ",

one might say that this brought the whole of the diversion road into the area of approaches. One cannot, however, press that reasoning too far; for otherwise one might find a railway company, on the strength of their having erected a bridge, made liable for the maintenance of several miles of roadway on either side of the bridge, because were it not for that roadway vehicular traffic could not reach the bridge at all. I think the answer to that line of argument is that the word " approaches " in s. 46 is qualified by the word " immediate ", and one has to find here something that is an immediate approach to the bridge. I am fortified in the conclusion to which I have come by some answers given by the county surveyor (Mr. Cornish) in cross-examination by counsel for the British Transport Commission. The county surveyor was asked a number of questions in cross-examination which bear out the view that it could not be said that the diversion road and the cutting were made for the purposes of the construction of the bridge. It was necessary to have a bridge to take the road over the railway, and the siting of the line of the railway was such that it was necessary to divert the existing road. It cannot then be said that the cutting or the diversion road were mere incidents of the construction of the bridge.

For the reasons I have endeavoured to state, in my judgment the learned Lord Chief Justice, if I may say so with respect, was perfectly right in the conclusion to which he came, and I would dismiss this appeal.

PARKER, L.J.: I agree. In order to succeed, the highway authority must bring this case within s. 46 of the Railways Clauses Consolidation Act, 1845. Counsel seeks to do that, in the first instance, by saying that the road and the embankment in question formed part of the immediate approaches to the bridge. He goes so far as to say that " approaches " includes everything which the railway company had to alter in order to enable traffic to reach the bridge; in other words, he treats the whole of the road between " A " and " B " on the plan as approaches. I am quite unable to accept that, because it gives no effect to the words in the section " immediate approaches ". Section 46 is dealing really with a point on the map, namely, a point where the road crosses the railway or the railway crosses the road, and it is dealing only with works at that point. I would also mention that it would be surprising if the contention of counsel for the highway authority were right, having regard to the obligation of the railway company under s. 50 to fence all the immediate approaches.

Secondly, counsel says that, if he is wrong on that point, this work comes within the words " all other necessary works connected therewith ". It seems to me that on the facts of this case the works in question were necessary for the railway company's cutting, and not necessary for the bridge. Be that as it may, it seems to me again that the necessary works connected therewith are really matters such as buttresses and revetments, and the like, which are directly, and not indirectly, connected with the structure of the bridge, the words here being: " such bridge, with the immediate approaches, and all other necessary works."

For those reasons and the reasons given by my Lord, I would dismiss this appeal.

PEARCE, L.J.: I agree. The insertion of the word " immediate " in s. 46 of the Railways Clauses Consolidation Act, 1845, and the use of the word "with" instead of " and " are clearly intended to narrow the word " approaches ". I cannot believe that the additional words " and all other necessary works connected therewith ", were intended to bear a meaning which would in fact extend the ambit of the word " approaches ", which had already been deliberately narrowed. In my view, the road and embankment in this case do not come within the section.

For the reasons which my Lords have given, I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Overton & Blackbourn*, agents for *Vernon Lawrence*, Newport, Mon. (for the Monmouthshire County Council, the highway authority); *M. H. B. Gilmour* (for the British Transport Commission, the successors to the railway company).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

CARSON (INSPECTOR OF TAXES) *v.* PETER CHEYNEY'S EXECUTOR.

[COURT OF APPEAL (Jenkins, Parker and Pearce, L.JJ.), October 2, 3, 21, 1957.]

Income Tax—Profits—Death of taxpayer—Periodical payments under deceased's contracts received by executor—Author's royalty payments—Liability of payments to tax—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5 *c.* 40), *Sch.* 1, *Sch. D, Cases II, III, VI—Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *Sch. D, Cases II, III, VI.*

An author entered into contracts with different publishers, undertaking in three to write or deliver books for publication and in the fourth licensing publication in the French language of one of his existing works. The royalties which were due under the contracts were assessed, admittedly correctly, under Case II of Sch. D to the Income Tax Act, 1918. After his death the royalties under the contracts which were received by his executor were assessed to tax under Case III or alternatively Case VI of Sch. D to the Act of 1918 and of Sch. D to the Income Tax Act, 1952. On appeal,

Held: the royalties were not liable to tax, since they were the reward for the author's professional activities obtained by licensing his copyright to publishers and were not simply income from property in the form of such copyright, and, being payable by reference to copies sold and not to periods of time, were not analogous to interest on instalments on promissory notes.

Gospel v. *Purchase* ([1951] 2 All E.R. 1071) applied.

Bennett v. *Ogston* ((1930), 15 Tax Cas. 374) distinguished.

Decision of HARMAN, J. ([1957] 2 All E.R. 698) affirmed.

[As to the charge of professional earnings to tax under Case II of Sch. D, s. 123 of the Income Tax Act, 1952, ceasing on death, see 20 HALSBURY'S LAWS (3rd Edn.) 241, para. 443, text and note (e); as to the nature of payments charged under Case III of Sch. D, see 20 HALSBURY'S LAWS (3rd Edn.) 247, 248, para. 453; and as to the scope of Sch. D, see ibid., 281, para. 508.

For Cases III and VI of Sch. D of Sch. 1 to the Income Tax Act, 1918, and Cases III and VI of Sch. D to the Income Tax Act, 1952, see 12 HALSBURY'S STATUTES (2nd Edn.) 167, 173 and 31 ibid., 116, 132, respectively.]

Cases referred to:

(1) *Davies* v. *Braithwaite,* (1933), 18 Tax Cas. 198; Digest Supp.

(2) *Asher* v. *London Film Productions, Ltd.,* [1944] 1 All E.R. 77; [1944] K.B. 133; 113 L.J.K.B. 149; 170 L.T. 17; 2nd Digest Supp.

(3) *Gospel* v. *Purchase,* [1951] 2 All E.R. 1071; [1952] A.C. 280; 32 Tax Cas. 367; 3rd Digest Supp.

(4) *Bennett* v. *Ogston,* (1930), 15 Tax Cas. 374; Digest Supp.

Appeal.

The respondent taxpayer, the sole surviving executor of the will of R. E. Peter S. Cheyney, deceased, appealed to the General Commissioners of Income Tax for Bromley, Kent, against assessments to income tax made on him under Sch. D to the Income Tax Acts, 1918 and 1952, for 1951-52 (totalling £10,000) and 1952-53 (totalling £18,000). The question for determination was whether sums paid to the executor after the death of Peter Cheyney as royalties under agreements entered into by him were assessable to tax under Case III or Case VI of Sch. D.

Peter Cheyney was a well-known writer of detective fiction who died on June 26, 1951. During his lifetime he had entered into fifty or sixty agreements to write books or for the publication of books already written. Four of such agreements were put in evidence before the commissioners and it was agreed between the parties that the decision of the court as regards sums paid under those four agreements should apply to moneys paid under all other agreements, unless the court should distinguish one of the agreements from another. All the agreements made by Peter Cheyney from which royalties arose could be classified as regards form into one of the categories of which the four were representative. During his lifetime Peter Cheyney was assessed under Case II of Sch. D in respect of the royalties he received from the agreements, as being profits arising from the carrying on of his profession as an author, after deducting therefrom allowable expenses, and the Crown admitted that he was properly so assessed. For the purpose of computing the Case II tax liability, the rule consistently followed was to credit the copyright royalties as receipts on the day they fell due for payment under the agreements with the publishers.

The assessments for the two years in question comprised sums received by the executor from contracts made by Peter Cheyney and also sums received by the executor from contracts which he had entered into with the publishers after Peter Cheyney's death. The actual receipts of the executor were: Under contracts made by Peter Cheyney £11,725 19s. 10d. in 1951-52 and £12,026 0s. 5d. in 1952-53; and under contracts made by the executor £598 13s. in 1951-52 and £2,195 15s. 1d. in 1952-53. The executor admitted liability to tax under Sch. D in respect of sums received under contracts made by him, without prejudice to his alternative contention (ii) (a) as regards sums received under contracts made by Peter Cheyney.

The executor contended: (i) that the sums received by him after Peter Cheyney's death arising from contracts made personally by Peter Cheyney were remuneration earned by Peter Cheyney during his lifetime in following his profession and, seeing that his profession had ceased on his death, such payments could not be taxable as annual payments under Case III or as annual profits or gains under Case VI of Sch. D; (ii) in the alternative, that (a) if the royalties were annual payments falling within Case III of Sch. D, no assessment could be made on the executor in so far as they were payable wholly out of profits or gains brought into charge to tax; (b) if the royalties were annual profits or gains falling within Case VI of Sch. D, they must be considered as accruing from day to day and be computed so far as concerned the year 1951-52 by excluding such portions of the royalties as had accrued to the date of Peter Cheyney's death. The Crown contended that the sums were annual payments assessable under Case III of Sch. D or in the alternative were assessable under Case VI of Sch. D. The commissioners held that Peter Cheyney derived his remuneration during his lifetime from his professional activities as an author in writing books, that when he wrote them he created copyrights but that any such copyright did not become an income bearing asset any more than a contract with publishers and that accordingly the sums were rewards for professional services of Peter Cheyney in his lifetime and their nature was not altered by his death so as to make them taxable under Case III or Case VI. They therefore allowed the appeal.

On June 6, 1957, HARMAN, J., dismissed the Crown's appeal against that decision ([1957] 2 All E.R. 698), holding that the royalties were professional remuneration to the author for work done and did not change their nature on his death so as to become assessable under Case III or Case VI. The Crown appealed to the Court of Appeal.

H. B. Magnus, Q.C., and *A. S. Orr* for the Crown.
B. L. Bathurst, Q.C., and *C. N. Beattie* for the taxpayer.

Cur. adv. vult.

Oct. 21. **JENKINS, L.J.**, read the following judgment of the court: This is an appeal by the Crown from a judgment of HARMAN, J., dated June 6, 1957, affirming a decision of the General Commissioners of Income Tax for the division of Bromley, Kent, in favour of the respondent taxpayer, who had appealed against assessments to income tax, Sch. D, for the years 1951-52 and 1952-53 made on him as sole surviving executor of the will of the late Mr. Peter Cheyney, a well-known author of detective fiction, in respect of royalties received by the taxpayer

A after Mr. Cheyney's death under contracts with publishers made in his lifetime.

Mr. Cheyney died on June 26, 1951. It is common ground that down to the date of his death he had been carrying on the profession of an author, and accordingly that during his lifetime the royalties received by him under his contracts with the various publishers of his works were properly assessable under Case II of Sch. D, as profits of his profession, and not as annual payments B under Case III or as

> " annual profits or gains not falling under any other case and not charged by virtue of any other Schedule "

under Case VI. During the continuance of the profession Case VI was by definition excluded because the royalties fell under Case II, and Case III had no C application because Case II applied and accordingly the proper subject of tax was not simply the amount of the royalties received under each of the various contracts considered individually, but consisted of the balance of profit arising from the totality of Mr. Cheyney's professional activities, arrived at by deducting from the aggregate of his professional receipts the aggregate of the outgoings properly allowable as expenses of his profession. See *Davies* v. *Braithwaite* (1) ((1933), D 18 Tax Cas. 198). See also *Asher* v. *London Film Productions, Ltd.* (2) ([1944] 1 All E.R. 77 at p. 80), where LORD GREENE, M.R., distinguishes annual payments constituting " pure income profit ", and as such payable under Case III, from payments which are merely an element in the computation of profits and accordingly are not so taxable.

This having admittedly been the position as regards royalties received in E Mr. Cheyney's lifetime, the question in the case is whether (as is contended on the part of the Crown) the discontinuance of Mr. Cheyney's profession by reason of his death had the effect of changing the character of the royalties thereafter received from that of profits or gains of Mr. Cheyney's profession to that of annual payments taxable under Case III or alternatively of annual profits or gains taxable under Case VI. This very question was, on closely comparable F facts, decided against the Crown by the House of Lords in *Gospel* v. *Purchase* (3) ([1951] 2 All E.R. 1071). The commissioners and the learned judge regarded the present case as concluded against the Crown by that authority, which is, of course, binding on us as it was on them. Counsel for the Crown sought to persuade us that this case was distinguishable on its facts from *Gospel* v. *Purchase* (3) and that we were free to decide it, and ought on the merits to decide it, the other G way. We are not so persuaded.

In order to do justice to counsel's submission it will be necessary to make a comparison between the facts of the two cases, but before doing so we should refer to a passage, quoted in both of them, from the judgment of ROWLATT, J., in *Bennett* v. *Ogston* (4) ((1930), 15 Tax Cas. 374 at p. 378), which was accepted by the House of Lords in *Gospel* v. *Purchase* (3) as embodying a correct statement H of the relevant principle of income tax law (see per LORD SIMONDS, L.C., [1951] 2 All E.R. at p. 1074, and per LORD ASQUITH OF BISHOPSTONE, ibid., at p. 1075). In *Bennett* v. *Ogston* (4) ROWLATT, J., said this (15 Tax Cas. at p. 378):

> " When a trader or a follower of a profession or vocation dies or goes out of business—because Mr. Needham is quite right in saying the same observa- I tions apply here—and there remain to be collected sums owing for goods supplied during the existence of the business or for services rendered by the professional man during the course of his life or his business, there is no question of assessing those receipts to income tax; they are the receipts of the business while it lasted, they are arrears of that business, they represent money which was earned during the life of the business and are taken to be covered by the assessment made during the life of the business, whether that assessment was made on the basis of bookings or on the basis of receipts."

We should add that the particular case before ROWLATT, J., was concerned with the question whether the interest element in instalments on promissory notes falling due after the death of a deceased moneylender and collected by his executors was taxable in their hands as "interest of money" under Case III of Sch. D or was simply a deferred receipt of the discontinued business and as such not taxable under the Case; and that, after stating the principle to be applied in the passage quoted above, he went on to decide that question in favour of the Crown in the following words (ibid.): A B

> "But this is not that case; because here the interest in question is not the accrued earnings of the capital during the life of the deceased or the time the business was carried on; it is the earnings of the capital, or so much as is left of it since the death, and this interest has been earned over the time which has elapsed since the death." C

And (ibid., at p. 379) he said:

> "I think when you are dealing with what is interest and nothing but interest you cannot say it is in the nature of business, because it is payment by time for the use of money."

While accepting as correct ROWLATT, J.'s statement of the principle to be applied, LORD SIMONDS, L.C., in *Gospel* v. *Purchase* (3) ([1951] 2 All E.R. at p. 1074) expressed a doubt, which he found it unnecessary to decide, on the question whether the learned judge correctly applied the principle in the case before him. D

But, so far as the principle itself is concerned, *Gospel* v. *Purchase* (3) must be taken as establishing the general proposition that, where after the discontinuance of a business or profession sums are received which represent money earned during the life of the business or profession they are not assessable to tax but are taken to be covered by the assessment made "during the life of [that we take to mean 'down to the date of discontinuance of'] the business". Moreover, in view of the nature of the receipts with which *Gospel* v. *Purchase* (3) was concerned, that case must further be regarded as establishing that this general proposition is not displaced by the circumstance that the receipts in question are periodical payments in the nature of royalties or shares of profits which are not payable or quantified or capable of quantification until after the date of discontinuance. After referring to *Bennett* v. *Ogston* (4), LORD SIMONDS, L.C., said this ([1951] 2 All E.R. at p. 1074): E F

> "If so [i.e., if ROWLATT, J., had correctly stated the relevant principle] there seems to me to be an end of the case. How else could these sums come to the hands of Mr. Howard or his executors than as the remuneration for his professional activities, the reward for services rendered by him during his life and unpaid for at his death? It appears to me wholly irrelevant that they were not payable until after his death and equally so that they were not and could not be quantified until after that event. They retained the essential quality of being the fruit of his professional activity. If in all the circumstances it was not possible to bring the sums into account in the years in which they were earned, as I will assume to be the case, the result is not to change the character of the payment, but to exhibit that some professional earnings may escape the income tax net. The withdrawal of the cross-appeal shows that lump sum payments made in the circumstances of the present case do so escape." G H I

We will return later to ROWLATT, J.'s actual decision in *Bennett* v. *Ogston* (4), on which some reliance was placed by counsel for the Crown.

We now pass to a comparison of the facts of the present case with those of *Gospel* v. *Purchase* (3). As to the latter, Leslie Howard Stainer (better known by his professional name of Leslie Howard) was a distinguished film actor and producer whose profession was discontinued by his death in 1943. Prior to his death he had in the ordinary course of his profession entered into certain contracts with film-producing companies under which he was to render services (in the shape of producing, directing, and acting) in specified films for remuneration which included percentages or shares of the profits or receipts to be derived from the exploitation of the films when made. It appears that in one instance Mr. Howard was the owner of the story and shooting script of the proposed film, both of which he was to assign to the company, but no part of the payments to be made by the company was expressed to be attributable to this assignment as distinct from the services to be rendered by Mr. Howard. In each case the copyright in the film when completed was to belong to the company. Mr. Howard in each case duly performed the services contracted for. After his death sums were from time to time received by his executors in respect, inter alia, of the percentage or shares of profits or receipts payable under the contracts in question. It is to be observed: (a) that the contracts gave Mr. Howard no proprietary interest in the completed films; (b) that in the one case in which he owned the story and shooting script the contract required him to make it over to the company; (c) that the percentages or shares of profits were in the nature of remuneration for services, save in so far as some undefined part of such payments in the case in which he owned the story and shooting script should be held attributable to his assignment of those items to the company; and (d) that the amounts which might from time to time be received by the executors by way of percentages or shares of profits were unpredictable, depending as they did on the popularity of the films and the energy and success with which they might be exploited.

As to the facts of the present case, we would refer to para. 2 of the Case Stated by the General Commissioners, which reads as follows:

> " The following facts were admitted or proved:
>
> " (a) Reginald Evelyn Peter Southouse Cheyney (hereinafter called Peter Cheyney) was a well known writer of detective fiction who died on June 26, 1951.
>
> " (b) During his lifetime Peter Cheyney had entered into some fifty to sixty agreements with publishers to write books or for the publication of books already written. Four only of such agreements were put in evidence, and it was agreed between the parties that the decision of the court as regards sums paid under those four agreements should apply to moneys paid under all other agreements, unless the court should distinguish one of these four agreements from another. All the agreements made by the deceased from which royalties arose could, as regards form, be classified into one of the categories of which these four agreements are representative. There were also produced to the commissioners lists of the titles of books to which the representative royalty agreements refer and of the amounts received. These lists are not exhibited but may, if necessary, be referred to as part of the Case.
>
> " (c) Peter Cheyney during his lifetime was assessed under Case II of Sch. D in respect of the royalties he received from his said agreements as being profits arising from the carrying on of his profession as an author after deducting therefrom all proper and allowable expenses of carrying on such profession, and the Crown admitted that he was properly so assessed. For the purpose of computing the Case II tax liability, the rule consistently followed was to credit the copyright royalties as receipts on the day they fell due for payment under the agreements with the publishers.
>
> " (d) The assessments for the two years in question comprised sums received by the executor from contracts made by Peter Cheyney and also sums received by the executor from contracts which he had entered into with the publishers subsequently to Peter Cheyney's death. In respect of sums received under contracts made by the executor the executor admitted his liability to tax under Sch. D . . ."

There are certain qualifications to that to which I need not refer.

We should next refer to the four specimen agreements with publishers exhibited to the Case. The first of the specimen agreements, dated Sept. 9, 1942, and made between Mr. Cheyney (therein called "the author") and Faber and Faber, Ltd. (therein called "the publishers"), was expressed to relate to a work provisionally entitled "Making Crime Pay" which was to be written by Mr. Cheyney. By cl. 1, the author granted to the publishers

> "the sole right of publishing and selling the said work in volume form in the English language for the period of unrestricted copyright throughout the world except the United States of America."

By cl. 2, the author was to deliver to the publishers the manuscript of the said work by Jan. 31, 1943. By cl. 3, the publishers agreed to publish the said work within six months of the delivery of the manuscript to them unless prevented by circumstances beyond their control, and reserved to themselves the final decision on all other details of publication and on the issue and price of subsequent editions. By cl. 4, the publishers agreed during the term of unrestricted copyright to make payments to the author in the shape of royalties consisting of specified percentages of the published price, or in certain circumstances of the amounts received by the publishers, in respect of all copies sold. The author was to receive £250 at the time of publication on account of and in advance of royalties. By cl. 5, all details as to the manner of production, publication and advertisement were to be left to the discretion of the publishers who were to bear all expenses in connexion therewith. Clause 6 contained machinery for the calculation and payment of the sums from time to time due to the author in respect of royalties. Clause 7 gave the author certain rights to receive copies free or at reduced prices. Clause 8 contained a provision for the reverter of all rights in the work to the author if the work should be out of print and the publishers should not within six months from the receipt of a written notice from the author issue a new edition or if the publishers should fail to make accountings and payments as therein provided within one month of receipt of written notification of any such default. Clause 9 contained a warranty by the author that the work was not a violation or infringement of any existing copyright or proprietary right at common law and contained nothing obscene, indecent or libellous. Finally, cl. 10 related to the correction of proofs by the author.

The second specimen agreement dated Sept. 19, 1950, and made between Mr. Cheyney ("the author") and William Collins Sons & Co., Ltd. ("the publishers") related to five novels to be written by the author, and, as in the case of the first specimen agreement, the grant of copyright contained in cl. 1 was limited to the publication of the five novels in question in volume form throughout the world with the exception of the United States of America. It contained in cl. 4 more elaborate provisions for the payment of royalties by the publishers, which in some instances were to be in the form of percentages of the price of copies sold, and in others in the form of a fixed sum per copy sold, and also a provision for the payment in advance of royalties of the sum of £1,500 on delivery of the manuscript of each novel to the publishers. There was (in cl. 10) an express reservation to the author of all dramatic, cinematograph, serial, translation and other rights not specifically granted. There were in cll. 9 and 11 comparable provisions for reverter. Although different in form, we do not think that the second specimen agreement is for the present purpose distinguishable from the first in any material respect.

The third specimen agreement dated Mar. 12, 1946, and made between Mr. Cheyney ("the author") and Messrs. Dodd Mead & Co., Inc. ("the publishers", in this instance an American company) related to four works to be delivered by the author to the publishers which the publishers were to publish within eight months of the delivery of each work. The copyright granted by the author to the publishers (by cl. 1) comprised the exclusive right of printing and publishing the works in volume form in the United States of America. As in the other agreements, the author was (by cl. 6) to be remunerated on a royalty basis dependent on copies sold, with a provision for a specified payment in advance of royalties (cl. 7). There were comparable provisions for reverter to the author in certain events (cll. 11 and 12). By cl. 14 the proceeds of sale of selection, abridgement, digest and second serial rights were to be equally divided between the author and the publishers, and by cl. 15 the right of translation, dramatisation and all other rights not specified in the agreement were expressly reserved by the author. Again we do not think there is for the present purpose any material point of distinction between the third agreement and the first, although different in form.

The fourth specimen agreement dated Nov. 4, 1947, was made between Mr. Cheyney (therein called " the proprietor ") and Les Presses de la Cité (" the publishers ", in this instance a French firm). The proprietor granted to the publishers the sole licence to translate and publish the work " Making Crime Pay " in volume form in the French language for a payment of 50,000 francs in advance of royalties and a royalty of twelve per cent. on the published price of every copy sold in the French translation up to 5,000 copies, and fifteen per cent. on all copies sold thereafter. The publishers were to bring out their edition of the work within six months of the date of the agreement (cl. 4) and (by cl. 6) it was provided that the translation of the work should be made faithfully and accurately and that abbreviations or alterations should only be made in the text with the written consent of the proprietor or his agent. There were provisions in cll. 8 and 10 for the termination of the licence in the event of the publishers not issuing their edition within six months, the work going out of print, or the publishers becoming bankrupt or committing any breach of the agreement.

It is to be observed that the first and second specimen agreements related to works to be written by Mr. Cheyney. It seems probable that the third also in fact related to works to be written, although it only refers in terms to the delivery of the works in question. On the other hand, the fourth specimen agreement is simply a licence of the French language rights in an existing work.

Laying side by side the facts of *Gospel* v. *Purchase* (3) and those of the present case, we ask ourselves whether such differences as there are between them would suffice to justify this court in reaching a different conclusion here from the conclusion reached by the House of Lords in *Gospel* v. *Purchase* (3). What are the differences ?

Mr. Howard was a professional film actor and producer. His profession consisted in producing and acting in films for reward. Mr. Cheyney was a professional author. His profession consisted in the writing of literary works for reward. The sums sought to be taxed in Mr. Howard's case (so far as now material) consisted of percentages or shares of the profits arising from the exploitation of films to the making of which he had contributed his professional services as an actor or producer or director, and constituted his reward for those services. The sums sought to be taxed in the present case (so far as the contracts made in Mr. Cheyney's lifetime are concerned) consisted of royalties based on sales of books written by him in the ordinary course of his profession, and constituted his reward for his professional activities in the shape of the writing of those books. Indeed, in those instances in which the books dealt with by Mr. Cheyney's contracts with publishers were yet to be written one may say that the royalties constituted (in part at all events) remuneration for his professional services in writing the books. In each case everything required to be done by Mr. Howard or Mr. Cheyney in order to earn the sums in question had been done during the continuance of the profession. In each case the sums in question were in the nature of periodical payments which did not become payable, and were not quantified or capable of quantification, until after the profession had been discontinued.

So far the parallel between the two cases seems as close as it well could be, given the differences in the character of the two professions. We can found no

A material distinction on the circumstance that, whereas the sums in question in Mr. Howard's case can be described with complete accuracy as remuneration for professional services, the sums in question in Mr. Cheyney's case are more aptly described as the reward for his professional activities. It is clear that the principle stated in *Bennett* v. *Ogston* (4) applies to professional activities whether or not they consist of the rendering of services; see per LORD SIMONDS, L.C., in *Gospel* v. *Purchase* (3) in the passage already quoted ([1951] 2 All E.R. at p. 1074) B where he says of the payments in Mr. Howard's case that they "retained the essential quality of being the fruit of his professional activity". See also the second paragraph of LORD ASQUITH's speech ([1951] 2 All E.R. at p. 1075), where he says:

> "It seems quite clear that the payments the liability of which to tax is in issue were exclusively the fruit or aftermath of the professional activities of C Mr. Leslie Howard during his lifetime."

Counsel for the Crown has argued that there is an essential ground of distinction between the two cases. He says that, whereas the sums in question in Mr. Howard's case were simply and solely remuneration for professional services rendered during the continuance of the profession, the sums in question in D Mr. Cheyney's case were payments for property in the shape of the copyrights. He puts it that every time Mr. Cheyney wrote a book he created for himself property in the shape of the copyright in the work and that the copyright in each work as and when brought into existence constituted a potential source of income which became an actual source of income when a contract providing for royalty payments was entered into with a publisher. Therefore, says counsel, the royalties E in the present case were income from property, namely, the copyrights. He admits that during the continuance of the profession the royalties received were receipts of the profession to be included in the computation of its profits under Case II of Sch. D and could not be taxed under Case III or Case VI. But he says that, on discontinuance, the royalties lost their character as profits or gains of the profession and became simply income from property, viz., the copyrights, which thenceforth F were substituted for the profession as their source, and as such became taxable under Case III or Case VI.

We do not feel able to accept this argument consistently with the speeches in *Gospel* v. *Purchase* (3). We quote again from the speech of LORD SIMONDS, L.C., where he said ([1951] 2 All E.R. at p. 1074):

> "My Lords, it appears to me that the issue is confused by raising in G general terms the question whether professional remuneration may in certain circumstances assume a different character for tax purposes when the taxpayer is dead or has retired. At least, *Asher* v. *London Film Productions, Ltd.* (2) is no authority for such a proposition. In that case there was no question of the same sum assuming a different quality in changing conditions. I am content to assume that there may be such a case H though I find it difficult to imagine. But here I cannot see how or where the change takes place. The source of these payments was the professional activity of Mr. Howard. It was never anything else. It is true that his remuneration took the form of annual payments which, if other conditions were satisfied, might fall within Case III. But other conditions were not satisfied, for ex hypothesi the source of the remuneration was the exercise of I a profession falling within Case II. Then your Lordships were pressed, particularly by junior counsel for the Crown, with the argument that the remuneration of Mr. Howard took the form of an 'income bearing asset' which became assessable after his death in the hands of his executors. I am not sure that I correctly apprehend the argument, though I can well understand that, if a professional man receives as remuneration for his services the sum of £1,000 2½ per cent. consols, and retains them, he will suffer deduction of tax from the interest. But I do not understand in what sense the

> sums of money receivable by Mr. Howard can be described as an income bearing asset. At one time it appeared to be urged that the several contracts, which at once imposed obligations on Mr. Howard and created rights in him, were income bearing assets, the income being the remuneration paid under them. Jenkins, L.J., described this argument as ‘ placing a strained and artificial construction on these contracts ’ and I am content to dismiss, without using more vigorous language, a contention that wholly disregards both the form and substance of the transaction. If I am right in thinking that the sums in question were not assessable under Case III because they were nothing else than remuneration professionally earned by Mr. Howard in his lifetime, this disposes also of the alternative claim under Case VI.”

We would refer also to the speech of Lord Asquith (ibid., at p. 1075) from which, although it has been set out in extenso in the judgment of Harman, J., we venture to quote this passage:

> “ Applying this principle [i.e., the principle stated in *Bennett* v. *Ogston* (4)] to the facts of the present case prima facie the resulting conclusion can only be that the payments in issue escape tax. It is, however, contended by the Crown that in *Bennett* v. *Ogston* (4) the reason why the principle involving exemption did not apply was that when the moneylender died there was outstanding an income bearing asset (viz., that part of the principal which was then unrepaid) which continued to earn income, as it were, in its own right. It was argued for the Crown that the same was the case here, the income bearing asset consisting of the contracts made by Mr. Leslie Howard whereunder the payments in question were posthumously made. There seems to me, however, to be a very clear distinction between ‘income bearing assets’ for the purpose of this type of case and the contracts in question. If Mr. Leslie Howard had stipulated for payment in blocks of shares or bonds, or any other instruments which by their independent vitality generate income, the dividends or interest might well have been taxable in the hands of his executors. The contracts in the present case enjoy, in my view, no such independent vitality.”

It is no doubt true that Mr. Cheyney obtained his royalties by licensing the copyright in his works to publishers. But the copyright did not drop from the skies. It was brought into existence by his professional activity in the writing of books and by nothing else, and it was just as much part of his profession to turn his literary labours to account by licensing the copyright he had created to publishers as it was to write the books in which the copyright subsisted.

Counsel for the Crown, in reliance on the actual decision in *Bennett* v. *Ogston* (4), has submitted that the royalties received after Mr. Cheyney's death were in the same case as the interest received after the moneylender's death. The interest, says counsel, was taxable because it was attributable to a period subsequent to the discontinuance of the moneylender's business. So here (he submits) the royalties received after the death of Mr. Cheyney were attributable to the use of the copyright for periods subsequent to the discontinuance of Mr. Cheyney's profession. We do not think this comparison is sound. The royalties were not payable by reference to periods of time but by reference to copies sold. They were the measure of the reward to be received by Mr. Cheyney for his professional activity in the production of original and therefore copyright works. If Mr. Cheyney had chosen to license or assign any of his copyright works to publishers for a lump sum, the sum received would have differed from the royalties only in point of quantification and mode of payment, and not in the essential character common to both, viz., that of a reward for professional activities wholly completed at the date of discontinuance.

Counsel for the Crown has also raised an argument based on Mr. Cheyney's residual interests in the copyrights. For example, the rights granted by the first and second specimen agreements were limited to publication and sale in volume form in the English language, while those granted by the third specimen agreement were limited to publication in volume form in the United States of America, with an additional provision for the equal division of the proceeds of sale of selection, abridgement and second serial rights. So, says counsel, Mr. Cheyney was left with potential but untapped sources of income in the shape of the rights in other modes of reproduction or in respect of publication in other parts of the world. We do not see that this makes any difference. So far as these residual rights were disposed of on a royalty basis by contracts made during the continuance of the profession, they would go to swell the profits and gains of the profession taxable under Case II of Sch. D. So far as they were similarly disposed of by contracts made after discontinuance, the proceeds in the form of royalties would admittedly fall within Case III or Case VI of the Schedule. That does not so far as we can see displace the conclusion that, on the principle of *Gospel* v. *Purchase* (3), the proceeds of such contracts as Mr. Cheyney did make during the continuance of his profession were professional earnings and nothing else, whether received before or after discontinuance.

It is interesting to note that in *Gospel* v. *Purchase* (3) leading counsel for the taxpayers at the conclusion of his reply said this:

> " These sums are remuneration. The case is not like that of a copyright which resembles a block of shares, acquired in the course of exercising a profession, which afterwards continues to produce income."

This implies recognition that different considerations might apply to a case such as the present one. But it overstates the point in favour of the Crown, inasmuch as copyrights do not produce income " in their own right " or proprio vigore. Contracts licensing or disposing of copyrights may result in the receipt by the person licensing or disposing of them of valuable consideration which may be in the form of periodical payments or in the form of a lump sum, and the question is as to the quality or character of those receipts.

We confess we regard this case as perhaps providing a somewhat stronger argument for the Crown than did *Gospel* v. *Purchase* (3), but giving the matter the best consideration we can we see no sufficient ground to justify this court in distinguishing that case, and would accordingly dismiss this appeal.

Appeal dismissed. Leave to appeal to the House of Lords granted on terms.

Solicitors: *Solicitor of Inland Revenue; Frere, Cholmeley & Nicholsons* (for the taxpayer).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

BROWN *v.* DAVIES.

[Court of Appeal (Lord Evershed, M.R., Romer and Ormerod, L.JJ.), October 23, 24, 1957.]

Landlord and Tenant—Repair—Tenant's covenant—Exception of reasonable wear and tear—Onus of showing that dilapidations were attributable to wear and tear—Whether non-repair a breach of covenant.

Rent Restriction—Possession—Breach of covenant—Covenant by tenant to repair—Whether material date at which to determine whether covenant broken was the day of hearing or a previous time—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5 *c.* 32), *s.* 3 (1), *Sch.* 1, *para.* (*a*).

A tenancy agreement, dated Oct. 1, 1938, in respect of a dwelling-house which was within the ambit of the Rent Restrictions Acts, contained in cl. 4 (*c*) and (*i*), the following covenants on the part of the tenant: "(*c*) To use and occupy the . . . premises in a fair and tenantable manner and keep the interior clean and in good repair and condition and decorated except as to dilapidation or damage resulting from reasonable wear and tear . . . (*i*) To permit the landlord . . . to enter upon and view the condition of the said premises and upon notice given by the landlord . . . to carry out any interior repairs and decorations necessary to put the premises in as good a state of repair and condition as the same are now in ". There was also a covenant by the tenant to cultivate the garden attached to the house. In June, 1952, the landlord served on the tenant a notice to quit, and the tenant thereafter remained in occupation of the premises as a statutory tenant. From about 1952 until the beginning of 1957 the tenant did no internal decoration or repairs and did not cultivate the garden; thus, over a period of years, he had not occupied the premises in a fair and tenantable manner or kept the interior in good repair and condition and decorated. In an action by the landlord for possession under s. 3 of and Sch. 1 (a)* to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, on the ground that the tenant was in breach of obligation to repair and decorate etc., the premises and to cultivate the garden, an order for possession was made by the county court judge, although the tenant had done a certain amount of internal decoration and repairs before the hearing. On appeal, it being conceded that the tenant was in breach of the covenant to cultivate the garden and that therefore there was jurisdiction to make an order for possession,

Held: the onus was on the tenant, if he were to escape the consequences of breach of obligation to repair and decorate etc., to show that the dilapidation of the premises was attributable to the " reasonable wear and tear " which was excepted from cl. 4 (*c*) of the tenancy agreement, and for that purpose mere non-feasance on his part in relation to repair and decoration was not enough; moreover in determining whether it was reasonable to make an order for possession under s. 3 (1) of and Sch. 1 (a) to the Act of 1933, the county court judge was entitled to take into consideration the tenant's past conduct, and accordingly the order for possession would not be disturbed (see p. 407, letter E, post).

Dictum of Tindal, C.J., in *Gutteridge* v. *Munyard* ((1834), 1 Mood. & R. at p. 336) applied.

Taylor v. *Webb* ([1937] 1 All E.R. 590) distinguished.

Semble: in determining whether there has been a breach of obligation within para. (a) of Sch. 1 to the Act of 1933, the court is not confined to considering the state of fact at the hearing, but has jurisdiction to make an order for possession if there has been a breach before then (see p. 403, letter E, and p. 409, letter D, post).

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* The relevant terms of this enactment are printed at p. 409, letter A, post.

Appeal dismissed.

[As to a covenant by a tenant to keep premises in good repair, reasonable wear and tear excepted, see 20 HALSBURY'S LAWS (2nd Edn.) 210, para. 230; and for cases on the subject, see 31 DIGEST (Repl.) 361, 362, *4930-4934*.

For the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1), and Sch. 1, para. (a), see 13 HALSBURY'S STATUTES (2nd Edn.) 1048, 1059.]

Cases referred to:

(1) *Taylor* v. *Webb*, [1937] 1 All E.R. 590; [1937] 2 K.B. 283; 106 L.J.K.B. 480; 156 L.T. 326; 31 Digest (Repl.) 296, *4332*.

(2) *Haskell* v. *Marlow*, [1928] 2 K.B. 45; 97 L.J.K.B. 311; 138 L.T. 521; 31 Digest (Repl.) 362, *4934*.

(3) *Gutteridge* v. *Munyard*, (1834), 7 C. & P. 129; 1 Mood. & R. 334; 174 E.R. 114; 31 Digest (Repl.) 358, *4892*.

Appeal.

The defendant, the statutory tenant of a dwelling-house, appealed from a judgment of His Honour JUDGE EVANS, Q.C., at Shrewsbury County Court, dated May 13, 1957, whereby it was adjudged that the plaintiff, the landlord, was entitled to an order for possession of the premises. The tenancy was originally a contractual tenancy, and the landlord claimed possession under Sch. 1, para. (a) to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, on the ground that the tenant was in breach of obligations under the original tenancy.

Douglas Draycott for the defendant, the tenant.

G. T. Meredith for the plaintiff, the landlord.

LORD EVERSHED, M.R.: This is an appeal from an order for possession of a bungalow, with a garden attached to it, known as " Berwyn " in Myddle, Shropshire. The appeal has raised some points of interest and difficulty and we are much indebted to Mr. Draycott for the arguments that he has put forward for the tenant, the appellant. The plaintiff, Mrs. Brown, entered into a long and elaborate form of tenancy with the tenant, the defendant, on Oct. 1, 1938, and one of the questions which has been mainly argued here concerns the effect of the covenants by the tenant in that agreement. Although 1938 is nearly twenty years ago, there has been no change either in the proprietorship of the reversion or in the occupancy, save only this—and it is a point to which the judge drew attention and in support of which he expressed, as one cannot help doing, some sympathy for the tenant—that in 1951 or 1952 the tenant unfortunately had serious domestic trouble and his wife departed from the premises, leaving him alone. He works as a managing clerk in a solicitor's office some little way away and so has to leave the house early in the day and return perhaps late in the evening. It is perhaps not unnatural that a man suddenly left alone like that should not be very adept at looking after a house and garden, matters which would more naturally have been within the province of his wife. Be that as it may, in June, 1952, the landlord served on the tenant notice to quit, and there is no question that the notice was effective. Thereafter the tenant remained in occupation as a statutory tenant, since the premises were within the ambit of the rent restriction legislation.

So matters went on for a long time, until eventually the present proceedings were started*. It may be said that they were started somewhat suddenly. There had been correspondence in 1956 in which the landlord intimated that she wished to inspect the premises with a view to calling on the tenant to execute some repairs. She did not follow that up, but instead initiated the present proceedings. She based her claim on the grounds which were set out in her particulars of claim as follows: that the tenant had committed breaches of the obligations which still bound him as a statutory tenant, derived as they were from the contract of tenancy, and the breaches complained of were of three kinds: (i) failure to repair and decorate; (ii) failure to keep, manage and cultivate the garden; and (iii) doing acts which were annoying to the landlord or the neighbours. The last matter dropped completely out of the case and I say no more about it. If, however, either or both of the two first complaints could be established, then the jurisdiction would arise for the county court judge to make an order for possession, and thereafter, as is well known, the question would be whether the judge in his discretion would think it reasonable so to do.

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* The landlord's particulars of claim were dated Mar. 26, 1957.

The terms of s. 3* of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, are well known and were cited by the learned judge in his judgment. The power to make an order arises, by virtue of Sch. 1 to the Act, if, inter alia, any rent has not been paid or if any other obligation of the tenancy " has been broken or not performed "†. It was suggested here and also before the learned judge that the material time at which to determine whether there was a breach of covenant was at the hearing. On the facts of this case I do not think that it is decisive whether that view be right or wrong, but I am not satisfied that it is correct. The language is: " any . . . obligation . . . has been broken ". The ordinary meaning of that phrase must be that the judge has to decide at the hearing whether there "has been" a breach of the covenant. The judge confined himself to the state of affairs as it was proved before him at the hearing and he found as a fact that at that date the tenant was in breach of the covenant as to repair of the house and also of that in regard to the garden. I do not accept, however, the view that, on the construction of the relevant language in para. (a) of Sch. 1, the judge was so confined.

I shall have to examine a little more fully the evidence about the house. As regards the garden it is not in issue that the tenant not only had committed breaches of his obligation, but that he was still in breach at the hearing. As the learned judge pointed out, the tenant was no gardener and apparently gardening was not a matter in which he took the smallest interest. In the result, the exterior of the place, the garden surrounding the property, had become a jungle, to use the word which was used in the evidence. That being so, it follows that the jurisdiction for the judge to make the order arose whether or not he rightly concluded that there had been, or was at the date of the hearing still subsisting, a breach of the repairing covenant.

The case, therefore, has narrowed, on any view of it, to the question whether the judge rightly exercised his discretion in making the order. The main attack on the order was to this effect: that the learned judge took into account, as relevant for the exercise of his discretion, breaches past as well as present of the covenant to repair; that he was in error as a matter of law, having regard to the construction of the covenant, in so doing; and, therefore, that the allegation that it was reasonable to make an order cannot stand. Counsel for the tenant asked in opening the case that we should say that in the circumstances the only result must be to set aside the order for possession. Again, I am far from satisfied that, given the premise, that would be the right conclusion. If the learned judge had misdirected himself, I do not think it follows that we should thereupon set aside the order for possession. It might become necessary to send the case back, but, in the circumstances stated, it might be that this court could then determine, on a true apprehension of the matters to be taken into account, what order should be made. Those considerations, however, do not arise because in my judgment, for reasons which I must now attempt to A state and justify, there was no misdirection by the learned judge.

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* The relevant terms of the section are printed at p. 408, letter I, post.

† Paragraph (a) of Sch. 1 to the Act.

I must now read the relevant paragraphs in the covenant. I need not refer to what I will call the garden covenant [in cl. 4 (*e*)] because no question turns on that. Clause 4 of the tenancy agreement comprising the tenant's covenant contains many paragraphs, of which I propose to read the bulk of (*c*) and (*i*). Paragraph (*c*) is: B

> "To use and occupy the said premises in a fair and tenantable manner and keep the interior clean and in good repair and condition and decorated except as to dilapidation or damage resulting from reasonable wear and tear accidental fire . . ."

Then there are a number of calamities referred to, such as shots and shells from C aircraft which need not be considered. Paragraph (*i*) is:

> "To permit the landlord or her agents and others with the landlord's authority and by appointment with the tenant to enter upon and view the condition of the said premises and upon notice given by the landlord or her agents to carry out any interior repairs and decorations necessary to put the premises in as good a state of repair and condition as the same are now in." D

The first thing that is obvious on a reading of those two paragraphs is that the latter, on the face of it, is or may be of much stricter incidence on the tenant than the former; for, on the face of it, if the landlord were to view the premises and then to give notice to do decorations in order to bring the premises into the condition in which they were on Oct. 1, 1938, the tenant could not evade his obligation by saying: "You cannot require me to make good that lack of repair E or decoration for it can be shown to be exclusively due to reasonable wear and tear". I agree with counsel for the tenant that the duty of the court must be to construe, so far as possible, these paragraphs together so as to arrive at a coherent whole. The solution of the apparent conflict submitted by counsel for the tenant was to say that the real burden imposed on the tenant was to be found in para. (*i*) and that the landlord should pursue his remedy in accordance F with the provisions of that paragraph; that para. (*c*), if not rendered wholly ineffectual, was at best a very much slighter and relatively insignificant provision. I am not satisfied that the result of putting the two together in that way is to reduce the significance of para. (*c*) almost to nothing. It may well be inescapable that whoever drafted the agreement succeeded in the end in producing some repugnance in the provisions of the two paragraphs. I think that G one must regard para. (*c*) according to its own language and that the only effect of having para. (*i*) in the back of one's mind would rather be, contrary to the submission of counsel for the tenant, to make one disinclined to produce the somewhat absurd result that, notwithstanding para. (*i*), the first obligation as to repair and decoration is of practically negligible effect.

In support of the argument for reducing to minimal significance para. (*c*), H counsel for the tenant relied strongly on a decision of this court in *Taylor* v. *Webb* (1) ([1937] 1 All E.R. 590). The report is long and I shall not follow all through the three judgments, nor elaborate greatly the facts. I observe, however, that the facts were exceptional. It may suffice if I borrow the language of SCOTT, L.J., from his judgment where he says (ibid., at p. 596):

> ". . . our task [of construing the common exception in repairing covenants in leases, 'fair wear and tear excepted'] is not quite the ordinary one, as we have to construe the words removed from their normal context of a tenant's covenant, and transported into the text of a landlord's covenant." I

SCOTT, L.J., referring to the circumstance that the landlord in that case was himself a lessee under a headlease, and that under the headlease there was imposed on him, as tenant or lessee, an obligation to "keep the premises . . .

and the fixtures, painting, papering and decorations thereof in good and tenantable repair ", followed by the exception familiar enough to persons who practise in this class of work, " destruction or damage by fire and fair wear and tear excepted ". The lessee then being transmuted by the underlease into the situation of a landlord, assumed in the underlease a more limited obligation as to repair, for it was only to keep the outside walls and roofs properly repaired, but there was added the following referential language: " as and so far only as is required to be done by them under the [headlease] ". One of the first problems which the court had to decide was what was the effect of the reference to the headlease, and the court held that it imported into the obligation to keep the outside walls and roof properly repaired the exception " fair wear and tear excepted ". There was, therefore, on the landlord in that case (who was also the tenant under the headlease) a repairing covenant which was limited to the outside walls and roof. At the end of his judgment SLESSER, L.J., who delivered the first judgment of the court, said ([1937] 1 All E.R. at p. 594):

> " It will be observed that, in this case, unlike the case of *Haskell* v. *Marlow* (2) ([1928] 2 K.B. 45), there was no general obligation to keep the dwelling-house in good repair and condition, but only the walls and roofs, and, for the reasons which I have stated, I have come to the conclusion in this case, on the facts, that the landlord had no obligations whatever with regard to reparation . . ."

The matter was put by SCOTT, L.J., in this fashion ([1937] 1 All E.R. at p. 599):

> " The learned judge in effect found, and, in my view, rightly found, that the whole of the disrepair was due to the elements, coupled with the absence of any steps by anybody to prevent further progress of the decay: there was no suggestion of any ' unfair ' user by anybody, either tenant or landlord."

Finally, FARWELL, J., the third member of the court, said this (ibid., at p. 601):

> " Under that covenant, the lessor is prima facie liable for the serious state of disrepair into which, admittedly, the walls and roof have fallen, unless he can show (and the onus is on him) that that condition is due wholly to fair wear and tear. The meaning of the exception, in such a case as this, is, in my judgment, that the lessor is under no liability for disrepair due solely to such ordinary natural causes as may fairly be said to have been in the contemplation of the parties, for example, wind and weather, assuming no abnormal use of the property by him."

The damage complained of in *Taylor* v. *Webb* (1) was found to have been the direct and sole result of the operation of the elements on a sky-light in the roof, and so the conclusion went.

Counsel for the tenant in the present case sought to say that *Taylor* v. *Webb* (1) lays down a broad rule that, where one finds an exception, as one finds in para. (*c*) of cl. 4 of the agreement in the present case, " except as to dilapidation or damage resulting from reasonable wear and tear ", the effect is, for practical purposes, to negative all the preceding obligations unless it can be shown that the state of repair is due to some active or wilful damage done by the tenant as a tenant. If that were its effect, *Taylor* v. *Webb* (1) would have operated to set at nought what was laid down as long ago as 1834 by TINDAL, C.J., in *Gutteridge* v. *Munyard* (3) ((1834), 1 Mood. & R. 334 at p. 336). I quote from WOODFALL ON LANDLORD AND TENANT (25th Edn.) (1954), p. 765, to which counsel for the landlord drew our attention.

> " TINDAL, C.J., stated the effect of a repairing covenant containing an exception of reasonable use and wear in these words (1 Mood. & R. at p. 336): ' What the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value, constitute a loss, which,

> so far as it results from time and nature, falls upon the landlord. But the tenant is to take care that the premises do not suffer more than the operation of time and nature would effect; he is bound by seasonable applications of labour to keep the house as nearly as possible in the same condition as when it was demised '." A

I cannot conclude that this court, in *Taylor* v. *Webb* (1), intended to lay down a broad proposition inconsistent with the long-established statement of TINDAL, C.J.; all the more so perhaps since *Gutteridge* v. *Munyard* (3) was not, in fact, referred to at all. In any case, however, the question of the construction of any covenant must depend on the words of the particular covenant sought to be construed. I have already referred to the somewhat unusual terms of the covenant in *Taylor* v. *Webb* (1), a covenant which SCOTT, L.J., described ([1937] 1 All E.R. at p. 596) as being " a topsy-turvy covenant ", a hybrid. In the present case the obligation of the tenant is far more extensive on the face of it than was the obligation of the landlord in *Taylor* v. *Webb* (1). Observe that it opens with the words: B C

> " To use and occupy the said premises in a fair and tenantable manner and keep the interior clean and in good repair and condition and decorated . . ." D

and the exception is limited to " dilapidation or damage resulting from reasonable wear and tear . . ." I do not think it necessary or right that I should attempt to give an exposition of the exact scope of this provision. I am satisfied to put it no higher than that, if proof is given that the tenant is not keeping the premises in a fair and tenantable manner and not keeping the interior clean and well repaired and decorated, then, at the very least, the tenant must establish that the matters complained of ought to be attributed to dilapidation or damage resulting from reasonable wear and tear and to nothing else. It is to my mind quite plain that the tenant in this case, having such an onus on him (and counsel for the tenant admits that he has the onus), failed so to satisfy the judge. E

I must now make some reference to the evidence. The note is a little brief, but there were called, in addition to the landlord's husband, two experts who described the state of repair as they had found it at the date of an inspection somewhat before the trial. Mr. Evans, who was a partner in a firm of chartered surveyors, said that at least five years had passed since any decoration had been carried out; the entrance hall was not in good condition, with plaster cracks in the ceiling; the plaster in the kitchen was badly cracked at the side of the grate, and the paintwork was fair; the back kitchen showed flaking on the walls; the bathroom walls were dirty and the ceiling flaking; the bedroom showed slight signs of damp, with tarnished decorations; in the sitting-room the paper was peeling and the ceiling was cracked in three or four places. He described the premises as being " occupied and not lived in ", which, no doubt, is attributable, in fairness to the tenant, to the unhappy domestic situation in which he found himself. According to the evidence put forward on the tenant's side, his sins were of pure omission and nothing else; he had just done nothing. F G H

On the basis of the evidence given, the learned judge's conclusion on fact was as follows:

> " With regard to the interior decoration, it is also significant, I think, that [the tenant] even went to the extent of having these premises wired for electricity without asking leave of [the landlord] at all, treating her as if she did not exist except that he paid his rent. He treated the house as if it were his own, and there was neglect due to the unhappy circumstances, in that he lived there alone." I

The learned judge concluded:

> " I think it would be reasonable for [the landlord] to want it for someone in her family to live in, and reasonable to desire possession of a bungalow

> next door to her which would be occupied by someone who will keep it in good reasonable order, and not have this continued eye-sore in front of her every time she goes out of her own front gate."

Earlier the learned judge had dealt with the point on internal decoration and had also drawn attention to the passage in the evidence that the premises gave the impression of being occupied rather than lived in. He said that he could not at that late date accept an undertaking by the tenant to keep the premises in proper repair. I do not propose to go into further detail. It is quite plain that the learned judge took the view that, over a period of years, the tenant had not used and occupied the premises in a fair and tenantable manner and had not kept the interior clean and decorated. The judge was not satisfied that all that could be complained of were dilapidations exclusively resulting from reasonable wear and tear. In my judgment there was ample evidence for him so to hold.

It is true that, no doubt stirred into a sense of urgency by the pending trial, the tenant had had a lot of work done. I am not sure that the judge thought that it had been very well done. The tenant had called on some amateur to do a little decoration in his spare time. Be that as it may, at the date of the trial the main complaint centred on one room, namely, the bedroom. It is not necessary, in my judgment, to spend much time on that fact. The judge was of opinion—and I have already indicated that I am not satisfied that he was right—that, for the purposes of considering whether there had been a breach of covenant, he was not entitled to look further back than the date of the hearing. For reasons already given, I do not think that it matters whether there was, or, indeed, ever had been, a breach of the covenant to repair, since the jurisdiction was conferred by the breach of the covenant as regards the garden; but on the question of reasonableness the judge was plainly entitled, in my judgment, to consider, as he did, the extent to which the tenant had performed his obligations, not only immediately before the trial, but for some long period before the trial. He concluded beyond doubt, and, in my judgment, was well entitled so to do, that the tenant had failed in the respects which I have stated to perform the obligations which lay on him under cl. 4 (*c*) of the agreement and failed, putting it the other way round, to prove an excuse founded on the exception of fair wear and tear.

The judge, therefore, reached his conclusion that it was reasonable to make an order because it was reasonable to require and expect that the bungalow and the garden would be in the occupation of somebody who would be a proper tenant, and would keep the place clean and properly decorated, and would look after the garden. I should add that the judge made it quite clear, notwithstanding the actual form of words which he used (and which might be perhaps misinterpreted) that he appreciated that his duty was to decide whether it was reasonable to make the order, and not merely whether it was reasonable for the landlord to ask him to make the order. No point has been made on that by counsel for the tenant.

In the circumstances, therefore, I have reached the conclusion, first, that there was clear jurisdiction under s. 3 of and Sch. 1 to the Act of 1933, because a clear breach was proved and, indeed, was conceded; secondly, that there was no misdirection on any material matter which entitles this court to interfere with the judge's conclusion on the matter of discretion that in all the circumstances it was reasonable to make the order. I would like to say again that the judge expressed some sympathy for the tenant. He has been there a long time and he has had a domestic calamity of the first magnitude, from which, no doubt, the present situation is derived. Although one sympathises with him for these reasons, it seems to me, however, that we cannot go to the extent of disturbing the order to which the landlord was held to be justly entitled, and I would dismiss the appeal.

ROMER, L.J.: I quite agree. There are only two points of any general importance that have emerged in the discussion of the case before us, and I will confine the little that I have to say to those two matters.

It was submitted by counsel for the tenant that where one finds a covenant to repair and decorate which is qualified by excepting dilapidation or damage resulting from reasonable wear and tear, the result is that, in fact, the covenantor need do nothing active in the pursuance of his obligation; in other words, provided he just sits back and allows the elements to have such effect on the premises as naturally occurs, then it cannot be said of him that he is in breach of his covenant. Counsel for the tenant said that that was the result of the decision of this court in *Taylor* v. *Webb* (1) ([1937] 1 All E.R. 590). In my view, that is not the result of the decision in *Taylor* v. *Webb* (1). As LORD EVERSHED, M.R., pointed out, that case was a very exceptional one, and the covenant was in a very unusual form and, although it is true that the result for which counsel for the tenant contended in this case was that at which the court in *Taylor* v. *Webb* (1) arrived, I am quite clear that the decision had nothing like the general effect for which counsel contended. It seems to me that the law as laid down by TINDAL, C.J., in *Gutteridge* v. *Munyard* (3) ((1834), 1 Mood. & R. 334) is still the general law and was not intended to be overruled by this court in *Taylor* v. *Webb* (1). Nor, indeed, was the statement of the law by TINDAL, C.J., brought to the attention of the court in that case. The truth is that, in order to find out the scope and effect of a qualified covenant to repair, one has to look at the document as a whole, and it appears to me to be going far beyond anything that was said by any of the judges in *Taylor* v. *Webb* (1) to say that one merely has to find an exception for reasonable wear and tear to reduce the scope of the covenant to practically nothing at all.

In the present case, if one gave that negative effect to cl. 4 (*c*) of the agreement, one would come in almost direct collision with the covenant in cl. 4 (*i*) under which at any time the tenant is under an obligation, if so required by the landlord,

> ". . . to carry out any interior repairs and decorations necessary to put the premises in as good a state of repair and condition as the same are now in."

One must, so far as possible, effect a reconciliation between cl. 4 (*c*) and cl. 4 (*i*) and no such reconciliation is achieved by depriving cl. 4 (*c*), as the contention of counsel for the tenant would have the effect of depriving it, of practically any effect at all. Therefore, I think that *Taylor* v. *Webb* (1) must be regarded as a case (as, indeed, it was) dealing with a covenant in a very special form and with special circumstances, and that it does not form the foundation for a general statement of the law such as counsel for the tenant has laid before this court.

The second point was one which counsel for the tenant at first submitted but, after some discussion, was not disposed to press. As it was mentioned, I think that it might be as well to deal with the point. Counsel said that the court had no power under s. 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, and Sch. 1 to the Act, to make an order for possession on the ground that an obligation of the tenancy had been broken or not performed unless it was shown that the tenant was in breach at the date of the hearing—not, it is to be observed, at the date of the application, but at the date when the application came before the court. That point was put to the learned judge in the court below and for a time it was put to us, but I am quite satisfied that the point is not a good one.

Section 3 (1) of the Act of 1933 reads:

> "No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom shall be made or given unless the court considers it reasonable to make such an order or give such a judgment, and either—(a) the court has power so to do under the provisions set out in Sch. 1 to this Act . . ."

The provision in Sch. 1 to the Act which is relevant to the present case is:

> " A court shall, for the purposes of s. 3 of this Act, have power to make or give an order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if—(a) any rent lawfully due from the tenant has not been paid, or any other obligation of the tenancy (whether under the contract of tenancy or under the principal Acts), so far as the obligation is consistent with the provisions of the principal Acts, has been broken or not performed . . ."

The position of the rent is different, of course, from that of the obligation to perform the covenants, because with regard to rent the words of the Schedule are " if any rent lawfully due from the tenant has not been paid ", and it may well be that, if the tenant can show that he has paid the rent when the matter comes on for hearing, then he is outside that particular provision. When it is said that the court has no jurisdiction to deal with a breach of covenant to repair unless the tenant is in breach of it at the hearing, it appears to me that that is in direct conflict with the actual language of the Schedule, which is " if . . . any . . . obligation of the tenancy . . . has been broken or not performed ". It seems to me that the court has jurisdiction to make an order for possession under that provision provided that it is established that there has been at some time previously a breach of an obligation imposed on the tenant under the tenancy. Provided that that is established, the court has jurisdiction and it then becomes a matter of discretion as to the reasonableness of making the order. That that is the proper view of the matter is, I think, confirmed by the provisions of para. (b) of Sch. 1 to the Act which deals with the case where

> " the tenant . . . has been guilty of conduct which is a nuisance or annoyance to adjoining occupiers, or has been convicted of using the premises or allowing the premises to be used for an immoral or illegal purpose . . ."

showing quite plainly, as I think, that, if at any time prior to the case coming on the tenant has been guilty of nuisance or annoyance or has been convicted, then a foundation is laid for the exercise of the jurisdiction.

For the rest I have nothing to add to what LORD EVERSHED, M.R., has said.

ORMEROD, L.J.: I agree and have nothing to add.

Appeal dismissed.

Solicitors: *Gibson & Weldon*, agents for *Henry Lee, Bygott & Eccleston*, Wem (for the tenant); *Edwin Coe & Calder Woods*, agents for *Shay & Lingford-Hughes*, Shrewsbury (for the landlord).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*

JOHN FAIRFAX & SONS PTY., LTD. *v.* E. C. DE WITT & CO. (AUSTRALIA) PROPRIETARY, LTD.

[COURT OF APPEAL (Jenkins, Parker and Pearce, L.JJ.), October 18, 1957.]

Costs—Jurisdiction—Separate actions by different plaintiffs against same defendant arising out of same transactions—Actions listed and tried together—Defendant successful in one action only—Jurisdiction to order unsuccessful plaintiff to pay defendant's costs of both actions—R.S.C., Ord. 65, *r.* 1.

Practice—Parties—Separate actions by different plaintiffs against same defendant—Order that actions be listed and tried together—Effect—Whether there is jurisdiction to order unsuccessful plaintiff in one action to pay defendant's costs of both actions—R.S.C., Ord. 65, *r.* 1.

R.S.C., Ord. 65, r. 1, which provides that " the costs of and incident to all proceedings in the Supreme Court . . . shall be in the discretion of the court " gives the court a discretion to order the costs of and incident to all proceedings to be paid by the parties to those proceedings, or any of them, as the court in its discretion thinks right, but does not empower the court to order a person to pay costs incurred by another party in proceedings to which that person was not a party (see p. 413, letters G to I, p. 415, letter C, post).

An order that two actions be listed and tried together does not convert those two actions into one set of proceedings; the court therefore has no jurisdiction to order a party to only one of the two actions to pay costs incurred by the other party in the other action (see p. 414, letter I, and p. 415, letter D, post).

Dictum of COLLINS, L.J., in *Forbes-Smith* v. *Forbes-Smith & Chadwick* ([1901] P. at p. 269) applied.

An Australian mercantile company (" W. Ltd. ") procured an English company carrying on business in Australia as advertising practitioners (" E. Ltd.") to advertise goods in Australian newspapers. E. Ltd. went into voluntary liquidation at a time when the newspaper proprietors had not been paid for the advertisements. E. Ltd. commenced an action against W. Ltd. alleging, inter alia, that E. Ltd. acted as principal and not as agent in executing the advertising, and claiming the sums agreed to be paid by W. Ltd. for the advertisements. By consent on an interpleader summons in the action proceedings were agreed to be brought in England on behalf of representative claimants of the newspaper proprietors against W. Ltd., and the existing action by E. Ltd. against W. Ltd. and the new action were to be ordered to be listed and tried together. The newspaper proprietors accordingly commenced an action against W. Ltd., claiming that E. Ltd. had ordered the advertisements as agents for W. Ltd., and that W. Ltd. was therefore liable to the newspaper proprietors for the price of the advertisements. The two actions were ordered to be listed and tried together. At the trial judgment was given for E. Ltd. against W. Ltd. in the action between them, and for W. Ltd. in the action brought by the newspaper proprietors, the court holding in each action that E. Ltd. had acted as principals and not as agents for W. Ltd. W. Ltd. thereupon applied in the action brought by the newspaper proprietors for the costs of the action brought by E. Ltd. to be paid by the newspaper proprietors. On appeal by W. Ltd. against the determination of the trial judge that he had no jurisdiction to make such an order,

Held: the order that the two actions be listed and tried together did not convert the two actions into one set of proceedings, and so did not make the newspaper proprietors a party to the action by E. Ltd., and the court therefore had no jurisdiction to order the newspaper proprietors to pay the costs of that action.

Appeal dismissed.

[As to the discretion of the court as to costs, see 26 HALSBURY'S LAWS (2nd Edn.) 96, para. 181.]

Case referred to:

(1) *Forbes-Smith* v. *Forbes-Smith & Chadwick*, [1901] P. 258; 70 L.J.P. 61; 84 L. T. 789; 30 Digest (Repl.) 159, *133*.

Appeal.

The successful defendants in this action (" the 1955 action "), E. C. De Witt & Co. (Australia) Proprietary, Ltd., a mercantile firm (hereinafter referred to as " De Witts ") appealed against the decision of GORMAN, J., dated Feb. 15, 1957, refusing to order the unsuccessful plaintiffs, John Fairfax & Sons Pty., Ltd. newspaper proprietors (hereinafter referred to as " Fairfax ") to pay the costs incurred by the defendants in another action (" the 1954 action ") brought against De Witts by W. H. Emmett (Overseas), Ltd., advertising practitioners (hereinafter referred to as " Emmetts "). By order dated Jan. 5, 1956, it was ordered that the two actions should be listed and tried together, and they were so listed and tried. GORMAN, J., gave judgment for Emmetts against De Witts with costs in the 1954 action, and for De Witts against Fairfax with costs in the 1955 action. De Witts appealed, by leave of GORMAN, J., against the order for costs in the 1955 action. The facts are set out in the judgment of JENKINS, L.J.

Stephen Chapman, Q.C., and *M. J. Turner* (with him *John Stephenson*) for De Witts, the mercantile company, the defendants.

R. W. Goff, Q.C., and *Astell Burt* for Fairfax, the newspaper proprietors, the plaintiffs.

JENKINS, L.J.: This is an appeal with the leave of the judge from an order of GORMAN, J., dated Feb. 15, 1957, so far only as it relates to a certain matter of costs. The question arises out of a tangle of litigation which arose in these circumstances. The dramatis personae, if I may so describe them, were E. C. De Witt & Co. (Australia) Pty., Ltd., an Australian company with an office in London, which is a subsidiary of an American company, and the business of which consists of marketing various proprietary preparations with which the American company deals all over the world. This company has been referred to in the case as " De Witts." Next there is John Fairfax & Sons Pty., Ltd. (referred to in the case as " Fairfax ") a company registered in Sydney, New South Wales, but with an office in London. They are the proprietors of two newspapers, the " Sydney Morning Herald " and the " Sunday Herald ". Thirdly, there is an English company whose history I need not go into, but which I understand to have taken over the overseas business of an earlier company. Its name is W. H. Emmett (Overseas), Ltd. (referred to in the case as " Emmetts "), and it carried on what is now called the business of advertising practitioners.

It appears that De Witts were minded to secure publicity for their goods in the Australian papers. They became clients of Emmetts, the advertising practitioners, who engaged for reward to see that these goods were suitably represented in the appropriate advertising media of which, by far the most important, of course, is newspaper advertisement. There is no doubt that Emmetts placed a large amount of advertising in respect of De Witts' goods with a large number of different newspapers: the total came to something like one hundred and thirty different newspapers or newspaper proprietors. Unfortunately Emmetts fell into financial difficulties and the result was that the newspapers were not paid for the space which Emmetts had bespoken. On Nov. 19, 1953, Emmetts went into a creditors voluntary winding-up. It appeared, therefore, that if Emmetts were responsible for the amount expended on advertising, the newspapers probably would not get anything approaching the full amount due to them. It was, therefore, important for the newspapers to establish, if they could, a direct claim against De Witts. On the other hand it was, no doubt, the duty of the liquidator of Emmetts to get in all the money to which that company might be entitled in respect of these advertising transactions. The litigation began on Apr. 15, 1954, when Emmetts issued a writ against De Witts claiming the amount of the expenses Emmetts had incurred on advertising in the Australian press. A number of other claims emerged and the real contest which arose was on the question whether Emmetts, in doing this advertising work, were acting as principals to whom the newspaper proprietors could look for payment, or whether, on the other hand, they were acting as agents for De Witts so that the newspaper proprietors could establish a direct claim against De Witts. In the result other litigation was launched. Fairfax issued a summons on May 6, 1954, in the Metropolitan District Court of New South Wales claiming a sum of £360 15s. which was the amount due to Fairfax in respect of some of this advertising. That was a small proportion of the total in issue. If one counted in all the transactions with all the newspapers, the total amount involved was upwards of £14,000.

In those circumstances De Witts might be said to have been between two fires, and accordingly on June 22, 1954, they issued an interpleader summons in the Emmett action, and in that summons a formidable total of over one hundred newspapers were joined. It became obvious to the legal advisers of the various parties concerned that it would hardly be practicable to deal with these interpleader proceedings in the ordinary way, in view of the very large number of people concerned. Accordingly, after some negotiations an order was made by consent on June 17, 1955, on the interpleader summons in Emmetts' action. That consent order, so far as I need refer to it, is in these terms:

> " 1. Proceedings will be brought in England against De Witt by representative claimants represented by Messrs. Bell, Brodrick & Gray and Messrs. Pothecary & Barratt, including at least one claimant who is a member of the Australian Newspaper Proprietors Association and/or the Australian Newspapers Advertising Control Board and at least one claimant who has proved in the liquidation of Messrs. Emmett & Co., Ltd."

Then there was a provision about the acceptance of service and a provision that De Witts would not ask for security for costs. Then there were these provisions:

> " 4. The said proceedings will be ordered to be listed and tried together with the existing action Emmett against De Witt. 5. All claimants will accept the decision in the proceedings as conclusive of the rights and liabilities in their cases, also De Witts similarly will accept the decision as conclusive. Rights of appeal, however, to be open to all parties. 6. The pending proceedings in Australia by Fairfax Proprietary Co. Ltd., against De Witt will be stayed indefinitely the costs thereof being borne by the plaintiff or the defendant therein in accordance with the result of the proceedings. It is ordered:—(a) that the interpleader summons be adjourned sine die subject, however, to the following. (b) that the costs of the interpleader proceedings be reserved to the judge who tries the actions. (c) That De Witts have liberty to apply for an order barring claims by any claimants who have been served but have not appeared. (d) Liberty to all parties to apply to restore the summons in the event of any failure to carry out any of the terms of the above agreement."

In pursuance, though, it would seem, in anticipation of the actual completion, of the consent order, Fairfax issued a writ against De Witts on May 2, 1955, their claim being framed on the basis that Emmetts were agents for De Witts. That action, and one other, were, I think, the only actions started in pursuance of the arrangements stated in the consent order. The other was an action by " Truth & Sportsman " which, however, was in the end discontinued.

In due course the actions came before the learned judge and he decided that Emmetts were acting as he expressed it, " as principals both ways," that is to say they were not agents of De Witts, and when they placed advertising with a newspaper, the newspaper could look to them, and to them only for payment. On that it necessarily followed that Fairfax's action against De Witts failed, so that the appropriate order prima facie was, as regards that action: action dismissed with costs. On the other hand Emmetts succeeded against De Witts so that the order there would be prima facie: judgment for Emmetts against De Witts with costs.

That rather long recital of the complicated steps in this litigation brings me to the point of the appeal, which is a very short point. Counsel for De Witts claimed that the proper order to be made was that Fairfax's action against De Witts should be dismissed with costs, but that over and above that an order should be made on Fairfax, as I understand it, to pay De Witts' costs of the Emmett action. The learned judge held that he had no jurisdiction to make such an order. The order sought was analogous to what I understand is known as a Bullock Order*, which is frequently made between co-defendants or between a defendant and a third party where one or other of the parties concerned has been substantially responsible for the litigation. Those orders, however, are confined to orders for costs made as between the parties to the proceedings. The question that we have now to decide is whether the learned judge was right in holding, as he did, that there was no jurisdiction to make such an order in a case like the present one where there are in origin two actions and these actions are not consolidated, but are, by consent, listed so that they will come on together. Counsel for De Witts says that the court has such jurisdiction and he relies on the very wide words of R.S.C., Ord. 65, r. 1, which provides:

> " Subject to the provisions of the Act† and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge . . . "

Counsel for De Witts says that on the language of that rule, it was perfectly open to the judge in the present case to deal as he might, in his discretion, think fit with the costs of Emmetts action against De Witts, which, in counsel's submission, ought to have been ordered to be paid to De Witts by Fairfax. After paying the best attention I can to the argument of counsel for De Witts, I find myself unable to accept it. " All proceedings " means all proceedings, I suppose, commenced in any manner authorised by the Rules of the Supreme Court. It is with respect to proceedings in that sense that the judge is given an absolute discretion as to costs. But what does that mean ? When the rule says that costs are to be in the discretion of the court or judge, it cannot mean that the court or judge can direct the costs in question to be paid by any person the judge may choose, whether he is a party to the proceedings or not. Some limit must be placed on the language and I should have thought it reasonably plain that the limit is this: that the court has a discretion to order the costs of and incident to all proceedings to be paid by the parties to those proceedings, or any of them, as the court in its discretion thinks right. If that be so, it seems to me that there must be an end of the argument of counsel for De Witts, for what he claims is that the court has jurisdiction to direct that the unsuccessful plaintiff in one action shall pay the defendant in that action the costs of a different proceeding to which that plaintiff was not a party. That as I understand it, would be the result of holding that there is a discretion of the kind contended for by counsel for De Witts in this case. I do not think that that can be right, and I found myself on the language of the rule and on the reasons which I have attempted briefly to express.

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* I.e., an order such as was made in *Bullock* v. *L.G.O.C.*, [1907] 1 K.B. 264.

† I.e., the Supreme Court of Judicature (Consolidation) Act, 1925.

We were not referred to any authority precisely in point, but the conclusion which seems to me to be right is perhaps borne out by some of the observations made in *Forbes-Smith* v. *Forbes-Smith & Chadwick* (1) ([1901] P. 258). The head-note there was:

> " A wife having filed a petition for judicial separation, on the grounds of her husband's cruelty, the husband afterwards filed a petition for dissolution of the marriage. An order was made for the consolidation of the two suits, and they came on for trial together. The wife's charge against the husband was withdrawn, there being no evidence in support of it; and her petition was dismissed. On the husband's petition a decree nisi was made for dissolution of the marriage, with costs and damages against the co-respondent, and the decree was afterwards made absolute:—*Held*, that the consolidation order had not the effect of making the proceedings on the wife's petition part of the proceedings on the husband's petition, and that consequently there was no jurisdiction under s. 34 of the Matrimonial Causes Act, 1857, to order the co-respondent to the husband's petition to pay the costs of the proceedings on the wife's petition."

The decision of JEUNE, P., was reversed.

That is, of course, a very different case and it must be borne in mind that it turned to a great extent on a particular provision of the Matrimonial Causes Act, 1857. However, the observations of COLLINS, L.J., seem to me to have some bearing on the question in this case. He says (ibid., at p. 269):

> " This then being an appeal against a final order, the question next arises whether the decision was right. The parties have consented that the appeal shall be heard by two judges. Can the order be maintained ? The question turns upon s. 34 of the Matrimonial Causes Act, 1857. The power to order a co-respondent to pay costs is a statutory one; the court has no inherent power to visit with costs a co-respondent who is not in the strictest sense of the word a ' party ' to the proceedings. He is introduced into the suit by virtue of the provisions of the statute. It seems to me that the learned President was quite right in holding that the power given by s. 34 is limited to persons who are parties to ' the proceedings '. And I think ' the proceedings ' must mean the proceedings in a suit to which the co-respondent is a party, i.e., the proceedings upon ' a petition presented by a husband.' The section gives no power of itself to visit with costs any person who is not a party to the proceedings . . . [Then he said (ibid., at p. 271):] We cannot visit him with the costs of proceedings to which he was not a party. The jurisdiction arises only if the proceedings on the wife's petition have become part of the proceedings on the husband's petition, and I do not think that is the result of the order for consolidation. In my opinion there has been nothing analogous to consolidation at common law. The practice of trying at the same time petitions by a husband and a wife has been adopted merely for convenience, and does not operate to consolidate the two suits in the sense of constituting one suit out of the two."

In the present case, as has appeared from what I have already said, there was no consolidation. The difficulties in the way of consolidation were obvious in that the two actions were actions in which the interests of the respective plaintiffs were diametrically opposed. However, assuming that, in theory, consolidation would have been practicable, there was none. These two actions, still bearing their original character as separate and distinct actions, were, for convenience, listed and heard together; but that does not make them anything else than two actions, and I think that the learned judge's discretion as to the costs of either action must be confined to the parties to that action. For the reasons which I have endeavoured to express, I think that the learned judge came to a right conclusion in holding he had no jurisdiction to make the order sought.

A I would add that, while the view I have taken on the question of jurisdiction renders it unnecessary to go into the merits, which were not argued before us, it does seem to me that it is not, by any means, a foregone conclusion that the order which counsel for De Witts says should have been made ought, on the merits of the case, to have been made in all the circumstances.

For those reasons I would dismiss this appeal.

B **PARKER, L.J.:** I agree. Under R.S.C., Ord. 65, r. 1:

> "... the costs of and incident to all proceedings in the Supreme Court ... shall be in the discretion of the court or judge ..."

"Proceedings" there must mean proceedings properly brought before the court in the prescribed manner (see Ord. 1, rr. 1 and 2). It is also clear that A cannot C be ordered to pay the costs of B incurred in proceedings to which A was not a party. Accordingly, to succeed, counsel for De Witts must show in the present case that Fairfax were parties to the same proceedings as Emmetts and De Witts. He seeks to do that by reference to the order that was made in the interpleader proceedings that these two actions—and indeed a third—were to be listed and tried together. I am satisfied that that order does not have D the effect of turning separate proceedings into one set of proceedings. Nothing short of consolidation can do that under the existing rules, and in this case not only was there no order for consolidation, but on the facts it is clear that consolidation was impracticable.

The truth of the matter is that this order, which is not an uncommon order to make, is eminently one of convenience in that it enables all the evidence to be E called at once before the court; but it does not, under the rules as at present constituted, enable the judge at the trial of the proceedings listed and tried together to make what I may call a global order in regard to costs. For my part, I confess that, in cases where consolidation is not possible, it is not only convenient that this order should be made, but it may be that, in the interests of justice, the court should have power to deal with all the costs of the proceedings tried F together. However, under the rules, I am quite satisfied that that cannot be done at present.

For those reasons I would dismiss this appeal.

PEARCE, L.J.: I agree.

Appeal dismissed.

Solicitors: *Henry Pumfrey & Son* (for De Witts, the mercantile company, the defendants); *Bell, Brodrick & Gray* (for Fairfax, the newspaper proprietors, the plaintiffs).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

BAUME & CO., LTD. *v.* A. H. MOORE, LTD.

[CHANCERY DIVISION (Danckwerts, J.), October 22, 23, 1957.]

Trade Mark—Infringement—Maker's name—Bona fide use of own name as trade mark—Confusion in the course of trade—Trade Marks Act, 1938 (1 *&* 2 *Geo.* 6 *c.* 22), *s.* 4 (1), *s.* 8 (1).

Passing Off—Name of maker—Bona fide use by defendant of own name—Confusion of defendant's goods with plaintiff's.

The plaintiff, Baume & Co., Ltd., and its predecessors had traded in England as distributors and sellers of watches for some hundred years. Since 1878 the word " Baume " had been the registered trade mark for the watches, and the plaintiff was the registered proprietor of the mark. The defendant, A. H. Moore, Ltd., began to import and sell watches made by a Swiss company, known as Baume & Mercier, S.A. The watches, and the boxes containing them, bore the mark " Baume & Mercier, Genève ", without including the final letters " S.A." after the name " Baume & Mercier ". The plaintiff claimed that this use of the word " Baume " constituted an infringement of its trade mark (within s. 4 (1) of the Trade Marks Act, 1938*) and was calculated to pass off the goods sold by the defendant as the plaintiff's goods.

Held: (i) the defendant had not infringed the plaintiff's trade mark because, although the use of the name "Baume & Mercier, Genève " would be likely to cause confusion in the course of trade, its use was a bona fide use by the makers of their own name, which was therefore protected by s. 8 of the Trade Marks Act, 1938, notwithstanding that they used their name as a trade mark; and the absence of the letters " S.A." from the mark used by the defendant was not fatal to this defence (dictum of EVE, J., in *Jay's, Ltd.* v. *Jacobi,* [1933] Ch. at p. 415, not applied).

(ii) the defendant had not passed off the watches sold under the mark " Baume & Mercier, Genève " as the goods of the plaintiff since, the use of the mark was a bona fide use by the makers of their own name.

Harris (*C. & T.*) (*Calne*), *Ltd.* v. *Harris* ((1933), 51 R.P.C. 98) considered.

[As to the bona fide use of a person's own name not constituting infringement of a trade mark, see 32 HALSBURY'S LAWS (2nd Edn.) 594, para. 900; and for cases on the subject, on the right to use one's own name, see 43 DIGEST 265, *1053* et seq.

For the Trade Marks Act, 1938, s. 4 (1), s. 8, see 25 HALSBURY'S STATUTES (2nd Edn.) 1183, 1186.]

Cases referred to:

(1) *Jay's, Ltd.* v. *Jacobi,* [1933] Ch. 411; 102 L.J.Ch. 130; 149 L.T. 90; 50 R.P.C. 132; Digest Supp.

(2) *Harris* (*C. & T.*) (*Calne*), *Ltd.* v. *Harris,* (1933), 51 R.P.C. 98; *affd.* C.A., (1934), 51 R.P.C. 264; Digest Supp.

Action.

The plaintiff, Baume & Co., Ltd., was the registered proprietor of trade mark No. 14263 registered on Feb. 14, 1878, for watches and all other descriptions of horological instruments. The trade mark consisted of the word " Baume ".

The plaintiff had been trading as a distributor and seller of watches in England since 1834 and from that date the word " Baume " had been continuously and extensively used in relation to the watches. The defendant, A. H. Moore, Ltd., imported and distributed in England watches manufactured in Switzerland by Baume & Mercier S.A. These watches were sold in boxes bearing on the outside " Baume & Mercier, Genève " (or, in some cases, " Geneva "). On the dial of the watches and on the movement inside, the words " Baume & Mercier, Genève " or " Geneva " appeared. Baume & Mercier S.A. had manufactured watches under its own name since 1918, and there had at one time been a connexion between that company and the plaintiff in that the two companies were run by brothers named Baume. Any such connexion had long since ceased.

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* The terms of s. 4 (1) and s. 8 of the Trade Marks Act, 1938, are printed at p. 417, letters D to H, post.

The plaintiff claimed that the use of the word " Baume " as part of the name " Baume & Mercier " was an infringement of its trade mark " Baume " and also was calculated to deceive and create confusion so as to pass off goods sold by the defendant as the plaintiff's goods. The defendant denied the alleged infringement of the trade mark " Baume " and contended that use of " Baume & Mercier " involved only a bona fide use of the name of the manufacturers of the watches, such bona fide use being protected by s. 8 of the Trade Marks Act, 1938.

J. N. K. Whitford for the plaintiff.
F. E. Skone James for the defendant.

DANCKWERTS, J., briefly stated the facts and continued: So far as the trade mark is concerned, the matter depends now on the Trade Marks Act, 1938, s. 4 (1), which provides:

> " Subject to the provisions of this section, and of s. 7 and s. 8 of this Act, the registration (whether before or after the commencement of this Act) of a person in Part A of the register as proprietor of a trade mark (other than a certification trade mark) in respect of any goods shall, if valid, give or be deemed to have given to that person the exclusive right to the use of the trade mark in relation to those goods and, without prejudice to the generality of the foregoing words, that right shall be deemed to be infringed by any person who, not being the proprietor of the trade mark or a registered user thereof using by way of the permitted use, uses a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion, in the course of trade, in relation to any goods in respect of which it is registered, and in such manner as to render the use of the mark likely to be taken either —(a) as being use as a trade mark; or (b) in a case in which the use is use upon the goods or in physical relation thereto or in an advertising circular or other advertisement issued to the public, as importing a reference to some person having the right either as proprietor or as registered user to use the trade mark or to goods with which such a person as aforesaid is connected in the course of trade."

It will be observed that the provisions of s. 4 (1) are subject to s. 8 of the Act, which provides, so far as material:

> " No registration of a trade mark shall interfere with—(a) any bona fide use by a person of his own name or of the name of his place of business, or of the name, or of the name of the place of business, of any of his predecessors in business . . ."

The issues in the case, therefore, are, it appears: first, whether the use by importers of the name " Baume & Mercier, Genève ", would be liable to cause confusion in the course of trade; and secondly, assuming that that is so, whether a defence is open to the defendants in respect of the trade mark under s. 8 of the Act.

The defendant is not the manufacturer of the goods or the assembler; it merely imports them and distributes them, and its name is not " Baume & Mercier ". It is, however, accepted on both sides that, as the Swiss company to which I have referred is Baume & Mercier, S.A. (to use a very common abbreviation) if the goods using its name come within the provisions of s. 8, then there is a defence to the action for the defendant*. A

As regards passing off, the position is very similar, the salient point being whether the use of the name in the manner which has occurred is likely to cause confusion, and whether there is again a defence of honest user of the makers' own name. B

The name used, Baume & Mercier, is not exactly the same as the registered trade mark "Baume" which is used in connexion with watches as a mark by the plaintiff in the course of its trade. It would appear that in the past there was at any rate a family connexion between the plaintiff in this country and the company Baume & Mercier in Switzerland. At one time, apparently, there was a brother in Switzerland and a brother in England, but it is also plain that for C quite a time, at any rate, there has been no Baume connected with the company of Baume & Mercier, and it also appears that during the period when there were relatives in each of the two countries—in England and Switzerland—there may have been some co-operation between the two companies, and no sort of rivalry as regards trade in England. It appears that within the last few years the Swiss company has been desiring to extend its trade of the sale of watches in this D country, and it was in that way that the defendant came to import its watches and distribute them here.

A good deal of evidence has been given to suggest that in the watch trade customers are ready to distinguish one name from another, and also that the dealers in watches in this country are so used to different kinds of watches and different makes that they would not be likely to be misled into thinking that E there was any connexion between the plaintiff's watches and those sold by the defendant. There is, however, also some evidence which supports the view that the ordinary unlearned public not in the trade might use the name of the Swiss company, or the name under which the Swiss watches are sold, abbreviated and that some confusion might occur. I should perhaps mention that the plaintiff's watches are also made in Switzerland at present by a firm or company called F Mildia, and they are imported by the plaintiff and distributed by it. In a matter of this sort it is always rather difficult to see how far confusion is likely or possible, and what exactly the public will do, in the absence of positive evidence of actual deception. On the whole I have come to the conclusion that the names are sufficiently similar so that members of the public would not necessarily be likely to perceive that "Baume & Mercier" was not the same as "Baume" and I think, G therefore, that there is some probability that confusion might occur in England in respect of the sales of the watches.

I turn now to the second point, which seems to me to be one of importance, viz., whether the defendant has a defence under the provisions of s. 8 of the Trade Marks Act, 1938, and the corresponding case law in respect of the law of passing off. It is quite true, as has been pointed out by EVE, J., in *Jay's, Ltd.* v. *Jacobi* (1) H ([1933] Ch. 411), that the name of a limited company (or, it appears to me, the equivalent in Switzerland) is not complete without the word "Limited" in England, or the expression "Societé Anonyme" or the letters "S.A" abroad. In *Jay's* case (1) (ibid., at p. 415) EVE, J., referred to that as being a distinguishing feature, distinguishing the plaintiff's trade from that of the defendants in that case. I do not myself think that the matter is of decisive importance. One I knows, as a matter of fact, that companies' names are very commonly used without the addition of the word "Limited", and I should imagine the same is true of a company incorporated in Switzerland, where you would be likely to refer to it simply as "Baume et Mercier", particularly where the company is a successor of a business which has formerly been a partnership. That element is common to both the plaintiff in this country and Baume & Mercier in Switzerland.

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* Cf., 32 HALSBURY'S LAWS (2nd Edn.) 655, text and note (c).

Therefore, I think the mere omission of the letters " S.A." or the words " Societé Anonyme " is not fatal to the defendant's reliance on s. 8 and the corresponding defence which I have mentioned in respect of passing off.

Counsel for the plaintiff has put forward a point which has troubled me to some extent, partly because there does not seem to me to be conclusive authority on the matter. He has contended that the provisions of s. 8 only protect the use by a person or company of his own name generally in the sense of carrying on a trade and describing himself as such or giving his address with the name, and that where the name is used as a trade mark, then the defence is not available.

It is to be observed in considering this matter that it appears to be admitted on behalf of the defendant in its defence that the defendant has " offered for sale, sold and supplied watches bearing the mark ' Baume & Mercier, Genève '." It appears to be admitted there that the use of that name has been as a mark—meaning a trade mark—and there is indeed, I think, evidence supporting that admission: that the use of the name Baume & Mercier on the watches, and also on the boxes in which the watches were sold, has been the use of that name as a mark, indicating the origin of the goods in question. So far as the facts go, therefore, I think it must be accepted that the defence of the defendant cannot prevail unless the provisions of s. 8 are sufficiently wide to cover use by a trader or manufacturer of his own name as a mark in respect of the goods which are sold under his name. Besides the actual name of the company, Baume & Mercier, there appears the word " Geneva " or " Genève ", and the watches of the company are in fact assembled in Geneva, so that the description which is an addition to the name is, it would seem, a correct description. As regards infringement, I should perhaps have mentioned that the addition of the word " Geneva " cannot, I think, save the defendant if there is otherwise risk of confusion, but obviously so far as it is the use of the actual name of the manufacturer, the addition of the word " Geneva " or " Genève " assists rather than detracts from the defendant's case.

The only case in which the point now raised has been considered at all, as it seems to me, is a decision of FARWELL, J., in *C. & T. Harris* (*Calne*), *Ltd.* v. *Harris* (2) ((1933), 51 R.P.C. 98, affirmed on appeal (1934), 51 R.P.C. 264). There the defendant, whose name was F. S. E. Harris, was using the name " Harris " stamped on Danish bacon, and it was claimed by the plaintiffs that that was a passing off of the defendant's goods, and that his bacon could be confused with the plaintiffs' bacon, which was English bacon always and therefore not Danish. FARWELL, J., held that there was no likelihood or risk of confusion because of the difference in the trade, and therefore in a sense everything that he said on the point which I am now considering may be said to be obiter. FARWELL, J., is reported as making an interpolation in the course of the argument. Mr. Trevor Watson, K.C., on behalf of the defendant, said (51 R.P.C. at p. 102):

> " As regards the defence under s. 44 [Trade Marks Acts, 1905 to 1919, s. 44 was the forerunner of s. 8 in the Trade Marks Act, 1938] the question is whether the mark used is a bona fide use of the defendant's own name ",

whereupon FARWELL, J., said: " Do you say he can use his own name as a mark?" Mr. Trevor Watson, K.C., replied:

> " Yes, the only rights the registered owner has under the Act are set out in s. 39, and these are the sole rights of using the mark upon or in connexion with specified goods, never a monopoly of it for a mere general trading. These rights are cut down by s. 44. Any bona fide use by a person of his own name is permissible."

The judgment of FARWELL, J., does not deal exactly with the question which has been raised by counsel for the plaintiff in the present case. FARWELL, J., after reading s. 44 of the Trade Marks Act, 1905, continued (ibid., at p. 109):

> " It is said on behalf of the defendant that he is making a bona fide use of his own name, and he is therefore completely protected by s. 44. Now s. 44 is in wide terms, and it does provide in terms that no registration shall interfere with any bona fide user by a person of his own name. The defendant here is using his own name. In my judgment, the only question which I have to determine upon this section is whether such user is bona fide or not."

The learned judge was apparently directing his mind to the effect of s. 44, although it appears to me that the name simply of Harris which the defendant was using was not completely the defendant's own name, and as appears from other cases, the possibility of confusion is increased by a person who uses only part of his name, and that might not necessarily be a defence to the action. Moreover, it seems fairly plain that as the defendant was simply stamping " Harris " on the Danish bacon, he was using the name Harris as a mark. The learned judge then uses some language which I find it rather difficult to follow (ibid.):

> " If it be bona fide, then I see no way of escape for the plaintiffs from the effect of this section. I agree with the argument which has been addressed to me on behalf of the plaintiffs to this extent, that by using the words ' bona fide ' in that section it was not intended that the use should merely not be fraudulent, or deliberate with an intention to deceive, or anything of that kind, by the person whose own name is being used. If in fact the use of the name does lead to the result that that person's goods are being passed off as the goods of another, although that may not have been the intention of the person so using that name, and although he may have a perfectly honest reason for using it, yet if in fact the use of the name which the defendant makes is such that it leads, or must lead, to a misrepresentation that the goods of the defendant are the goods of the plaintiff, then in my judgment the defendant is not entitled to use his name, although it is his own name and although he has not, and may never have had, any fraudulent intention."

That is the passage which I find rather difficult to apply. I think that I understand what " bona fide " normally means in this connexion: it means the honest use by the person of his own name, without any intention to deceive anybody or without any intention to make use of the goodwill which has been acquired by another trader. When, however, I find the learned judge saying that there may be confusion which will prevent the use being bona fide for the purposes of the section, I find great difficulty in seeing what is the standard which is to be applied in a case of that kind. How much risk of confusion is necessary before the benefit of what appears to be quite a generally expressed section is lost? However, perhaps it is not necessary for me to consider that precise point in the present case, because whatever FARWELL, J., may have meant, I do not think that I can say in the circumstances of the present case that the use by Baume & Mercier S.A. of their name in the manner in which it has been used was not bona fide for the purposes of s. 8 of the Trade Marks Act, 1938.

I have still to deal with the point which I have mentioned: whether the use by Baume & Mercier of that name as a mark, for the purposes of indicating the origin of the goods, in spite of the language of the section and in spite of its being (as I have held) their own name, as I have mentioned, is none the less not protected by the section. Section 8 is expressed in general terms, and I agree with the suggestion which was put forward by counsel for the defendant in his argument, that if s. 8 merely applies to things like putting the name of a person over his business premises or putting it at the head of his notepaper and using it as part of the name of his company, then it seems that the protection provided by s. 8 is of an extremely limited character. I have come to the conclusion that it would not be right for me to put any such limitation on the excepting provision, as I see it, to prevent a person being harried in respect of the perfectly innocent and honest user of a name connected with himself for the purposes of selling his goods. I think it would not be right to limit the section in the way which has been contended for by counsel for the plaintiff.

In the present case the use of the name in respect of the watches, in regard to which complaint has been made, is a bona fide use by the makers of their own name, and therefore is protected by the provisions of s. 8. Accordingly the defence prevails in this respect and the action must fail.

Judgment for the defendant.

Solicitors: *Cummings, Marchant & Ashton* (for the plaintiff); *Stollard & Limbrey* (for the defendant).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

NOTE.

WEST OF ENGLAND STEAMSHIP OWNERS PROTECTION AND INDEMNITY ASSOCIATION, LTD *v.* JOHN HOLMAN & SONS.

[CHANCERY DIVISION (Roxburgh, J.), October 22, 1957.]

Practice—Service—Service out of jurisdiction—Partnership—One partner out of jurisdiction—Action against partnership in firm's name—Service of writ on partners within jurisdiction—Service of concurrent writ on partner outside jurisdiction—R.S.C., Ord. 11, *r.* 1 (*g*)—*R.S.C., Ord.* 48A, *r.* 1, *r.* 3, *r.* 8.

[As to actions against partners, see 24 HALSBURY'S LAWS (2nd Edn.) 442, 443, paras. 850, 851, and 446, para. 853.]

Case referred to:

(1) *Lindsay* v. *Crawford & Lindsays*, (1911), 45 I.L.T. 52.

Procedure Summons.

The plaintiffs in an action against a firm applied for leave to issue a concurrent writ and to serve it on a partner outside the jurisdiction, under R.S.C., Ord. 11, r. 1 (g).

The plaintiffs had commenced the action against the partners of the firm in the name of the firm "John Holman and Sons", in accordance with R.S.C., Ord. 48A, r. 1. The writ had been served, in accordance with R.S.C., Ord. 48A, r. 3, on each of the partners who was within the jurisdiction, but one partner was outside the jurisdiction and had not been served. By r. 3, service on the partners within the jurisdiction

> ". . . shall [subject to the rules] be deemed good service upon the firm so sued, whether any of the members thereof are out of the jurisdiction or not, and no leave to issue a writ against them shall be necessary . . ."

By R.S.C., Ord. 48A, r. 8, which deals with the execution of judgment against a firm

> ". . . execution may issue: (a) Against any property of the partnership within the jurisdiction . . . (c) Against any person who has been individually served, as a partner, with the writ of summons, and has failed to appear . . . But except as against any property of the partnership, a judgment against a firm shall not render liable, release, or otherwise affect any member thereof who was out of the jurisdiction when the writ was issued, and who has not appeared to the writ unless he has been made a party to the action under Ord. 11, or has been served within the jurisdiction after the writ in the action was issued."

By R.S.C., Ord. 11, r. 1:

> " Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever . . . (g) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."

The application was adjourned into open court for argument, and judgment was given in court.

K. W. Mackinnon for the plaintiffs.
None of the defendants appeared.

ROXBURGH, J., having referred to the relevant facts, pointed out (a) that there was a misstatement in R.S.C., Ord. 48A, r. 8, in the words " unless he has been made a party to the action under Ord. 11 ", because R.S.C., Ord. 11, dealt with service out of the jurisdiction, and not with making persons parties to the action; and (b) that (although this was a very technical point), as the matter stood at the moment, the plaintiffs could not make the application under R.S.C., Ord. 11, r. 1 (g), because that rule presupposed that, while there had been service on a person within the jurisdiction, there had been no service on the person outside the jurisdiction, and, by the effect of R.S.C., Ord. 48A, r. 3, there had already been what was deemed to be good service on the person out of the jurisdiction. HIS LORDSHIP continued: For forty-seven years there has stood in the ANNUAL PRACTICE* a note to this effect:

> ". . . If, however, there is good reason for effecting service on a partner in a firm sued under [R.S.C., Ord. 48A], r. 1, who is out of the jurisdiction, he must be sued personally as well as under the firm's name . . ."

That note has been standing for forty-seven years, and, as far as I know, has never been challenged. On the other hand, it seems to me to be quite illogical because the partner is sued by the use of the firm name. Surely, if he is to be sued separately, there should be something to indicate that the firm name does not in the particular circumstances include him. This particular practice was approved of, as far as I can see, and I think adopted, though the report is not at all easy to follow, in an Irish case, *Lindsay* v. *Crawford & Lindsays* (1) ((1911),

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* See note " Sued as partners . . . under r. 1 " (the first note to R.S.C., Ord. 48A, r. 3) in the ANNUAL PRACTICE, 1957, p. 855.

45 I. L.T. 52). I quite see the force of counsel's attack on that note and on the Irish case. Fortunately, I do not think that it is necessary for me to decide in this case whether that is necessarily the right procedure. The whole rule is illogical in the strict sense of jurisprudence. It is one of those many examples where English law has sacrificed principle to expediency. That being so, I am not sure why this practice, which seems to have stood for forty-seven years, should not be continued, because it is convenient, though perhaps illogical. To me it certainly is convenient because, if there is going to be an application under R.S.C., Ord. 11, for leave to serve a particular individual out of the jurisdiction, it is obviously much more convenient that that particular individual, who is going to be dealt with separately, should be separately named in the writ. Therefore, on the basis of convenience there is everything to be said for what seems to me to be an illogical practice.

Unfortunately, I take the view that the policy of counsel for the plaintiffs is one which is neither justified by rule, nor convenient. What he seeks to do is to say that, in an action merely against the partners in the firm name, he can come before the master and apply for leave to serve out of the jurisdiction one of the persons disclosed as being a partner in an affidavit. That does not seem to me to be a convenient practice. It seems to be not in accordance with the requirements of R.S.C., Ord. 11, for the technical reason which I have already given. My own view is that the logical and most convenient way would be to make all the partners parties individually, and just say at the end " trading as John Holman & Sons ". Because of that, it seems to me that the whole matter is not of much importance. I shall give counsel this alternative: he will have to amend before I give any leave to serve out of the jurisdiction. I shall be quite willing to let him adopt the course which has hitherto, so far as I know, been adopted for nearly fifty years; or he can do what I have suggested, which is, to my mind, the more convenient view. He can amend by putting in the name of all the partners individually, and then I shall give him leave under R.S.C., Ord. 11, r. 1 (g), because the foreign partner is a proper party.

Solicitors: *Richards, Butler & Co.* (for the plaintiffs).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

Re PARINGA MINING AND EXPLORATION CO., LTD.

[Chancery Division (Wynn-Parry, J.), October 28, 1957.]

Company—Reduction of capital—Practice—Reduction of share premium account—Form of minute for registration—Companies Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 38), *s.* 4, *s.* 56 (1), (2), *s.* 69 (5).

Where a reduction of share capital, including the writing down of part, or the writing off of the whole, of the share premium account is confirmed by the court, the minute approved by the court pursuant to s. 69 of the Companies Act, 1948, should not refer to the writing down or the writing off of the share premium account, for the following reasons, viz.—(a) if the share premium account is written off, such a reference is irrelevant, and (b) if it is written down, the substitution of the minute for the corresponding part of the memorandum (in accordance with s. 69 (5)) would give rise to a conflict between s. 4 of the Act (which provides that the conditions of the memorandum cannot be altered except as expressly provided by the Act) and s. 56 (2) (which enables the share premium account to be applied in certain ways).

[For forms of minutes on the reduction of share capital, see 6A Ency. Court Forms 68 et seq.

For the Companies Act, 1948, s. 4, s. 56 and s. 69, see 3 Halsbury's Statutes (2nd Edn.) 465, 508, 518.]

Petition.

This was an application to confirm a reduction of capital and share premium account. The scheme involved the reduction of capital from £300,000 to £67,610 and the cancellation of the share premium account of £189,556 18s. 2d.

The reduction was confirmed by the court and a question arose on the form of the minute which it was proposed to register in that, contrary to previous practice, it contained no reference to the writing off of the share premium account. The proposed minute was as follows:

" The capital of Paringa Mining and Exploration Co., Ltd., was by virtue of a special resolution and with the sanction of an order of the High Court of Justice dated . . . reduced from £300,000 divided into 591,200 shares of 1s. each and £270,440 stock to £67,610 stock. A special resolution has been passed to take effect upon the aforesaid reduction of capital taking effect increasing the capital of the company to £500,000 by the creation of 8,647,800 additional shares of 1s. each."

R. B. S. Instone for the company.

WYNN-PARRY, J.: This is a petition for the confirmation of a reduction of the company's capital and share premium account by writing down its capital from £300,000 to £67,610 and its share premium account from £189,556 18s. 2d. to nil. The evidence satisfies me that both those sums have been lost, and I find no difficulty in confirming the reduction. A point, however, has been taken on the form of the minute. It is, I am told, the practice of the court up to now, in cases where there is a share premium account and it is written off or written down, to include a reference to the resulting position as regards the share premium account in the minute. This practice has been challenged by counsel, who appears for the company.

The position of the share premium account on a reduction of capital is dealt with by s. 56 of the Companies Act, 1948. Section 56 (1) provides:

> " Where a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount or value of the premiums

> on those shares shall be transferred to an account, to be called ' the share premium account ', and the provisions of this Act relating to the reduction of the share capital of a company shall, except as provided in this section, apply as if the share premium account were paid up share capital of the company."

Prima facie, that language is sufficient to bring into operation all the other provisions of the Act relating in any way to the reduction of the share capital of the company, and would therefore bring into operation s. 69 and s. 70. Section 56 (2) provides:

> " The share premium account may, notwithstanding anything in the foregoing sub-section, be applied by the company in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares, in writing off—(a) the preliminary expenses of the company; or (b) the expenses of, or the commission paid or discount allowed on, any issue of shares or debentures of the company; or in providing for the premium payable on redemption of any redeemable preference shares or of any debentures of the company."

I will consider s. 69, bearing in mind the provisions of s. 4, namely, that:

> " A company may not alter the conditions contained in its memorandum except in the cases, in the mode and to the extent for which express provision is made in this Act."

Section 69 relates to the registration of the order of the court and the minute, and sub-s. (1) to the content of the minute according to the type of case involved. Sub-section (5) is the important sub-section for this purpose and it provides:

> " The minute when registered shall be deemed to be substituted for the corresponding part of the memorandum, and shall be valid and alterable as if it had been originally contained therein."

Section 70 relates to the liability of members in respect of reduced shares; and, prima facie, that also must operate in the case of a reduction involving the writing down or writing off of the share premium account. Take first the case of writing off a share premium account altogether. What is the relevance, for the purpose of the minute, of putting in a reference to that complete writing off? Section 69 (5) as I pointed out provides in effect that the minute is to form part of the memorandum, taking the place of the statement of the capital in the memorandum which, before registration of the minute, and before the reduction was confirmed, represented an accurate statement of the company's capital. If—this, I think, is a stronger case—a share premium account is written down without being written off completely, then the remaining amount of the share premium account, if it appears in the minute, must by the operation of s. 69 (5) be part of the memorandum.

How, then, is one to reconcile s. 4, which provides that a company may not alter the conditions of the memorandum except in the cases expressly provided in the Act, with the provision in s. 56 (2) that the share premium account may be applied by the company in the various ways which are stated in that section? It may be said that that can be done because of the express exception in sub-s. (1); but it seems to me to be very inconvenient to proceed on the basis that something is to be treated as part of the memorandum of association of a company and therefore prima facie unalterable under s. 4 except to the extent expressly allowed by the Act and at the same time that there should be this express power to deal with the share premium account as provided in s. 56 (2).

I think that the sensible view to take is to regard the provisions of s. 69 relating to the minute—I am not going to trouble about s. 70—as inapplicable, so far as regards the share premium account, to cases where the reduction involves either the writing down or the writing off of the share premium account. I think that the convenience of the matter and the doubts which have been thrown on the possible reconciliation of s. 4 and s. 56 make it desirable to alter the practice. I shall, therefore, in this case accede to the application which has been put forward by counsel and direct that the minute shall make no reference to the share premium account.

I therefore approve the minute without the proposed reference to the share premium account, with the slight exception that the word "additional" in front of "shares" in the last line of the minute as appearing in the petition should be omitted. There will be the usual directions as to advertisement.

Order accordingly.

Solicitors: *Nordon & Co.* (for the company).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

R. *v.* HEAD.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Donovan and Havers, JJ.), July 23, October 21, November 1, 1957.]

Criminal Law—Carnal knowledge—Mental defective—Whether offence can be committed against person unlawfully detained in institution—Mental Deficiency Act, 1913 (3 *&* 4 *Geo.* 5 *c.* 28), *s.* 56 (1) (*a*).

H. was convicted and sentenced on two charges, under s. 56 (1) (a) of the Mental Deficiency Act, 1913*, of carnal knowledge of a woman in October, 1956, while she was on licence from an institution for mental defectives. He appealed against his conviction and sentence on the ground that she was not legally detained, the original detention order not having been validly made. The prosecution admitted that the order was invalid, but contended that, as she was in fact a mental defective and a "woman . . . under care or treatment in an institution . . . placed out on licence therefrom" within the words of s. 56 (1) (a), the offence had been committed.

Held: section 56 (1) (a) of the Mental Deficiency Act, 1913, did not apply as the woman had not been lawfully made subject to the Act; the conviction was, therefore, quashed.

Per CURIAM: where a man is prosecuted for this offence under s. 8 of the Sexual Offences Act, 1956, evidence must be given . . . that the woman in respect of whom the charge is made was lawfully subject to the Act of 1913 at the time of the offence (see p. 429, letter H, and p. 431, letter D, post).

Appeal allowed.

[**Editorial Note.** Section 56 of the Mental Deficiency Act, 1913, was repealed at the end of 1956 by the Sexual Offences Act, 1956, s. 51 and Sch. 4, and s. 56 (1) (a) of the Act of 1913 is replaced by s. 8 of the Act of 1956.

As to the offence of carnal knowledge of a mental defective, see 21 HALSBURY'S LAWS (2nd Edn.) 504, 505, para. 917; as to what is meant by moral defective, see ibid., p. 279, para. 483; and for cases on sexual offences against women of weak intellect, see 15 DIGEST (Repl.) 1013, 1014, *9987-9990.*

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* The terms of this paragraph are printed at p. 429, letter C, post.

For the Mental Deficiency Act, 1913, s. 1 and s. 56 (1) (a), see 17 HALSBURY'S STATUTES (2nd Edn.) 1186 and 1218; and for s. 8 of the Sexual Offences Act, 1956, see 36 HALSBURY'S STATUTES (2nd Edn.) 221.]

Appeal.

John Shortriggs Head was convicted at Carlisle Assizes on May 22, 1957, on two charges of carnal knowledge of a mental defective in that he on Oct. 7 and Oct. 24, 1956, had carnal knowledge of a woman on licence from an institution for mental defectives. He was sentenced to four months' imprisonment. His application for leave to appeal was granted on July 8, 1957, and the appeal came on for hearing before LORD GODDARD, C.J., BYRNE and DEVLIN, JJ., on July 23, 1957, when the court adjourned the appeal for the Board of Control to be represented.

The woman was born on July 6, 1928, and was committed to an approved school in 1945 on a complaint by her father under s. 64 of the Children and Young Persons Act, 1933, that she was beyond his control. On July 2, 1947, an order was made by the Secretary of State under s. 9 of the Mental Deficiency Act, 1913, transferring her to an institution for defectives. The two medical certificates on which the order was made classified her as a moral defective, although the facts stated therein as the grounds of so classifying her were insufficient to show that she came within the definition of moral defective in the Mental Deficiency Act, 1913, s. 1 (d) (as substituted by the Mental Deficiency Act, 1927), viz.:

> "persons in whose case there exists mental defectiveness coupled with strongly vicious or criminal propensities and who require care, supervision and control for the protection of others."

A continuation order for a year from Sept. 29, 1948, was made on Oct. 5, 1948, by the Board of Control and her case was reconsidered when she reached the age of twenty-one. A further detention order for five years from Sept. 29, 1949, was made by the Board of Control on Oct. 4, 1949, and another for five years from Sept. 29, 1954, was made on Oct. 6, 1954. In 1954 Dr. Ferguson, the medical superintendent of the institution in which she was detained, re-classified her as "feeble-minded" rather than a moral defective. In October, 1956, at the time to which the charges related, the woman was in fact out on licence from an institution for mental defectives.

The appellant contended that he had committed no offence because the woman was not legally detained in the institution for defectives from which she was on licence at the time of the alleged offences. The respondents admitted that the original order of July 2, 1947, was not valid, but alleged that the offences charged were established because the woman was in fact a mental defective who had been receiving care or treatment in an institution for defectives and was on licence therefrom at the time of the alleged offences.

G. W. Guthrie Jones for the appellant.

The Attorney-General (*Sir Reginald Manningham-Buller, Q.C.*) and *A. S. Booth* for the Crown.

Rodger Winn for the Board of Control.

Cur. adv. vult.

Nov. 1. The following judgments were read.

LORD GODDARD, C.J.: This case is one of such importance that the court deems it convenient that they should exercise their powers under s. 1 (5) of the Criminal Appeal Act, 1907, and two judgments will be delivered. HAVERS, J., was to have delivered the second judgment, but he is ill, and he authorises me to say that he agrees with both the judgments about to be

delivered. The court has already allowed the appeal in this case and quashed the A
conviction and now proceed to give their reasons.

The appellant was convicted before HINCHCLIFFE, J., at the Carlisle Summer Assizes on two counts each charging him with having carnal knowledge of a mental defective contrary to s. 56 (1) (a) of the Mental Deficiency Act, 1913, and the particulars charged that on two days in October, 1956, he had carnal knowledge of a woman on licence from Dovenby Hall Hospital, an institution for B
mental defectives. It was not disputed that the accused had carnal knowledge of the woman on each of the occasions charged or that he knew that she had been an inmate of the institution and was on licence therefrom in the sense that he knew that she had been permitted to leave it to go to a school at Keswick as a domestic servant. In fact she had been licensed so to do. The defence was that the woman had never legally been certified as a mental defective, that her deten- C
tion for care and treatment had been illegal and that consequently she was not subject to any licence so that no offence had been committed.

The prosecution called as their first witness the medical superintendent of the hospital who produced the various orders that had been made in respect of this woman and the relevant documents under which she had been detained for care and treatment and he proved that he had given her a licence under D
which she was allowed to leave the hospital on condition that she went out to service at the school. The history obtained from the documents produced showed that in April, 1945, when she was sixteen years old, she had been brought before the justices under s. 64 of the Children and Young Persons Act, 1933, by her father, a widower, on his complaint that she was a child whom he was unable to control; and she was committed by the justices to an approved school. The E
record of information prepared pursuant to s. 72 (2) of the Act of 1933 stated that her conduct at school gave no trouble, that her school character was good—somewhat forward and her ability average, but her character in employment was unsettled and not satisfactory. The medical report described her mental ability as apparently normal. The justices made an order and she was sent to a Roman Catholic approved school where she stayed until July 2, 1947. On that day an F
order was made by the Secretary of State under s. 9 of the Mental Deficiency Act, 1913, transferring her from the approved school to an institution for defectives. The material words of this section are:

> "Where the Secretary of State is satisfied from the certificate of two duly qualified medical practitioners that any person . . . who is detained G
> in a school approved under s. 79 of the Children and Young Persons Act, 1907, is a defective, the Secretary of State may order that he be transferred therefrom and sent to an institution for defectives . . . and any order so made shall have the like effect as if it had been made by a judicial authority on petition under this Act."

It is indeed difficult to understand how this order came to be made. The two H
medical certificates purport to show that the girl was a moral defective and no attention seems to have been paid to the definition of a moral defective in the Act. It must be found that there exists mental defectiveness coupled with strongly vicious or criminal propensities in a person who requires care, supervision and control for the protection of others. This definition must have been entirely ignored or overlooked by the certifying medical men and must have I
escaped the attention also of the Secretary of State and his advisers. There is nothing in the certificates to justify this girl being classed as a moral defective; troublesome, wayward or even immoral though she may have been. The Attorney-General, who has appeared to support the conviction, and Mr. Rodger Winn who appeared for the Board of Control (as the court on granting leave to appeal asked that they should be represented to give any information that the court might require) both stated that they could not contend that this order was

valid. It is indeed disturbing to find that this young woman has been subject to an order classifying her as a moral defective, and therefore subject to the provisions of the Act of 1913 from July, 1947, to Oct. 16, 1957, which is now admitted to have been illegal. Had it been brought before this court by certiorari or on an application for habeas corpus the girl would have been immediately discharged, and the court cannot but regret that the Board of Control, who have the administration of the Mental Deficiency Act, 1913, and must be presumed to be thoroughly acquainted with its provisions, have all these years treated it as valid and apparently never questioned it. They did not discharge the girl until after leave to appeal had been granted by this court and indeed only a few days before the appeal was due to be heard.

Now the material words of the section under which the appellant was charged, s. 56 (1) (a) of the Mental Deficiency Act, 1913, were:

> " Any person—(a) who unlawfully and carnally knows, or attempts to have unlawful carnal knowledge of, any woman or girl under care or treatment in an institution or certified house or approved home, or whilst placed out on licence therefrom or under guardianship under this Act "

was guilty of an offence. The Attorney-General submitted that all that the prosecution had to prove to establish a case in addition to the fact of carnal knowledge having taken place was that the girl was in fact in an institution for care or treatment or that she was out on licence from such an institution. He submitted that the section did not require proof that the girl was a defective. Now by s. 71 " institution " meant " certified institution ", and the latter expression meant that it was one in respect of which a certificate had been granted to the managers to receive defectives and that must have meant defectives under the Act. It is true that paras. (b) to (e) of s. 56 (1) referred in terms to defectives and para. (a) did not, no doubt because it would be presumed prima facie that a person who was in a certified institution was a defective within the Act. In my opinion the concluding words of para. (a), the words " under this Act ", applied to a girl under care or treatment in an institution and also when placed out on licence as well as to one under guardianship. To put it shortly, unless the woman or girl was a person who had been made subject to the Act the section did not apply. It could not, we think, have had any application to the case of a woman who had not been found to be a mental defective under the Act, still less to one who was unlawfully detained in an institution though she was being subjected to care and treatment; and if she was unlawfully detained she needed no licence to go out. What the statute was making unlawful was carnal knowledge of a defective and that meant a mental defective under the Act. As the girl in this case had never been lawfully made subject to the Act it follows that no offence had been committed. So that there may be no doubt on the matter I desire to say that where a man is prosecuted for this offence, which is now an offence against s. 8 of the Sexual Offences Act, 1956, evidence must be given by the production of the relevant documents that the woman in respect of whom the charge is made was lawfully subject to the Act* at the time of the offence.

DONOVAN, J.: I need not repeat the facts. The question of law is whether the woman involved was at the time of the commission of the alleged offence a " defective " within the meaning of s. 56 (1) (a) of the Mental Deficiency Act, 1913.

The long title of that Act states its purpose to be the making of further and better provision for the care of feeble-minded and mentally defective persons; and s. 1, as subsequently amended†, enacts that four classes of persons—which

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* I.e., the Mental Deficiency Act, 1913.

† Section 1 was substituted by the Mental Deficiency Act, 1927 (c. 33), s. 1 and s. 1 (1) (c) so substituted was amended by the Education (Miscellaneous Provisions) Act, 1948 (c. 40), s. 11 and Sch. 1, Part 2.

are carefully defined—shall be deemed to be defectives within the meaning of the A
Act. One of these classes is as follows:

> "(d) Moral defectives, that is to say, persons in whose case there exists mental defectiveness coupled with strongly vicious or criminal propensities and who require care, supervision and control for the protection of others."

Section 2 provides that a person who is a defective may be placed in an institu- B
tion for defectives. Here the expression "who is a defective" must as a matter of construction mean a person in one of the four categories defined in s. 1. Section 4 of the Act lays down how defectives, other than those dealt with at the instance of their parent or guardian, are to be dealt with. An order may be made by a judicial authority (defined in s. 19), a court, or the Secretary of State, according to the circumstances. Sections 5 to 9 lay down precise requirements C
for the making of such orders; and ss. 10 to 12 deal with their effect and duration; s. 11 contains powers for the making of further orders on the expiration of the original or later order. Section 41 gives power to the Secretary of State to make regulations about a number of matters including (see para. (h) of sub-s. (1))—"the absence of patients from institutions under licence or temporarily without licence". Since the woman involved in the present case was away from D
the institution on licence, it is perhaps desirable to say in passing that the expression "patient" is used in various paragraphs of s. 41 (1) and is obviously used as a synonym for "defective". See also s. 42, s. 49 (2) and s. 51 (3), where the same thing occurs.

Then one comes to Part 4 of the Act headed "General. Offences, legal proceedings, etc.", in which s. 56 finds its place. [HIS LORDSHIP read s. 56 (1) (a) E
and continued:] It is clear from the earlier sections of the Act to which I have referred that s. 56 (1) (a) is dealing with "defectives" who are under care and treatment, etc., though that word is not actually used in para. (a) as it is in each of the four succeeding paragraphs. But the concluding words of the section giving a defence to a man if he did not know or suspect that the girl or woman was a defective, place the matter beyond all doubt; and indeed the prosecution suggest F
no other view.

If, then, s. 56 (1) (a) is dealing with defectives, what is a defective? It must mean a person who has been found to belong to one of the four categories of defectives specified in s. 1, and who is, in consequence of an order made under the Act, having care or treatment in an institution, or is out on licence by virtue of regulations made under the Act. That leads to the question: Was this woman G
such a defective? The answer is: No, because she was not found to belong to one of the said four categories, and was therefore not "a defective within the meaning of this Act" (see s. 1). She was placed in a category which is unknown to the Act. The prosecution was therefore never competent from the outset, since the woman lacked the necessary status to bring s. 56 into operation.

The Attorney-General argued that this defect was cured because there was H
unchallenged medical evidence at the trial that the girl was in fact a mental defective. So he says that fact, coupled with proof that she was out on licence from the institution, validates the prosecution. The answer to this is that whether she was mentally defective or not, she was not a defective within the meaning of the Act, since at the time of the alleged offence (which is the material time) she had never been classified as s. 1 requires and as the language of s. 9 I
also necessitates before an order can be made. This defect in the prosecution's case was fundamental, and could not be cured at the trial by offering to prove there and then that she could have been placed in one or other of the categories specified in s. 1. Section 56 does not deal with potential "defectives" but only with those in whose case the classification prescribed by the Act has taken place followed by an appropriate order under the Act. For the like reason, the reclassification of the woman as a feeble-minded person which Dr. Ferguson

apparently made of his own motion in 1954 is also ineffectual, even if valid. One reason why I add that last qualification is because of the explanation given by Dr. Ferguson for his action. " I am not very keen on this moral defective ", he is reported as saying, " it is very difficult ".

The Attorney-General was anxious to avoid prosecutions under this section involving a trial within a trial to determine the legality of the patient's detention. As I see it, however, that question is not really the issue. Illegality of detention is simply a consequence which flows from any failure to give a person the status of a defective under the Act.

At the same time I agree that the expression

> " under care or treatment in an institution or certified house or approved home, or whilst placed out on licence therefrom or under guardianship "

in s. 56 (1) (a) means that the woman or girl is lawfully so being dealt with. It is not to be supposed that Parliament was legislating for persons unlawfully detained in mental institutions, and in any event the words which follow those that I have quoted make the matter clear. They are " *under this Act* ", which are in my view to be read distributively, and so apply to the expression " under care and treatment " and to the expression " whilst placed out on licence ".

Accordingly, I think that the prosecution were right to produce the various documents relating to the woman's detention, and to produce the licence. Nor do I think that such a practice, which ought to be followed, can lead to any great difficulty unless there are many of these patients illegally detained, which I prefer not to suppose.

Finally, on the whole case I desire to associate myself with the comments which have fallen from LORD GODDARD, C.J.

Appeal allowed and conviction quashed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown); *Solicitor, Ministry of Health* (for the Board of Control).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

PIGOTT *v.* PIGOTT.

[COURT OF APPEAL (Hodson, Morris and Sellers, L.JJ.), October 16, 17, 1957.]

Husband and Wife—Maintenance—Application to High Court—Order for periodical payments—Whether retrospective to date of application—Security —Whether for wife's life or joint lives—Matrimonial Causes Act, 1950 (14 *Geo.* 5 *c.* 25), *s.* 23 (1), (2).

Under s. 23 (2) of the Matrimonial Causes Act, 1950, a husband cannot be ordered to secure to his wife periodical payments for any period exceeding their joint lives (see p. 435, letter H, and p. 438, letter H, post).

Tangye v. *Tangye* ([1914] P. 201) adopted; dictum of HODSON, J., in *Scott* v. *Scott* ([1951] 1 All E.R. at p. 217) applied.

Dictum of DENNING, L.J., in *King* v. *King* ([1953] 2 All E.R. at p. 1030) not applied.

An order requiring a husband to make periodical payments to his wife under s. 23 (1) of the Matrimonial Causes Act, 1950, may be made retrospective to the date on which the wife's originating summons was issued (see p. 435, letter I, post).

The hearing of a wife's application for an order for periodical payments under s. 23 (1) of the Matrimonial Causes Act, 1950, and that they should be secured under s. 23 (2) was delayed for one year by divorce proceedings of a "hopeless" character instituted by the husband. The wife was possessed of a small private income which was secured; the husband's margin of capital was not great and he was unlikely to be living out of the country. On appeal by the wife against the amount of periodical payments awarded and against the refusal of security for her life,

Held: (i) the order for periodical payments should be increased and should be made retrospective to the date on or about which the case would have been heard but for the divorce proceedings, credit being given for all payments of alimony pendente lite made to the wife during that period.

(ii) in the circumstances, and having regard to the absence of jurisdiction to order security lasting after the husband's death, the periodical payments would not be ordered to be secured.

Appeal allowed as to the amount and commencement of periodical payments.

[As to secured orders for maintenance of a wife on a husband's wilful refusal or neglect to maintain her, see 12 HALSBURY'S LAWS (3rd Edn.) 289, paras. 568, 569.

For the Matrimonial Causes Act, 1950, s. 23, see 29 HALSBURY'S STATUTES (2nd Edn.) 410.]

Cases referred to:

(1) *Scott* v. *Scott*, [1951] 1 All E.R. 216; [1951] P. 245; 27 Digest (Repl.) 85, *634*.

(2) *Tangye* v. *Tangye*, [1914] P. 201; 83 L.J.P. 164; 111 L.T. 944; 27 Digest (Repl.) 635, *5959*.

(3) *Clutterbuck* v. *Clutterbuck*, (1913), 108 L.T. 573; 27 Digest (Repl.) 635, *5962*.

(4) *Campbell* v. *Campbell*, (May 25, 1914), not reported.

(5) *King* v. *King*, [1953] 2 All E.R. 1029; [1954] P. 55; 3rd Digest Supp.

(6) *McLellan* v. *McLellan*, [1954] 1 All E.R. 1; [1954] P. 138; 3rd Digest Supp.

(7) *Bradley* v. *Bradley*, [1956] 1 All E.R. 543; [1956] P. 326; 3rd Digest Supp.

(8) *Meyer* v. *Meyer*, [1957] 2 All E.R. 546.

Appeal.

The wife appealed against an order of Mr. Commissioner GRAZEBROOK made on Mar. 8, 1957, on an application under the Matrimonial Causes Act, 1950, s. 23, by the wife by originating summons dated Aug. 17, 1955, for payments for her maintenance and for security therefor, ordering the husband to pay to her as from Mar. 15, 1957, periodical payments for herself at the rate of £200 per annum (less tax). She submitted that the amount of the periodical payments should be increased, that they should commence from Aug. 17, 1955, or some date earlier than Mar. 15, 1957, that the husband should secure the periodical payments to her for her life and that the husband should pay her her costs of the proceedings.

Harold Brown, Q.C., and *D. J. Hyamson* for the wife.
K. B. Campbell for the husband.

HODSON, L.J.: This is an appeal by a wife from an order of Mr. Commissioner GRAZEBROOK made on Mar. 8, 1957. The application by the wife was made under s. 23 of the Matrimonial Causes Act, 1950, which contains an additional power of the court to make orders for maintenance—additional in this sense, that, before 1949, the year before the date of the passing of this Act, a wife's right to obtain maintenance in respect of what is called wilful neglect to maintain could only be exercised in the magistrates' courts. Those courts have a limited jurisdiction as to amount, whereas the High Court is not so limited. It is true that the same result could be achieved in the High Court before 1950, because the wife who was not being maintained and whose husband had wilfully neglected to maintain her could seek restitution of conjugal rights, and, if she obtained an order for restitution of conjugal rights which was not complied with, she could then get an order for periodical payments of an unlimited amount: moreover, she could get an order that those periodical payments could be secured. That position still obtains, and is contained in s. 22 of the present Act, the Matrimonial Causes Act, 1950. Section 23, the additional section, reads as follows:

> "(1) Where a husband has been guilty of wilful neglect to provide reasonable maintenance for his wife or the infant children of the marriage, the court, if it would have jurisdiction to entertain proceedings by the wife for judicial separation, may, on the application of the wife, order the husband to make to her such periodical payments as may be just; and the order may be enforced in the same manner as an order for alimony in proceedings for judicial separation.
>
> "(2) Where the court makes an order under this section for periodical payments it may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife the periodical payments, and for that purpose may direct that a proper deed or instrument to be executed by all necessary parties shall be settled and approved by one of the conveyancing counsel of the court."

The wife in this case made application under both limbs of this section and asked for periodical payments, and for those periodical payments to be secured. In this court (security having been refused below) counsel for the wife has argued that security should be given as to part, at any rate, of the periodical payments, and that that security should be for the life of the wife. The commissioner refused security, but made an order for £200 a year less tax by way of periodical payments, to be paid during joint lives, under the first part of the section. [HIS LORDSHIP dealt with the application for an increase in the amount ordered to be paid by way of maintenance, held that it should be increased to £300 during the joint lives of the husband and wife, and continued:] The question of security is not a very easy one. I have come to the conclusion (for reasons which I shall give) that this section operates so as to provide for security during joint lives and not for the wife's life—though different considerations arise in divorce cases, where provision has to be made for a wife after a divorce; and the statute clearly provides for security to be made in favour of a wife for a term not exceeding her life. If I am right, however, in thinking (as I do think) that under this section security extends only for joint lives, it is perhaps only in cases somewhat out of the ordinary that there is a real necessity for security to be given—cases where there is some reason to suppose that it will be difficult to obtain compliance with the order, because the husband is likely to be out of the country or for some other reason, and, perhaps, cases where there is ample free capital available which can be used for that purpose. In this case, the husband's margin of capital is not very great, taking the excess of capital over his debt to the bank; and, moreover, the wife is not wholly insecure, in that her own private income is a secured income which, all being well, will be with her for her life. Therefore, I have thought that this is not a case where we should order security.

In coming to that conclusion I am influenced by the construction which I put on the section; because, if I had thought that the section enabled the court to give security for life for the wife, it is obviously to her advantage to get that, because the husband might die and the payment would die with him and she would be left with nothing from him. So it is necessary for me to give some reasons why I take the view that I do. I express my opinion with some difficulty because in *Scott* v. *Scott* (1) ([1951] 1 All E.R. 216) I have already expressed an opinion obiter on this subject. *Scott* v. *Scott* (1) was a case under the predecessor of s. 23, which we are now considering. I pointed out (ibid., at p. 217) that, as a matter of history, the section in question, s. 5 of the Law Reform (Miscellaneous Provisions) Act, 1949:

> ". . . was introduced to simplify the procedure by which in the High Court a wife might, in appropriate circumstances, obtain what are called periodical payments. It is necessary to look at s. 187 of the Supreme Court of Judicature (Consolidation) Act, 1925, which, after providing that a decree for restitution of conjugal rights should not be enforced by an attachment, provides that, in the event of failure to comply with the decree, the court may order the respondent to make the petitioner such periodical payments as may be just. In s. 5 (2) of the Act of 1949 it is provided that the court may order the husband to secure to the wife the periodical payments. Section 5 follows the same line as s. 187, the position now being that, instead of a husband who is living apart from his wife, being given the alternative of taking her back or showing cause why he should not do so, and, failing either, being ordered to provide for her periodical payments, the wife is entitled to periodical payments if she can prove that the husband has been guilty of wilful neglect to provide reasonable maintenance for her or for her children."

I expressed the opinion (which was not necessary to the judgment) (ibid., at p. 218):

> "In the event of divorce, she is entitled to claim maintenance to be secured to her for her life as opposed to the period of joint lives, which appears to be the utmost that can be obtained under s. 5 of the Law Reform (Miscellaneous Provisions) Act, 1949."

I there had in mind the decision (which has been followed ever since in periodical payment cases following a decree of restitution of conjugal rights) in *Tangye* v. *Tangye* (2) ([1914] P. 201). Sir Samuel Evans, P., said (ibid., at p. 209):

> "I cannot think that the Act intended that the periodical payments during the disobedience of the order for restitution should be more fixed or permanent or extend for a longer term than the alimony obtainable if the further remedies towards judicial separation were pursued and the consequent relief obtained."

He was of opinion that the order to make periodical payments was one made personally against the respondent; and he pointed out (ibid., at p. 210) that an earlier decision to the effect that security might be given for life by Bargrave Deane, J., in *Clutterbuck* v. *Clutterbuck* (3) ((1913), 108 L.T. 573) had not been followed by the same learned judge in a later case of *Campbell* v. *Campbell* (4) (not reported).

Since the decision in *Tangye* v. *Tangye* (2), to the best of my recollection, it has never been contended that periodical payments can be secured for the life of the petitioner. In the language of Sir Samuel Evans, P. ([1914] P. at p. 211):

> " It cannot operate for a period longer than the joint lives of the husband and wife . . ."

The language used in s. 23 (1) of what is now the Matrimonial Causes Act, 1950, is very closely parallel to the language used in the earlier Act; and on the face of it the payments in s. 23 (1) are payments to be made personally by the husband to the wife—" such . . . payments as may be just ". If that is so, I think it follows that the reference in sub-s. (2),

> " Where the court makes an order under this section for periodical payments it may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife *the* periodical payments ",

refers back to the periodical payments in sub-s. (1), to which I have already referred. I am not unmindful of the other sections of this Act which deal with security for maintenance for the wife and for children, and sections which deal with maintenance and alimony otherwise; but I find nothing in those sections to lead me to suppose that the construction is otherwise than that which I have stated.

My dictum was not followed—in circumstances which will be stated more fully by Morris, L.J., in his judgment—in *King* v. *King* (5) ([1953] 2 All E.R. 1029). The matter of security did not arise directly, but Denning, L.J., who delivered the first judgment, did what I had earlier done—referred incidentally to what could happen under s. 23. He said (ibid., at p. 1030):

> " Under s. 23 the court can order the husband to secure the payments by a deed of covenant, depositing some of his property as security and covering her, not only during their joint lives, but also during widowhood . . ."

So far as I am aware, the matter was not argued before him any more than it was argued before me; but an order in those terms was made by Karminski, J., in *McLellan* v. *McLellan* (6) ([1954] 1 All E.R. 1) on Nov. 13, 1953: periodical payments were ordered for joint lives, and in addition a security order was made in respect of a relatively small sum compared with the total for the life of the applicant. The record in the registry has been examined, and I find that to be the order which the learned judge made. The matter came before Willmer, J., in *Bradley* v. *Bradley* (7) ([1956] 1 All E.R. 543) where he mentioned the conflicting dicta and, having referred to the *McLellan* case (6), followed the order which Karminski, J., had made. Counsel have not been able to tell us whether any argument was submitted to Karminski, J., before he made his order. The report of the case (which was reported on a different point) does not disclose whether this matter was raised; and if I may say so with respect, Willmer, J., quite rightly followed the only decision which was in point, that of Karminski, J., and did the same thing that Karminski, J., had done in that earlier case. Now that the matter has been argued, I am of opinion that security cannot be ordered under s. 23 (2) for any period exceeding joint lives.

At the end of the case, owing to the delays which had occurred, the question arose as to the date from which the order should run, and the commissioner ordered that it should run from the date of the hearing before him. In my view (and I think that there really has been no contest in this court on this matter) there is jurisdiction under s. 23 to make the order date back to the issue of the summons. I am fortified in that view by the opinion of Lord Merriman, P., who, I think, was of that opinion. In *Meyer* v. *Meyer* (8) ([1957] 2 All E.R. 546) he had to consider the analogous question of ante-dating an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, but in passing he referred with approval to what had been done by Karminski, J., in the *McLellan* case (6) ([1954] 1 All E.R. 1). He held that he could ante-date the order and properly should do so in that case. During the course of the argument it was pointed out that there are rules dealing with interim orders and that there is no reference to an interim order in this particular section, although there are references to interim orders elsewhere in the statute. But without going through the matter at length, I have no doubt that, in a proper case, there is jurisdiction to ante-date the order, although, of course, it does not necessarily follow that the court, in its discretion, will ante-date it to the date of the issue of the summons.

In this case the matter would have come before the court on or about Feb. 10, 1956, and it was delayed for a year by the move of the husband, who had started fresh proceedings for divorce of a " hopeless " character which, whatever the husband's intention may have been, had the effect of delaying the wife's application for maintenance until a year later. It is true that she had alimony pendente lite during the pendency of the divorce suit: that was agreed at a very low figure, 30s. a week, without prejudice to her right to maintenance. In those circumstances, therefore, I think that it cannot be said that the husband discharged his duty of maintaining his wife, because he paid her the only alimony which was ordered. The maintenance should date back to Feb. 10, 1956, giving credit for all sums which she received under the alimony order.

[His Lordship dealt with the question of costs and said he would allow the appeal.]

MORRIS, L.J., agreed that the amount of the periodical payments should be increased to £300 and continued: We were invited to order security under the provisions of s. 23 (2) of the Matrimonial Causes Act, 1950, and we were invited to fix security, if we fixed it at all, for the life of the wife. In *Bradley* v. *Bradley* (7) ([1956] 1 All E.R. 543) Willmer, J., had before him the observations of my Lord in *Scott* v. *Scott* (1) ([1951] 1 All E.R. 216) and the observations in *King* v. *King* (5) ([1953] 2 All E.R. 1029) and he had the knowledge that Karminski, J., had made an order for security for the life of the wife in another case. Mr. Fairweather was counsel in *King* v. *King* (5) in this court and also in *Bradley* v. *Bradley* (7). In his argument in *Bradley* v. *Bradley* (7) he said that in *Scott* v. *Scott* (1), Hodson, J., stated that, on an order on the ground of wilful neglect to provide reasonable maintenance, a wife appeared to be entitled to claim security only for joint lives. That in *King* v. *King* (5), on the other hand, Denning, L.J., expressed the view that periodical payments under s. 23 could be secured to a wife during her widowhood: and that this statement was at the highest merely obiter dictum. Counsel then stated (in *Bradley* v. *Bradley* (7)) that, having himself been engaged in *King* v. *King* (5), he had no recollection of argument having been addressed to the court on the point of the duration of the secured provision; that the judgment had been delivered after the intervention of the long vacation and he submitted that the passage as to the duration of the secured provision had been inserted in the judgment per incuriam. Willmer, J., had that material before him; and he said ([1956] 1 All E.R. at p. 547):

> " I am bound to note, however, that although the phrase only occurs in the judgment of Denning, L.J., it was a judgment which was concurred in by both the other members of the court, neither of whom gave any separate judgment beyond expressing concurrence."

I was one of the members of the court, and ([1953] 2 All E.R. at p. 1032) I delivered no separate judgment but contented myself with saying that I had had an opportunity of considering Denning, L.J.'s judgment and that I was in agreement with it. Singleton, L.J., agreed that the appeal should be dismissed.

The point which arose in *King* v. *King* (5) is well summarised in the headnote. The wife had obtained a decree of judicial separation from her husband, and she later applied to the court for an order for secured maintenance under s. 23 in preference to applying for alimony under s. 20 (2). The husband took the objection that the words defining the scope of the court's jurisdiction excluded the wife's application, she being already judicially separated. The decision of the court was that the word " jurisdiction " in s. 23 (1) was used in the special sense and meant that, where the parties to a marriage had the requisite domiciliary or residential qualifications to enable a court to entertain proceedings for judicial separation, then the court had jurisdiction to entertain applications under s. 23 by the wife of such marriage. The court decided that, as there were those qualifications in that case, the court had jurisdiction to entertain the wife's application.

My recollection accords with that of learned counsel, Mr. Fairweather, that no argument was directed to the point which now arises. The case was argued on July 30, 1953, and the judgment was given by DENNING, L.J., on Oct. 12, 1953, and contained the passage ([1953] 2 All E.R. at p. 1030):

> " It would not seem to matter under which section she applies, so long as an order is made for payments to her. But the difference is this. Under s. 23 the court can order the husband to secure the payments by a deed of covenant, depositing some of his property as security and covering her, not only during their joint lives, but also during widowhood, whereas under s. 20 (2) the court has no power to order any such security to be provided for her."

The words " not only during their joint lives, but also during widowhood " must, I think, be regarded as having been obiter: there was no argument in that case on that matter, according to my recollection.

Although, therefore, I concurred in that judgment, I think that today it does become necessary to consider whether the wording with which I concurred in that obiter dictum is to be preferred to the obiter dictum of my Lord in *Scott* v. *Scott* (1). In *Tangye* v. *Tangye* (2) ([1914] P. 201) the wording that was being considered was as follows (s. 2 of the Matrimonial Causes Act, 1884):

> " From and after the passing of this Act, a decree for restitution of conjugal rights shall not be enforced by attachment, but where the application is by the wife the court may, at the time of making such a decree, or at any time afterwards, order that in the event of such decree not being complied with within any time in that behalf limited by the court, the respondent shall make to the petitioner such periodical payments as may be just, and such order may be enforced in the same manner as an order for alimony in a suit for judicial separation. The court may, if it shall think fit, order that the husband shall, to the satisfaction of the court, secure to the wife such periodical payment, and for that purpose may refer it to any one of the conveyancing counsel of the court to settle and approve of a proper deed or instrument to be executed by all necessary parties."

That language is to be compared with the language in s. 22 of the Matrimonial Causes Act, 1950, and also with the language in s. 23, with which we are now concerned. SIR SAMUEL EVANS, P., delivered a considered judgment. He referred to the order that might be made in the case of dissolution or nullity. In this connexion, s. 19 (2) and (3) of the Act of 1950 may now be compared. The President said this (ibid., at p. 210):

> " But even in such cases, namely, dissolution or nullity, any order made under sub-s. (2) of the same section cannot be made for a longer period than the joint lives of husband and wife, and can be discharged, modified, suspended, revived, or increased, according to the circumstances from time to time. It was argued that because it was enacted in sub-s. (2) of s. 1 of this Act that the order should be ' during the joint lives ', the absence of such

> words from s. 2 of the Act of 1884 showed that the order could be for the life of the petitioner."

A similar point might have been suggested here. The President went on (ibid.):

> " Such an argument is wholly inapplicable to a statute dealing with wholly different proceedings, and is hardly worth pursuing; but it may be pointed out that probably the words ' during the joint lives ' were inserted in dealing with an order for monthly or weekly payments in dissolution or nullity cases, in express contradistinction to the words ' for a term not exceeding her life ' which are to be found in the provision for orders to secure a gross sum or annual sum in the same cases."

All those words apply in reference to s. 19 (2) and (3). Then the President went on (ibid.):

> " I have said that in no case in practice, as far as I have been able to ascertain in the registry, has an order for periodical payment been made for the life of the petitioner, or for any term other than the joint lives of the petitioner and respondent, since the passing of the Act thirty years ago, except in the case of *Clutterbuck* v. *Clutterbuck* (3) ((1913), 108 L.T. 573)."

He went on to state that he did not think that that case should be regarded as binding authority. Then he summarised his view in the words ([1914] P. at p. 211):

> " In my view, an order for periodical payments under s. 2 of the Act of 1884 cannot be made or secured for the life of the petitioner. It cannot operate for a period longer than the joint lives of the husband and wife, or until the court otherwise orders. I am of opinion that, according to the law and practice, the proper form of order for periodical payments in favour of the wife in cases of restitution is that the respondent do pay to her during the joint lives of herself and her husband, or until further order of this court, the sum fixed, at the periods specified."

That authority seems to me strongly to support the view of the matter that was expressed, obiter, by my Lord in *Scott* v. *Scott* (1). If one considers the wording of the section itself, s. 23 (1) refers to ordering the husband to make to the wife " such periodical payments as may be just "; and then sub-s. (2) says that the court may order the husband to " secure to the wife *the* periodical payments ". I find it impossible to resist the view that " the periodical payments " referred to are those previously referred to in sub-s. (1), and those periodical payments, in my judgment, are periodical payments under an order that the husband should make payments to the wife, which I think refers to an order during joint lives.

For those reasons, I have come to the conclusion that, if it were proper to order security in this case at all, the security ought to be, not for the life of the wife, but at most for joint lives. Having, therefore, considered the question which has arisen, the view that I have formed is that which I have endeavoured to express and which coincides with that expressed by my Lord, with all the authority that my Lord's opinion, supported by his experience, commands.

I do not think that I can usefully add anything on the other matters dealt with by my Lord, beyond saying that I agree with all the other conclusions.

SELLERS, L.J.: I agree with the order proposed by my Lord; and, as I agree with the reasons given by both my Lords, I do not feel it incumbent on me, or desirable, to add any reasoning of my own—with this one exception. I agree with my Lords in their construction of s. 23 (1) and (2) of the Matrimonial Causes Act, 1950. The husband is called on in given circumstances to make under an order such periodical payments as the court may think just; and sub-s.

(2) only deals with security to ensure that that order may be carried out. In contrast with that section, s. 19 (2) provides:

> "On any decree for divorce or nullity of marriage, the court may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life . . ."

Those last four words are not present in s. 23. I would accept the argument of learned counsel for the husband, when he contrasted the position between the case where the marriage was subsisting and the husband could be called on to make payments but the wife would have benefits still existing and possibly accruing, and the case where, in divorce or nullity, she ceased to be a wife at all and thereby lost all her rights. In this subsisting marriage there are the rights on intestacy, there are any rights which might arise under the Inheritance (Family Provision) Act, 1938, widows' pensions, and benefits of that kind. The wife is not deprived of those rights in the circumstances which exist here, and that may be good reason for s. 23 being in the terms that it is in, and not either (as I think) expressly or impliedly permitting the court to enforce or make an order for security for the duration of her life.

As to the circumstances in which security would be ordered, it would be difficult to pronounce any general view. In this particular case the wife has some secured income of her own—not a very large amount. The husband, whilst having some capital, has apparently got it well wrapped up at the moment and it is not free, or not readily free, to be called on as security. He is apparently going to remain in this country; there is no question of his living abroad. I agree with my Lords that, on the facts of this case, it does not seem appropriate that security should be ordered for any amount of the annual payment which I agree should be a matter of an order under s. 23 (1)—namely, the sum of £300 a year.

Appeal allowed as to the amount and commencement of periodical payments.

Solicitors: *J. H. H. Kidgell & Co.* (for the wife); *Marcy & Co.* (for the husband).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

PRACTICE DIRECTION.

RESTRICTIVE PRACTICES COURT.

Restrictive Trade Practices—Court—Practice—Interlocutory applications—Time—Applications for extension or abridgment of time—Restrictive Practices Court Rules, 1957 (*S.I.* 1957 *No.* 603), *r.* 49.

By virtue of the power conferred on me by r. 49 of the Restrictive Practices Court Rules, 1957, I hereby give the following general direction:—

Applications in England and Wales to extend or abridge the time prescribed by the said rules or by order of the court may until further order be dealt with by the clerk of the court who may at his discretion either dispose of the same or adjourn them to the judge.

PATRICK DEVLIN,
President.

Nov. 4, 1957.

A

R. *v.* METROPOLITAN POLICE COMMISSIONER, *Ex parte* MELIA.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Donovan and Havers, JJ.), October 18, 1957.]

Justices—Warrant—Indorsement—Indorsement pinned to warrant—Validity—Indictable Offences Act, 1848 (11 *&* 12 *Vict. c.* 42), *s.* 12. B

A magistrate who signs a proper form of indorsement, which form is then pinned to a warrant, does not "make an indorsement on the warrant, signed with his name," as required by s. 12* of the Indictable Offences Act, 1848.

[As to backing Irish warrants, see 10 HALSBURY'S LAWS (3rd Edn.) 355, para. 649, note (l) and 21 HALSBURY'S LAWS (2nd Edn.) 554, para. 976, text and note (i). C

For the Indictable Offences Act, 1848, s. 12, see 5 HALSBURY'S STATUTES (2nd Edn.) 670; and for the Magistrates' Courts Act, 1952, s. 131, Sch. 5, see 32 HALSBURY'S STATUTES (2nd Edn.) 523, 531.]

Application for writ of habeas corpus. D

On Aug. 16, 1957, the Dublin District Court, at the instance of the applicant's wife, issued a warrant for the arrest of the applicant. On Sept. 28, 1957, a metropolitan magistrate sitting at Clerkenwell signed a form of indorsement authorising the execution of the warrant within his jurisdiction pursuant to s. 12 of the Indictable Offences Act, 1848. The signed form was then pinned to the warrant, and on Sept. 30, 1957, the warrant was executed by the arrest of the applicant by the police within the magistrate's jurisdiction. On Oct. 2, 1957, the Divisional Court gave the applicant leave to move for a writ of habeas corpus and the applicant was released on bail. E

H. H. Harris for the applicant.

F. H. Lawton, Q.C., and *W. W. Stabb* for the Metropolitan Police Commissioner.

C. H. Gage for the prosecutrix, the applicant's wife. F

LORD GODDARD, C.J., delivered the judgment of the court: In this case the warrant has not been indorsed in the manner required by the Indictable Offences Act, 1848, s. 12. It seems that a practice exists at Clerkenwell of having a form and pinning it to a document, but that is not an indorsement on the back of the document as required by law. Therefore, the applicant in this case was illegally in custody, and accordingly we have no option but to discharge him. G

Applicant discharged.

Solicitors: *J. Dalton* (for the applicant); *Solicitor, Metropolitan Police; Hempsons* (for the prosecutrix).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

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* Section 12 (as amended by the Magistrates' Courts Act, 1952, s. 131 and Sch. 5), provides that "If any person against whom a warrant shall be issued in . . . Ireland, by any justice of the peace . . . shall . . . reside . . . in . . . England . . . it shall and may be lawful for any justice of the peace in and for the county or place . . . where [such person] shall reside or be . . . to make an indorsement (K.) on the warrant, signed with his name, authorising the execution of the warrant within the jurisdiction of the justice making the indorsement."

RAHIMTOOLA *v.* H. E. H. THE NIZAM OF HYDERABAD AND OTHERS.

[HOUSE OF LORDS (Viscount Simonds, Lord Reid, Lord Cohen, Lord Somervell of Harrow and Lord Denning), July 16, 17, 18, 22, November 7, 1957.]

Constitutional Law—Foreign sovereign state—Immunity from suit—Impleading foreign sovereign state—Money deposited with bank in London—Transferred, on instructions of agent of beneficial owner, to account of servant of foreign state—Transfer unauthorised by beneficial owner—Demand for re-transfer —Action by beneficial owner against bank and servant of foreign state claiming money.

Where a creditor who has the legal title to a debt situate in England is the agent for a sovereign state, the beneficial title to the debt will not be investigated by the court, if the state claims sovereign immunity, even though it does not also assert beneficial title to the debt.

In September, 1948, when Indian troops were invading the territory of Hyderabad, certain funds were standing to the credit of the account of the government of the Nizam of Hyderabad with the respondent bank in London. Two persons were authorised to draw on this account, the Nizam's Finance Minister (hereinafter referred to as "Moin") and the Agent-General for Hyderabad in London, and there was no ostensible limit to their authority. In September, 1948, it was orally agreed between the appellant, who was then High Commissioner for Pakistan in the United Kingdom, and either Moin or the Agent-General for Hyderabad that the money then standing to the credit of the account should be transferred into the appellant's name as agent of the government of Pakistan. By a letter dated Sept. 16, 1948, Moin instructed the bank to transfer the moneys in question to the credit of the appellant's account and the bank transferred such moneys, amounting to £1,007,940 9s. to the credit of an account entitled "To Habib Ibrahim Rahimtoola (High Commissioner for Pakistan in London)". Subsequently in September, 1948, the Financial Secretary of the Nizam's government sent the bank a cable objecting to their action in making the transfer. It was asserted by the Nizam that Moin's action was unauthorised by him, but it was not imputed to the bank or the appellant that Moin's ostensible authority was known by either of them to have been exceeded. In February, 1952, the appellant ceased to hold the office of High Commissioner for Pakistan in the United Kingdom. In July, 1953, when he had become Ambassador of Pakistan to France, on the instructions of his government he requested the bank to transfer the account to the name of the then High Commissioner for Pakistan in the United Kingdom, stating that the account would in future be operated by him and his successors in office, but the bank refused to do so in view of the conflicting claims. In July, 1954, the Nizam and the State of Hyderabad issued a writ in an action against Moin, the bank and the appellant claiming against the bank and the appellant payment of the £1,007,940 9s. as money held in trust for the Nizam or as money due and owing to the Nizam or as money had and received to the use of the Nizam. A concurrent writ was by leave served out of the jurisdiction on Moin and the appellant. On an application by the appellant to set aside the writ and concurrent writ and all subsequent proceedings against the appellant and to stay all further proceedings against the bank on the ground that the action impleaded the Sovereign State of Pakistan,

Held: (i) as against the appellant the writ and concurrent writ and all subsequent proceedings should be set aside because the legal title to the debt of £1,007,940 9s. had vested in the appellant as agent of the Sovereign State of Pakistan which was entitled to refuse to have the title of its agent investigated by the court.

United States of America v. *Dollfus Mieg et Compagnie S.A.* ([1952] 1 All E.R. 572) applied.

(ii) as against the bank the action should be stayed since to recover from the bank the £1,007,940 9s., to which the State of Pakistan was nominally entitled, would interfere with the legal rights of the Sovereign State of Pakistan.

(iii) the principle in *Buller* v. *Harrison* ((1777), 2 Cowp. 565) (whereby an agent may be personally liable for money paid to him on account of his principal under mistake of fact and re-claimed by the payor before being paid by the agent to his principal) had no application where the principal was a foreign sovereign state.

(iv) the principle of the trust cases (e.g., *Larivière* v. *Morgan*, (1872), 7 Ch. App. 550*) (whereby the court would not stay its administration of an English trust in which a foreign sovereign was beneficially interested) had no application where the trustee was a foreign sovereign state.

Per Lord Denning: sovereign immunity should not depend on whether a foreign government is impleaded, directly or indirectly, but rather on the nature of the dispute . . . if the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so, because it does offend the dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic courts of another country; but if the dispute concerns, for instance, the commercial transactions of a foreign government . . . and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity (see p. 463, letter I, to p. 464, letter A, post).

Observations on *Haile Selassie* v. *Cable & Wireless, Ltd.* ([1938] 3 All E.R. 384); see particularly per Lord Somervell of Harrow at p. 456, post.

Decision of the Court of Appeal (sub nom. *Nizam of Hyderabad* v. *Jung*, [1957] 1 All E.R. 257) reversed.

[As to the jurisdiction of the courts to entertain an action in respect of property in which a foreign sovereign or state has an interest, see 7 Halsbury's Laws (3rd Edn.) 266, para. 569.]

Cases referred to:

(1) *Compania Naviera Vascongado* v. *Cristina S.S., The Cristina*, [1938] 1 All E.R. 719; [1938] A.C. 485; 107 L.J.P. 1; 159 L.T. 394; Digest Supp.

(2) *Haile Selassie* v. *Cable & Wireless, Ltd.*, [1938] 3 All E.R. 384; [1938] Ch. 839; 107 L.J.Ch. 380; 159 L.T. 385; Digest Supp.

(3) *United States of America & Republic of France* v. *Dollfus Mieg et Compagnie S.A. & Bank of England*, [1952] 1 All E.R. 572; [1952] A.C. 582; 3rd Digest Supp.

(4) *Buller* v. *Harrison*, (1777), 2 Cowp. 565; 98 E.R. 1243; 1 Digest 670, *2828*.

(5) *Juan Ysmael & Co. Incorporated* v. *Government of the Republic of Indonesia*, [1954] 3 All E.R. 236; [1955] A.C. 72; 3rd Digest Supp.

(6) *The Charkieh*, (1873), L.R. 4 A. & E. 59; 42 L.J. Adm. 17; 28 L.T. 513; 1 Digest 49, *393*.

(7) *Gibson* v. *Minet*, (1824), 2 Bing. 7; 9 Moore, C.P. 31; 2 L.J.O.S.C.P. 99; 130 E.R. 206; 1 Digest 694, *3031*.

(8) *Clark's Case*, (1613), Godb. 210; 78 E.R. 128; 43 Digest 467, *55*.

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* The trust cases are referred to by Lord Radcliffe in *United States of America* v. *Dollfus Mieg et Compagnie S.A.* ([1952] 1 All E.R. at pp. 588, 589); references to them will be found in the speeches in the present case at p. 448, letter D, p. 450, letter F, p. 455, letter A, and p. 461, letter E, post.

A (9) *Liversidge* v. *Broadbent*, (1859), 4 H. & N. 603; 28 L.J.Ex. 332; 33 L.T.O.S. 226; 157 E.R. 978; 12 Digest (Repl.) 677, *5228*.

(10) *Hinson* v. *Burridge*, (1595), Moore, K.B. 701; 72 E.R. 850.

(11) *Sims* v. *Brittain*, (1832), 4 B. & Ad. 375; 1 Nev. & M.K.B. 594; 110 E.R. 496; 1 Digest 392, *953*.

B (12) *Sims* v. *Bond*, (1833), 5 B. & Ad. 389; 2 Nev. & M.K.B. 608; 110 E.R. 834; 1 Digest 567, *2120*.

(13) *Cooke* v. *Seeley*, (1848), 2 Exch. 746; 17 L.J.Ex. 286; 154 E.R. 691; 12 Digest (Repl.) 46, *243*.

(14) *Performing Right Society, Ltd.* v. *London Theatre of Varieties, Ltd.*, [1924] A.C. 1; 93 L.J.K.B. 33; 130 L.T. 450; 43 Digest 129, *1315*.

C (15) *Banque Belge Pour L'Etranger* v. *Hambrouck*, [1921] 1 K.B. 321; 90 L.J.K.B. 322; 35 Digest 168, *9*.

(16) *The Jupiter*, [1924] P. 236; 93 L.J.P. 156; 132 L.T. 624; Digest Supp.

(17) *L'Affaire Vestwig*, 1946, Annual Digest and Reports of Public International Law Cases No. 32; S. 1947. I. p. 137.

D (18) *Baccus S.R.L.* v. *Servicio Nacional Del Trigo*, [1956] 3 All E.R. 715; [1957] 1 Q.B. 438; 3rd Digest Supp.

(19) *Johore* (*Sultan of*) v. *Abubakar Tunku Aris Bendahara*, [1952] 1 All E.R. 1261; [1952] A.C. 318; 3rd Digest Supp.

(20) *Brinsmead* v. *Harrison*, (1871), L.R. 6 C.P. 584; 40 L.J.C.P. 281; 24 L.T. 798; *on appeal*, (1872), L.R. 7 C.P. 547; 41 L.J.C.P. 190; 27 L.T. 99; 43 Digest 531, *668*.

E (21) *Biddle* v. *Bond*, (1865), 6 B. & S. 225; 34 L.J.Q.B. 137; 12 L.T. 178; 29 J.P. 565; 122 E.R. 1179; 3 Digest 101, *287*.

(22) *Strousberg* v. *Costa Rica Republic*, (1880), 44 L.T. 199; 1 Digest 48, *389*.

(23) *Brunswick* (*Duke*) v. *Hanover* (*King*), (1844), 6 Beav. 1; 6 State Tr. N.S. 33; 13 L.J.Ch. 107; 2 L.T.O.S. 306; 49 E.R. 724; *affd.* H.L., (1848), 2 H.L. Cas. 1; 9 E.R. 993; 38 Digest 12, *62*.

F (24) *Larivière* v. *Morgan*, (1872), 7 Ch. App. 550; *revsd. on the facts*, H.L. sub nom. *Morgan* v. *Larivière*, (1875), L.R. 7 H.L. 423; 44 L.J.Ch. 457; 32 L.T. 41; 1 Digest 48, *390*; 43 Digest 641, *779*.

(25) *Stevenson* v. *Anderson*, (1814), 2 Ves. & B. 407; 35 E.R. 373; 29 Digest 473, *219*.

G (26) *Carnatic* (*Nabob*) v. *East India Co.*, (1793), 2 Ves. 56 (30 E.R. 521); sub nom. *Arcot* (*Nabob*) v. *East India Co.*, 4 Bro. C.C. 180 (29 E.R. 841); 1 Digest 45, *355*.

(27) *Civilian War Claimants Assocn., Ltd.* v. *R.*, [1932] A.C. 14; 101 L.J.K.B. 105; 146 L.T. 169; Digest Supp.

Appeal.

H Appeal by Habib Ibrahim Rahimtoola from an order of the Court of Appeal (Lord Evershed, M.R., Birkett and Romer, L.JJ.), dated Dec. 20, 1956, and reported sub nom. *Nizam of Hyderabad* v. *Jung*, [1957] 1 All E.R. 257, reversing an order of Upjohn, J., dated July 30, 1956, and reported [1956] 3 All E.R. 311. On a motion by the appellant, who was the third defendant in the action brought by the respondent, the Nizam of Hyderabad, and by the I State of Hyderabad against Nawab Moin Nawaz Jung, the respondents, Westminster Bank, Ltd., and the appellant, Upjohn, J., set aside the writ of summons issued on July 8, 1954, the concurrent writ of summons issued pursuant to an order of Wynn-Parry, J., dated Jan. 11, 1955, and all subsequent proceedings against the appellant, and stayed the action against the respondent bank. On Nov. 1, 1956, the State of Hyderabad was dissolved, but prior to its dissolution it assigned to the Nizam all such interest (if any) as it had in the sum the subject of the action. The facts appear in the opinion of Viscount Simonds, p. 444, letter D, to p. 445, letter B, post.

B. J. M. MacKenna, Q.C., R. O. Wilberforce, Q.C., and *O. R. Smith* for the appellant.

Sir Andrew Clark, Q.C., and *S. B. R. Cooke* for the respondent, the Nizam of Hyderabad.

Geoffrey Cross, Q.C., Eustace Roskill, Q.C., and *Peter Foster* for the respondents, Westminster Bank, Ltd.

The House took time for consideration.

Nov. 7. The following opinions were read.

VISCOUNT SIMONDS: My Lords, the question in this appeal is whether the Court of Appeal were right in refusing to set aside a writ of summons and all subsequent proceedings in an action brought by the respondent, the Nizam of Hyderabad, against the appellant, and further refusing to stay all further proceedings in the same action against the respondents, Westminster Bank, Ltd. An order to that effect had been made by UPJOHN, J., but was reversed by the Court of Appeal.

In September, 1948, the appellant, Habib Ibrahim Rahimtoola, was High Commissioner for Pakistan in the United Kingdom and he held that office until Feb. 13, 1952. In that capacity he was bound to act on the instructions of the government of Pakistan normally given to him by the Foreign Minister, Sir Mohammed Zafrullah Khan. In the same month there were certain funds standing to the credit of the account of the government of Hyderabad with the respondent bank. For the purpose of this appeal no distinction is to be made between the State, the Government and the Nizam of Hyderabad. The Nizam was an absolute monarch. His Finance Minister was then the Nawab Moin Nawaz Jung whom I will call Moin, and the Agent-General for Hyderabad in London was the Nawab Mir Nawaz Jung Bahadur whom I will call Mir. Each of them was authorised to draw on this account and there was no ostensible limit to his authority.

On or about Sept. 16, 1948, it was orally agreed between the appellant and either Moin or Mir (it is not quite clear which) that the money then standing to the credit of the account should be transferred to an account in the name of the appellant as High Commissioner for Pakistan and in pursuance of that agreement he signed the necessary specimen signature forms, and Moin, by a letter of the same date, instructed the bank to transfer the moneys in question to the credit of the account of the appellant. The bank accordingly transferred such moneys, amounting to £1,007,940 9s. to the credit of an account entitled " To Habib Ibrahim Rahimtoola (High Commissioner for Pakistan in London) " and forwarded to him a credit advice showing this title. The appellant has sworn that he agreed to accept and accepted the transfer as agent of the government of Pakistan, that he did so on the express instructions of Sir Zafrullah Khan and that he has ever since regarded himself as bound to deal with such account as his government may direct and that he is prosecuting this appeal on their instructions. I see no possible reason for doubting his assertion which every subsequent action of his supports. On the other hand it is asserted by the Nizam that the action of Moin was unauthorised by him. When the matter was before UPJOHN, J., the evidence was rightly regarded by him as inadequate, but in the Court of Appeal further evidence was admitted, an affidavit by the Nizam himself, containing his statement, which has not been challenged, that Moin had no authority to make the transfer in question. It has not, however, been imputed to the bank or to the appellant that Moin's ostensible authority was known by either of them to have been exceeded.

On July 27, 1953, the appellant, who had then become Ambassador of Pakistan to France, acting on the instructions of his government, requested the bank to transfer the account to the name of Mr. M. A. H. Ispahani, then the High Commissioner for Pakistan in the United Kingdom, stating that the account would in future be operated by him and his successors in office. To this the bank replied by a letter in which they stated that, as he was aware (and as the fact was), a claim had been made regarding the moneys in question by the Nizam's government and that, on Sept. 28, 1948, a Mr. Gupta as financial secretary of that government had sent them a cable objecting to their action in making the transfer in question. They further stated that he would no doubt also be aware of the statement made in the Indian Parliament that the Indian government proposed to file a suit for the recovery of the amount standing to the credit of such account. This last statement can be disregarded for it appears that, the State of Hyderabad having been dissolved, whatever rights that state or India as its successor had have been formally assigned to the Nizam.

Thus, my Lords, matters stood in July, 1953, and the bank adopted the reasonable attitude that they could not admit the claim of either the Nizam or the Pakistan government until their rights had been determined in proper proceedings. Accordingly, on July 8, 1954, a writ was issued by the Nizam and the State of Hyderabad as co-plaintiffs against Moin, the bank and the appellant claiming [against the bank and the appellant] payment of the sum of £1,007,940 9s. under three alternative heads (a) as money held in trust for the Nizam (in all that follows I ignore the State of Hyderabad), (b) as money due and owing to the Nizam, (c) as money had and received to the use of the Nizam. For the present purpose I can ignore other claims in the writ. A statement of claim was duly delivered to which the bank put in a defence. A concurrent writ was by leave served out of the jurisdiction on Moin and the appellant, and on July 19, 1955, the appellant gave notice of motion (which was amended on Sept. 4, 1956) for an order setting aside the writ and concurrent writ and all subsequent proceedings against the appellant and the bank. I pause to observe that the position of the bank has throughout been one of impartial willingness to pay its debt to whomsoever it may be justly due but, reasonably enough, it is anxious not to have this action continued against it but not against the appellant. This anxiety is shared by the appellant and has determined the form of order originally made by UPJOHN, J., and the course of the argument on this appeal.

On the motion coming before that learned judge with a number of affidavits on either side which add little, if anything, to the bare statement that I have made, an order was made in accordance with its terms. I have read and re-read the judgment of the learned judge and I may, perhaps, be permitted to say that I find in it such a lucid exposition of the facts and relevant law that I should have been content to adopt it as my own and say no more but for the unfortunate fact that the Court of Appeal came to a different conclusion and set aside his order. In my opinion, as I believe in that of all of your Lordships, they were wrong in doing so.

The first question is in what capacity did the appellant accept a transfer of the funds in question and become the customer of the bank to whom it was primarily accountable. It has been said that there are three possible views. The first is that he was acting as a private individual. This view is so clearly untenable that I will not say more about it. The other alternatives were stated thus by ROMER, L.J. ([1957] 1 All E.R. at p. 271): (i) that he was acting as "agent" for Pakistan, and (ii) that he was acting as the "organ" or "alter ego" of Pakistan, and that learned lord justice came to the clear conclusion that the appellant accepted the transfer in his official capacity as servant or agent of Pakistan. On the other hand he could not accept the view that he was the "organ" or "alter ego" of Pakistan. If these words or either of them connote that a High Commissioner is in the same sense to be identified with the government he represents as is, for instance, a Department of State, I am not prepared to take a different view. But for the purpose of the present case it appears to me to be unimportant. No doubt, if a defendant by whatever name he is called be identified with the sovereign state, his task is easy; he need prove no more in order to stay the action against him. But, as soon as it is proved that quoad the subject-matter of the action the defendant is the agent of a sovereign state, that, in other words, the interests or property of the state are to be the subject of adjudication, the same result is reached. This is precisely what is meant by the rule thus stated in Dicey's Conflict of Laws (6th Edn.), at p. 131:

> "Rule 19.—The court has (subject to the exceptions hereinafter mentioned) no jurisdiction to entertain an action or other proceedings against (1) any foreign sovereign . . . An action or proceeding against the property of any of the foregoing is, for the purpose of this rule, an action or proceeding against such person . . ."

Lord Atkin, in *Compania Naviera Vascongado* v. *Cristina S.S., The Cristina* (1) ([1938] 1 All E.R. 719 at p. 720), said:

> " . . . two propositions of international law engrafted on to our domestic law . . . seem to me to be well-established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign. That is, they will not by their process make him against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages. The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his, or of which he is in possession or control."

I should not, my Lords, have reminded your Lordships of these very familiar propositions were it not that the Court of Appeal has, as it appears to me, failed to observe them. That the government of Pakistan were the principals (disclosed or undisclosed, it matters not) for whom the appellant as agent held the account in question with the bank, is, as I have already said, established beyond doubt. They were, and are, in a position to sue the bank either in the name of their agent, the appellant, or, if he were unwilling that his name should be used, in their own name adding him as a defendant. The bank could not pay any other person without disregard of, and detriment to, their interests. For the bank knows only the appellant and knows him, as I think, though it does not matter, as the agent of the government. I do not understand what difference it makes to this simple fact that before the Court of Appeal it was proved, or at least asserted and not disproved, that Moin exceeded his authority in making the transfer to the appellant. It would, or might be, important if the matter was litigated, but that is just what the government of Pakistan through its agent declines to do. Much stress has been laid on the fact that it has not asserted a beneficial interest in the fund. But why should it? It is not concerned to admit, assert or deny. It has the legal title, which cannot be displaced except by litigation which it is entitled to decline. It rests on the principle, the statement of which I take from the judgment of the Court of Appeal in *Haile Selassie* v. *Cable & Wireless, Ltd.* (2) ([1938] 3 All E.R. 384), just because the respondent particularly relied on that case (ibid., at p. 386),

> ". . . if property locally situate in this country is shown to belong to, or to be in the possession of, an independent foreign sovereign, or his agent, the courts cannot listen to a claim which seeks to interfere with his title to that property, or to deprive him of possession of it."

It is true that in that case the court did not decline to adjudicate on the claim of a foreign sovereign state; it did so on the ground that, as there stated (ibid., at p. 388):

> " In the case of a debt such as that with which we are concerned, there can be no question of possession or control, and the title to it is the very thing which stands to be established or not to be established in these proceedings."

Your Lordships are not concerned to consider whether the principle, which was there correctly stated, was also there correctly applied. In the present case its application does not appear to me to be in doubt. The property in dispute is situate in this country. I say that, because it is for many purposes necessary to ascribe a situation to a chose in action which physically has none, and for the purpose of this doctrine no other situation can be ascribed to it than the place in which it can be sued for and enforced. A suit by a third party, the Nizam, is calculated and intended to interfere with the title of the appellant and his principals, the government of Pakistan, and with their possession or control of their property. It can only be maintained if the government of Pakistan take a course which their sovereign dignity entitles them to reject and descend into the arena. I have used the words " possession or control " because they are the words used in the statement of principle that I have adopted. It may be said that " possession " is not an apt word in connexion with a chose in action, but it seems to me that the two words, whether used together or separately, are apt to describe the relation in which an owner stands to the property which he owns. I would deprecate fine distinctions in our municipal laws in the application of international doctrine. Let it be supposed that a bank holds valuables, as for instance gold bars, on account of a foreign government or its agent, and at the same time is indebted to the same party on current or deposit account in a sum of £x. It has been made clear by the recent case of *United States of America & Republic of France* v. *Dollfus Mieg et Compagnie S.A. & Bank of England* (3) ([1952] 1 All E.R. 572) that the foreign government could deny the jurisdiction of an English court to adjudicate on their rights in regard to the valuables. I decline to accept the argument of counsel for the respondent that this conclusion rested on any sacred principle as to the rights of bailor and bailee, and I should regard it as deplorable if the court, while accepting as a matter of comity the right of the foreign government to deny its jurisdiction in regard to valuables, yet rejected it in regard to a chose in action. To make one law in regard to valuables, bars of gold or perhaps bearer bonds, and another in regard to simple contract debts is not a policy that should recommend itself to your Lordships. Whether the property is a gold bar or a debt, the government of Pakistan is the legal owner and is entitled to refuse to have its title investigated. The case law dealing with this question has been so recently and so fully expounded in the *Dollfus Mieg* case (3) that I think it unnecessary to add anything on the broad question.

There are, however, two other aspects of the question which I must examine. In the Court of Appeal, and, as I understand it, not until his reply, counsel for the Nizam raised a novel point which had not been considered by UPJOHN, J., but which found favour with that court. The argument runs thus. It is the law as laid down by a series of cases starting with *Buller* v. *Harrison* (4) ((1777), 2 Cowp. 565) and as stated in 1 HALSBURY'S LAWS OF ENGLAND (3rd Edn.) at p. 233, para. 522, that

> ". . . if a third person pays money to an agent under a mistake of fact, or in consequence of some wrongful act, the agent is personally liable to repay it, unless, before the claim for repayment was made upon him, he has paid it to the principal or done something equivalent to payment to his principal."

Apply this principle of law to the facts of this case. The account was transferred to the name of the appellant by a mistake of fact or other wrongful act, viz., the unauthorised action of Moin; the appellant and the bank were informed of the wrongful act and of the Nizam's claim before the appellant had dealt with the account either by paying the money to his principal or in any other way. Therefore, it is concluded, the appellant is liable in this suit to repay the Nizam and there is no need to consider any question of sovereign immunity. This argument, as I say, was successful in the Court of Appeal, but I think that your Lordships unanimously reject it.

My Lords, I am not concerned to deny that, in a suit in which private persons only are concerned, the rule in *Buller* v. *Harrison* (4), if I may call it so, may prevail, though I would suppose that in any case the principal should not be denied the opportunity of asserting that the money was not paid to his agent in consequence, for instance, of a mistake of fact. But where, as for this purpose I assume to be the case here, the transfer is made to one who, if not an " organ " of a foreign government, is demonstrably its servant and agent, it would make a strange breach in the international principle if it were open to a third party to recover from the agent by the mere assertion of mistake or other wrongful act. That is the very thing which the agent on behalf of his principal is concerned to dispute, and, if his principal is a foreign sovereign, it is the very thing on which the courts of this country may not adjudicate in the face of the foreign sovereign's objection. I look again at the writ to see what is the substance of the matter. The claim is that money was paid to the appellant in trust for the Nizam or as money due and owing to the Nizam or as money had and received to the use of the Nizam. These are matters which directly concern the principals on whose behalf the appellant received the money. They cannot be determined without impleading him. Therefore they cannot be determined at all.

The second matter is this. As your Lordships are aware, this branch of the law has long been complicated by a series of cases in the Court of Chancery or the Chancery Division of the High Court in which the question has been of a claim by a foreign sovereign to a trust fund or a share in a trust fund subject to the administration of the court. On this subject I can add nothing to what was said by my noble and learned friend LORD RADCLIFFE in the *Dollfus Mieg* case (3) ([1952] 1 All E.R. at p. 588). But I have failed to see that they have any relevance to the present case. Here is no trust fund which is being administered by the court. It is possible that, if the action proceeded as between private persons and all the matters in dispute were litigated to a conclusion, it might be held (though truly it would be unnecessary to do so) that the appellant held the account with the bank in trust for the Nizam. But that is a consequence of carrying to a successful conclusion litigation which, in its inception, has nothing in common with the administration of a trust. Certainly the government of Pakistan has never admitted that its agent or itself is a trustee for the Nizam and, until that fact is established, the cases that have been cited are wholly irrelevant. It cannot be established because the government, through its agent, declines adjudication by our courts.

It remains to consider the question of the bank, whose attitude I have already stated. It is willing to pay whomsoever it may be ordered to pay but unwilling that the action should be stayed against the appellant but continued against itself. It is, I think, clear that it would not be right to allow the action to proceed against the bank alone. Such a course would lay it open to a second attack. The account is the account of the government of Pakistan in the name of its agent. If it pays a third party under an order of the court made in proceedings by which that government is not bound, it is not safeguarded against a further claim. But further than that, since the legal title is in the government, it cannot in substance be anything but a grave interference with its property for a third party to sue the bank and, if the suit is successful, to recover from the bank the money to which it is nominally entitled.

In my opinion, in this as in the rest of his judgment UPJOHN, J., was right*. This appeal should, therefore, be allowed, the order of the Court of Appeal set aside and that of the learned judge restored. The Nizam must pay the costs of both the appellant and the bank here and in the Court of Appeal.

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* For his reasoning on this point, see [1956] 3 All E.R. at p. 320, letters D-F, quoted by LORD COHEN at p. 455, letter G, post.

A My Lords, I must add that since writing this opinion I have had the privilege of reading the opinion which my noble and learned friend, LORD DENNING, is about to deliver. It is right that I should say that I must not be taken as assenting to his views on a number of questions and authorities in regard to which the House has not had the benefit of the arguments of counsel or of the judgment of the courts below.

B **LORD REID:** My Lords, in this case the respondent, the Nizam of Hyderabad, sues for payment of a sum of just over one million pounds. That sum is held by the respondents, Westminster Bank, Ltd., in an account standing in the name of "Habib Ibrahim Rahimtoola (High Commissioner for Pakistan in London)". Mr. Rahimtoola is the appellant in this appeal. The State of C Pakistan claims that this action should be stayed on the ground that it infringes the sovereign immunity of Pakistan from actions in our courts. Such a claim may arise from a sovereign state's claim to have a beneficial interest in the property which is the subject of the action but no such claim is made in this case. The claim to immunity may also arise by reason of the state having some other interest in the property. In *United States of America & Republic of France* v. D *Dollfus Mieg et Compagnie S.A. & Bank of England* (3) ([1952] 1 All E.R. 572), no beneficial interest was claimed in gold bars deposited in a bank, but the states concerned had, as bailors, an immediate right to possession of the bars. This was held sufficient to entitle them to have an action stayed which was brought by the owners of the bars against the bank. The question in this case is whether Pakistan has an interest such that its claim to sovereign immunity requires this E action to be stayed.

In 1948 this money was deposited with the bank in an account in the name of the government of Hyderabad, and the persons entitled to operate on this account were the Agent-General and the Finance Minister of Hyderabad. In September, 1948, Indian troops were invading the territory of Hyderabad, and the Finance Minister approached the appellant with a view to the money being F transferred to him.. No doubt the Finance Minister acted in what he thought were the best interests of the Nizam, but he had no authority to make such a transfer. The appellant was not then aware of this. The only evidence about the transaction is that given by the appellant in two affidavits. He was not cross-examined. It appears that a meeting took place on Sept. 16 at which there were present the Finance Minister of Hyderabad, the appellant, who was G then High Commissioner for Pakistan, and the Foreign Minister of Pakistan. The appellant did not wish to become involved, but he was overruled by his Foreign Minister who was his superior and who directed him to accept a transfer of the money into his name as High Commissioner. The transfer was made by the bank on Sept. 20 and intimated to the appellant on the same day. I shall not consider the evidence in detail because I think that it is clear that the appel- H lant was throughout acting under instructions in his official capacity. I can find no ground for the respondents' contention that the transfer was made to the appellant in his private capacity as an individual in whom the Finance Minister had confidence as a suitable person to hold the money.

The Court of Appeal decided that the action should not be stayed. They were of opinion that, even if the appellant was acting in his official capacity, I he was only an agent, that he held the legal title to the money, that there can be no possession or control of a chose in action by any one who does not hold the legal title, and that, therefore, there was no basis for Pakistan's claim to have the action stayed.

In my opinion, that is too narrow a view. On and after Sept. 20, 1948, when the bank opened the account in the name of "Habib Ibrahim Rahimtoola (High Commissioner for Pakistan in London)" the position was that the appellant as a servant or officer of the State of Pakistan was bound to act on any instructions regarding this money given to him by the appropriate Minister of that state.

If the appellant for any reason failed or was unable to do so then, in my judgment, Pakistan could have taken proceedings directly against the bank to recover the money. It is true that the appellant was the only person who could operate the account and that the bank was not bound to honour any cheque which was not signed by him. But that does not mean that there was no other way by which Pakistan could recover the money. Even if it be said that the form in which the account was opened was not sufficient notice to the bank that the appellant was acting merely as an officer or agent of Pakistan, that state was at least the undisclosed principal of the appellant. It is well settled that a principal, including an undisclosed principal, has a right to sue directly and in his own name. I can see no reason why this rule should not apply to banking, but it may well be that, if a bank declines to pay the principal without getting the authority of the agent who is its customer, the principal, in suing the bank, would have to make his agent a defendant in the action. And the principal would, of course, have to prove that the agent had, in fact, acted as his agent. It appears to me that Pakistan had an immediate and direct right to sue the bank in its own name for payment of this money and, in that sense, it had a legal title. It had full control of this chose in action.

I do not think that it is correct to regard the appellant as a trustee. If the appellant acted throughout as the servant or agent of Pakistan, I find it difficult to see how he could become a trustee for someone else. A trustee has the duty and right to hold the trust property and to prevent anyone from carrying it off. But the appellant could not have prevented Pakistan from suing for this money without his consent. That state had control. If anyone became a trustee by reason of the facts that, to the knowledge of the Finance Minister of Hyderabad, the appellant took the money as servant or agent of Pakistan, that no beneficial interest is claimed either by Pakistan or the appellant, and that they were later informed that the Nizam's property had been transferred without his authority, then the trustee must I think be the State of Pakistan itself. But that would not help the Nizam. We were referred to cases which show that the court will not halt the administration of an English trust because a foreign sovereign makes a claim in respect of the trust property but will not submit his claim to the jurisdiction of our courts. It may well be that the claim to sovereign immunity does not extend to such a case. But in these cases there was an independent trustee who was subject to our jurisdiction, and they appear to me to have no application to a case where the trustee is the sovereign himself. It would be quite inconsistent with the whole conception of sovereign immunity that we should require the sovereign to submit himself to our jurisdiction and seek to control him in his conduct of the trust which he has undertaken. If the State of Pakistan is a trustee then it must be left to that state to determine what its duty is.

We were also referred to a series of cases beginning with *Buller* v. *Harrison* (4) ((1777), 2 Cowp. 565), where it was held that a person who has paid money to the agent of a person who wrongfully induced the payment may recover the money directly from the agent if the agent still has the money in his possession. Normally, a person who claims repayment would have to sue the principal, and I have found nothing to suggest that these cases would apply to a case where the person claiming payment could not successfully sue the principal. In the present case, the sovereign immunity of Pakistan would prevent an action against that state, and, even if the principle of *Buller* v. *Harrison* (4) applied to the circumstance of the payment in the present case, which I doubt, the fact that the principal could not be sued in my view excludes its application.

I have assumed that the appellant is to be regarded as merely the agent or servant of Pakistan. I do not find it necessary to consider the question whether a High Commissioner should be regarded as the representative of the state which he represents so that to implead him would be equivalent to impleading the state itself, or whether, if that were so, it would make a difference that the appellant ceased to be High Commissioner before the commencement of this action.

The point at issue in this case can now be stated in a simple form. The State of Pakistan has a right to sue the bank, but Pakistan claims no beneficial right to the money owed by the bank. Does that entitle Pakistan to have the action stayed (i) in so far as it is directed against the appellant, and (ii) in so far as it is directed against the bank? I do not see any reason why the right of that state to claim sovereign immunity should depend on whether the bank account stands in the name of the state itself or stands in the name of its servant, agent or nominee. It was not disputed that, if the bank account had stood in the name of the state itself, the state could not have been made a party to this action against its will. It appears to me to follow that the state is entitled to object to its agent being made a party; the agent would merely be defending the action on behalf of his principal. I am, therefore, of opinion that the action must be stayed in so far as it is directed against the appellant, and I proceed to consider whether it can continue against the bank alone.

In a number of recent cases it has been necessary to consider in what circumstances a sovereign, who is not directly impleaded, is entitled to have an action stayed on the ground that it affects property in which the sovereign has, or claims to have, an interest. Most of these cases deal with ships or chattels, and the only one dealing with a chose in action to which we were referred is *Haile Selassie* v. *Cable & Wireless, Ltd.* (2) ([1938] 3 All E.R. 384). There the defendants owed money to the Emperor of Ethiopia. When the action was brought the plaintiff was recognised by our government as de jure sovereign and the King of Italy was recognised as de facto sovereign of that country. The de facto sovereign claimed the money and sought, unsuccessfully, to have the action stayed. In that case SIR WILFRID GREENE, M.R., in delivering the judgment of the Court of Appeal said (ibid., at p. 386):

> "The rule applies in the case both of actions in personam and of actions in rem, but it has never been extended to cover the case where the proceedings do not involve either bringing the foreign sovereign before the court in his own person, or in that of his agent, or interfering with his proprietary or possessory rights in the event of judgment being obtained. Where it is either admitted or proved that property to which a claim is made either belongs to, or is in the possession of, a foreign sovereign, or his agent, the principle will apply; but, where property which is not proved or admitted to belong to, or to be in the possession of, a foreign sovereign or his agent is in the possession of a third party, and the plaintiff claims it from that third party, and the issue in the action is whether the property belongs to the plaintiff or to the foreign sovereign, the very question to be decided is one which requires to be answered in favour of the sovereign's title before it can be asserted that that title is being questioned . . . It would be a strange result if a person claiming property in the hands of, or a debt alleged to be due by, a private individual in this country were to be deprived of his right to have his claim adjudicated upon by the courts merely because a claim to the property, or the debt, had been put forward on behalf of a foreign sovereign."

That passage, if it were still fully authoritative, would go far to assist the Nizam. But it must now be read in light of the decisions of this House in the *Dollfus Mieg* case (3) and of the Privy Council in *Juan Ysmael & Co. Incorporated* v. *Government of the Republic of Indonesia* (5) ([1954] 3 All E.R. 236). In the latter case it is said (ibid., at p. 240):

> "In their Lordships' opinion, a foreign government claiming that its interest in property will be affected by the judgment in an action to which it is not a party, is not bound as a condition of obtaining immunity to prove

> its title to the interest claimed, but it must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective." A

The *Dollfus Mieg* case (3) shows that a sovereign can have an action stayed without having either a proprietary right in the sense of a beneficial right or a possessory right in the sense that the sovereign can effectively deal with the B property at his own hand. In the *Dollfus Mieg* case (3) the gold bars were held by the bank. The bank could not be compelled by the sovereign governments, the bailors, to hand the gold bars over to them except by a judgment of the court, and it would not do so without either a judgment or the consent of Dollfus Mieg because, if it had done so, it would have laid itself open to an action of damages by Dollfus Mieg. Nevertheless, the sovereign governments were held C entitled to have the action of Dollfus Mieg stayed and so to create a deadlock. Dollfus Mieg were prevented from recovering their property and the sovereign governments could not make good their right to immediate possession without doing the very thing that they objected to doing—submitting themselves to the jurisdiction of the English courts by suing the bank for delivery of the bars. Staying the present action may lead to a similar deadlock, but it is much too D late now to argue that that is a good reason for not giving effect to the principle of sovereign immunity.

It is true that Dollfus Mieg were permitted to proceed against the bank alone in an action of damages for conversion of thirteen of the gold bars which the bank had negligently failed to retain in their possession. The result of the bank's failure to retain possession of the gold bars was that it could be sued for E damages both by Dollfus Mieg as owners of the bars and by the sovereign government as bailors of the bars. The fact that Dollfus Mieg were permitted to pursue their action for damages does not appear to me to assist the present respondent. In the present case, the bank owes a single debt—the amount at the credit of the account in the name of the appellant. The question is to whom that debt should be paid. In order to succeed, the Nizam would have to displace F the legal title and the right of the State of Pakistan to recover the money. In my judgment, an action for that purpose does directly affect the rights of that state, and it cannot be allowed to proceed in the absence of that state or its representative.

The argument for the Nizam involves the proposition that, if a sovereign deposits with a bank both money and gold bars, in neither of which he claims a G beneficial interest, and a third party sues the bank claiming to be owner of both, then, although the sovereign can found on the principle of immunity to prevent the action from proceeding with regard to the gold bars, he cannot prevent the action from proceeding with regard to the money. The principle of sovereign immunity is not founded on any technical rules of law; it is founded on broad considerations of public policy, international law and comity. While the H differences between the rights of a bailor and the rights of a lender of money are of great importance in many respects, those differences do not appear to me to require or justify such a result. I would associate myself with the final observations of my noble and learned friend, VISCOUNT SIMONDS.

In my judgment this appeal should be allowed.

LORD COHEN: My Lords, I need not restate the facts. The first question I that arises is whether the action brought by the respondent, the Nizam, against the appellant and the respondents, Westminster Bank, Ltd., should be stayed as against the appellant under the doctrine of sovereign immunity. The second, which only arises if the first question is answered in the affirmative, is whether the action should be allowed to proceed against the bank.

Counsel for the Nizam submits that the first question should be answered in the negative on a number of grounds. He argues in the first place, that the account opened by the bank in the name of the appellant was opened in his favour in his individual capacity, and that the reference to " High Commissioner for Pakistan " in the title of the account was merely descriptive, and was not intended to connote any Pakistan government interest in the account. This view appears to have commended itself to the Master of the Rolls and Birkett, L.J., although they did not decide the matter in favour of the Nizam on this ground. I find it impossible to accept it as correct in view of the affidavit evidence by the appellant, the accuracy of which is not challenged. In his first affidavit* he says that it was agreed between the defendant Moin (who had been placed by the Nizam in control of the funds in question) and himself that the said funds should be transferred to him as the agent of the government of Pakistan, and that he accepted the transfer in accordance with the instructions of and as agent for his government. In his second affidavit† he is more explicit. Speaking of the interview at which the transfer was arranged and at which there was present, in addition to the defendant Moin and the appellant, Sir Mohamed Zafrullah Khan, the then Foreign Minister of Pakistan, he says that (i) the said Foreign Minister instructed him to accept the transfer of the said funds into an account in his name but described as the High Commissioner for Pakistan; (ii) but for those express instructions he would never have agreed to the transfer; (iii) it was never suggested to him that he should accept the said funds on his own account as a private individual as agent or trustee for the Nizam; (iv) had such a suggestion been made he would have refused the transfer as he would have considered it improper to act in such a way while holding the position of High Commissioner. In face of this evidence I am forced to the conclusion that, when the appellant accepted the transfer of these funds, he did so on behalf of the government of Pakistan.

My Lords, in the Court of Appeal, Romer, L.J., accepted that the appellant did not take the transfer in his individual capacity and then proceeded to consider whether, taking the transfer on behalf of the State of Pakistan, he did so as the alter ego of the state or merely as its servant or agent. Like Upjohn, J., I do not think that, in considering the application of the doctrine of sovereign immunity, I ought to draw narrow distinctions. To make a distinction between a title to a debt in the name of the state and title to a debt in the name of the appellant as High Commissioner of the state would, in my opinion, be drawing a very narrow distinction. However, I am content for the moment to say that, having regard to the title of this account in the books of the bank, and to the circumstances in which the account was opened, the appellant was plainly the agent for the State of Pakistan, and the state could have enforced the transfer to the state of the balance to the credit of the account, though the appellant might have been a necessary party to the proceedings. Prima facie, therefore, a suit against the appellant in respect of this account affects the right or interest of the State of Pakistan. None the less the Court of Appeal rejected the claim of the appellant to sovereign immunity on the basis of a principle stated in 1 Halsbury's Laws of England (3rd Edn.) at p. 233, para. 522, in the following terms:

> " The receipt of money from a third person by an agent on his principal's behalf, does not in itself render the agent personally liable to repay it when the third person becomes entitled as against the principal to repayment, whether the money remains in the agent's hands or not. But if a third person pays money to an agent under a mistake of fact, or in consequence of some wrongful act, the agent is personally liable to repay it, unless, before the claim for repayment was made upon him, he has paid it to the principal or done something equivalent to payment to his principal."

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* Dated July 15, 1955.

† Dated June 19, 1956.

Applying that exception to the present case, counsel for the Nizam argued that (i) Moin acted wrongfully in transferring the funds to the appellant; (ii) the appellant was the agent for the State of Pakistan and before he had transferred the funds to his principal, the state, he had notice of Moin's wrongful act and knew that the Nizam was demanding the return of the money. Therefore (iii) the Nizam could recover the balance to the credit of the account from the appellant as money had and received without impleading the State of Pakistan directly or indirectly. This argument was accepted by the Court of Appeal, ROMER, L.J., saying that the appellant could successfully escape from this position only by identifying himself with the State of Pakistan. My Lords, were it necessary to do so I should, I think, have regarded the evidence of the appellant as discharging this onus; but I do not think it is necessary to go so far. Like the Master of the Rolls and BIRKETT, L.J., I am prepared to base my judgment on the citation made by them from the speech of LORD RADCLIFFE in *United States of America & Republic of France* v. *Dollfus Mieg et Compagnie S.A. & Bank of England* (3) ([1952] 1 All E.R. 572 at p. 587), though I arrive at a different conclusion. I need not repeat that citation. I am prepared to accept that the effect of it is correctly stated by their Lordships in the following extract from their judgment ([1957] 1 All E.R. at p. 265):

> "From this passage it sufficiently appears, in our judgment, that the prohibition which is of the essence of the rule, is a prohibition against the assertion by the English court of jurisdiction to entertain proceedings against a sovereign who (or a sovereign state which) is unwilling to submit to such jurisdiction. Whenever, therefore, the rule is invoked in a proceeding to which the sovereign is not made or sought to be made a party but in which the subject-matter is some property in regard to which the sovereign has or claims some kind of right or interest, the applicability of the rule depends on the extent to which the prosecution of the claim so affects the right or interest of the sovereign 'as to amount in one way or another to a suit against the sovereign'. The proposition is imprecise, no doubt; but as LORD RADCLIFFE observed, the law cannot be set at rest 'by any neat combination of words'."

In my opinion, the suit instigated by the Nizam so affects the right or interest of the State of Pakistan as to make this case on a par with the *Dollfus Mieg* case (3). True it is, as the Court of Appeal point out, that in that case the subject-matter of the suit was chattels, that in the case of chattels a sovereign state must act through individual agents, and that this necessity does not apply in the case of a chose in action. In the case of a chose in action the question is, no doubt, one of title, not control, but, in my opinion, the effect of the transfer of the balance into an account in the name of "Habib Ibrahim Rahimtoola (High Commissioner for Pakistan in London)" was to vest in the State of Pakistan such title to the balance to the credit of that account as to make any suit against the appellant to recover that balance whether as "money held in trust for the [Nizam]" or as "money due and owing to the [Nizam]" or "as money had and received to the use of the [Nizam]" a claim which amounts to a suit against a sovereign state.

Before parting from this part of the case I would call attention to two points. In the first place, it is to be observed that no question of sovereign immunity arose in any of the cases establishing the exception to the general rule stated in the passage from HALSBURY which I have cited. It would be strange, indeed, if the applicability of the rule of sovereign immunity depended on whether the defendant was the sovereign or his agent. Secondly, I would observe that this point was not taken before UPJOHN, J., and was only raised in reply in the Court of Appeal. It may, none the less, be a good point, but at least in such circumstances I may be allowed to suspect a flaw in the argument and to hope that I have exposed it.

There remains the question whether what were called the trustee cases apply. If they do, it matters not whether the transferee was the appellant or the State of Pakistan. In either event counsel for the Nizam contended that he was entitled to maintain his suit on the ground that the English courts will not be deterred from administering a British trust by reason only that a beneficial interest in the trust fund is claimed by a sovereign state. His argument on this point was rejected by all the members of the Court of Appeal. I am content to express my agreement with them and to adopt the language of ROMER, L.J., where he says ([1957] 1 All E.R. at p. 276):

> "I think those cases are only properly applicable where the court finds a trust fund in the hands of a person who is an independent trustee, and that they should not be extended to cases in which the person who controls the fund combines the character of trustee with that of agent for the foreign state which is setting up an interest in the fund. The contrary view, as it seems to me, would stretch what has hitherto been regarded as an exception to the doctrine to a point at which it ceases to be reconcilable with the doctrine itself. An additional reason why I should hesitate to hold that the exception applies is that Pakistan has not sought to establish any beneficial interest in the fund; its claim, as urged before the court, is limited to the legal title to the fund and is founded on agency, and not the trusteeship, of [the appellant]. Such a position, as I am inclined to think, is outside the scope and ratio alike of the relevant authorities which were brought to our attention."

My Lords, I agree with UPJOHN, J., in thinking the quotation which he makes from SIR ROBERT PHILLIMORE in *The Charkieh* (6) ((1873), L.R. 4 A. & E. 59 at p. 97) particularly applicable to the present case. It reads as follows:

> "The object of international law, in this as in other matters, is not to work injustice, nor to prevent the enforcement of a just demand, but to substitute negotiations between governments, though they may be dilatory and the issue distant and uncertain, for the ordinary use of courts of justice in cases where such use would lessen the dignity or embarrass the functions of the representatives of a foreign state . . ."

I would, therefore, stay the proceedings against the appellant.

There remains the question whether the action should be allowed to proceed against the bank. In my opinion it should not. On this point also I agree with UPJOHN, J., that proceedings must be stayed and for the reasons that he gives ([1956] 3 All E.R. at p. 320):

> "With regard to the bank, the plaintiffs* are suing the bank for the debt due at law to [the appellant]. Proceedings must be stayed against them, for to continue to sue them is to interfere with the property of the sovereign. That is clearly the proper course when dealing with a claim in detinue: see *United States of America* v. *Dollfus Mieg et Compagnie S.A.* (3). This cannot be likened to the case of a claim for damages for conversion. In this case, unlike the claim in respect of the thirteen bars of gold in *United States of America* v. *Dollfus Mieg et Compagnie S.A.* (3), there is no claim for damages against the bank. Nor does this case resemble *Haile Selassie* v. *Cable & Wireless, Ltd.* (2) ([1938] 3 All E.R. 384). The question there was: To whom were Cables & Wireless, Ltd., indebted? In this case, so far as the bank is concerned, there is only one answer to that question—[the appellant]. Both Moin and Mir had authority to operate the account, and the statement of claim does not allege that the bank had any knowledge of the alleged but, as I have held, unproved breaches of duty by Moin or Mir. The plaintiffs* can reach the debt only through [the appellant]. Therefore, the action against the bank must be stayed."

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* The Nizam and the State of Hyderabad.

True it is that evidence not available to UPJOHN, J., was produced to the Court of Appeal establishing a prima facie case that Moin had been guilty of a breach of duty but he was acting within the scope of his ostensible authority and neither the bank nor the appellant was aware of the alleged excess of authority when the account was transferred to the appellant. I do not think, therefore, the alleged excess of authority affords any reason why the action should be allowed to proceed against the bank.

For these reasons as well as for the reasons given by your Lordships I would allow the appeal. I only desire to add that I entirely agree with the concluding observations of my noble and learned friend on the Woolsack.

LORD SOMERVELL OF HARROW: My Lords, I agree with the opinion of my noble and learned friend, LORD REID, which has just been given. I would also like to associate myself with the concluding observations of my noble and learned friend on the Woolsack.

I wish only to add a few words on the decision in *Haile Selassie* v. *Cable & Wireless, Ltd.* (2) ([1938] 3 All E.R. 384). I would agree that it is not sufficient for a foreign sovereign, in cases where the facts do not speak for themselves, simply to claim. On the other hand, there would be no " immunity " if the foreign sovereign had to *prove* its title. I respectfully do not accept the statements to this effect in the speech of LORD MAUGHAM in *Compania Naviera Vascongado* v. *Cristina S.S., The Cristina* (1) ([1938] 1 All E.R. 719 at p. 738). This passage, which was in its context a dictum, was cited with approval in the *Haile Selassie* case (2) ([1938] 3 All E.R. at p. 388). The foreign sovereign must, in my opinion, establish an arguable issue. The decision in the *Haile Selassie* case (2) was based on a further ground. This, it was said, is not a case of property, possession or control of a chattel. The Italian government is not a necessary party to the action. That, of course, is true. It is also true that a decision in favour of Haile Selassie would not have been pleadable as res judicata against the Italian government.

The contract was made in 1935 at a time when the plaintiff was sovereign. The telegraphic station, the operation of which gave rise to the dues claimed, was closed on May 2, 1936, one day after the plaintiff left the country and seven days before the King of Italy proclaimed the annexation of the territory. The writ was issued on Jan. 4, 1937. On that date His Majesty's government recognised the plaintiff as de jure and the King of Italy as de facto sovereigns of Ethiopia. The issue was between the de jure and de facto sovereigns. The Court of Appeal decided that the claim by Haile Selassie was to proceed in the absence of the Italian government, the defendant having raised the defence that by reason of the conquest of Ethiopia the right to recover the sum claimed had vested in the King of Italy. The court, if the case had proceeded to trial, would have had to decide whether it had become so vested or not. If the decision was in favour of the plaintiff, the court would presumably have decided that, having regard to international law, the nature of the agreement and the dates and so on, the King of Italy had no claim. It does not seem to me satisfactory to say that this is not indirectly impleading a foreign sovereign because he is not estopped by res judicata. It also puts, or may put, the defendant in a position in which I would prefer he should not be placed. He cannot interplead because one claimant is a foreign sovereign, but he may have to pay twice over.

If and in so far as the decision proceeded on the principle stated above I would wish to reserve the point.

LORD DENNING: My Lords, if the State of Pakistan succeed in this case in putting up the " protective umbrella " of sovereign immunity, it will be the first time, so far as I know, that the courts of this country have ever allowed it to be raised to ward off a claim to a debt or a chose in action situate here on the ground that a foreign government own or control it. Your Lordships have heretofore allowed it to be raised in regard to a ship destined for public purposes, and in regard to gold bars likewise destined, but never before in regard to a debt. Much of the argument in the courts below and before your Lordships was dominated by the question: To whom does this money—this debt—belong? That question was asked, no doubt, because of the rule stated in Dicey's Conflict of Laws (6th Edn.) at p. 131, and the " two propositions of international law " formulated by Lord Atkin* which, so far as applicable to this case, come down to this: Is this debt the property of the State of Pakistan? or alternatively, is that state in control of it? for, if so, the action must be stayed.

Counsel for the appellant argued that the debt was the property of Pakistan because it had the legal title to it. He said that Pakistan could sue the bank at law in its own name for it; or at any rate that the appellant could sue for it, and the appellant was the agent of Pakistan.

The legal title to the debt was originally in the respondent, the Nizam of Hyderabad. It was assigned by his Finance Minister, acting within the scope of his ostensible authority to the appellant or to Pakistan—I will consider which in a moment—and that assignment was effective to pass the legal title to the transferee. So much was admitted by counsel for the Nizam but, as I pointed out during the argument, the assignment was not complete and perfect so as to pass the legal title until the bank attorned to the transferee. At any moment up to the attornment the Nizam could have countermanded the instructions to the bank and no one could say him nay: see *Gibson* v. *Minet* (7) ((1824), 2 Bing. 7). Neither the appellant nor Pakistan could have objected up to that point for the simple reason that they gave no value. They paid nothing for the debt. They gave up nothing. They promised nothing. And they could not say that there was a legal assignment within s. 136 of the Law of Property Act, 1925, seeing that the arrangements for the transfer were all made by word of mouth. There was nothing in the nature of an " absolute assignment by writing ". There was only notice in writing to the debtor. Nevertheless, as soon as the assignment was perfected by the attornment of the bank to the transferee, the legal title passed; for the money was thenceforward held by the bank to the use of the named transferee and could be recovered by him from the bank, not in an action of simple contract, but in an action of debt or for money had and received to his use: see *Clark's Case* (8) ((1613), Godb. 210), *Liversidge* v. *Broadbent* (9) ((1859), 4 H. & N. 603 at p. 612). A few days after the attornment —before, indeed, it had been acknowledged by the transferee—the Nizam countermanded the instructions to the bank, but it was then too late to stop the legal title passing.

The transfer being good, however, the question is: To whom was the legal title transferred? Was it to the appellant? or to the State of Pakistan? This is a question of construction. The named transferee here was not the State of Pakistan but the appellant himself. True he was described in brackets as " (High Commissioner for Pakistan in London) ". That is a description of his office and shows that he was acting in an official capacity. It shows, indeed, that he was an agent. But he still remained the named transferee. If he had been so named and described in a transfer of land or of shares, or in the assignment of an insurance policy, or in a bill of exchange as the payee or indorsee to whom the money was to be paid, there could be no doubt that the legal title would pass to him and not to Pakistan: see *Hinson* v. *Burridge* (10) ((1595), Moore, K.B. 701 (point 1)). So, also, in this transfer the legal title passed to the appellant. If Pakistan had desired to have the legal title in itself, it should have taken care to have the account transferred into its own name, but it did not do so and must take the consequences, just as the principals had to do in *Sims* v. *Brittain* (11) ((1832), 4 B. & Ad. 375, see p. 378) and *Sims* v. *Bond* (12) ((1833), 5 B. & Ad. 389, see p. 394). On the wording of the transfer here, as it stands, the appellant was in law the named transferee just as effectively as if the description "High Commissioner" had been omitted. He was the customer of the bank and the sole person entitled to operate the account. If the Foreign Minister of Pakistan had purported to give instructions to the bank, they could properly reply: "If you want anything done with this account, you must tell [the appellant] and let *him* give us the instructions. He is our customer and the only person we know in this matter ". A B

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* See [1938] 1 All E.R. at p. 720.

Counsel for the appellant argued, however, before your Lordships—not, I believe, in the courts below—that Pakistan was entitled to sue the bank at law in its own name, without joining the appellant as a party, because it was his principal in the matter. This might be a tenable argument if Pakistan could show that it was the real contracting party who was lending its money to the bank. That appears from *Cooke* v. *Seeley* (13) ((1848), 2 Exch. 746), on which counsel so much relied. But it is not this case. The real contracting party here was the Nizam of Hyderabad who lent his money to the bank. He, through his Finance Minister, transferred the debt to the appellant; and thereupon the appellant acquired the legal title as transferee, not as contractee. It is just the same as when any piece of property is transferred into the name of a transferee who is acting on behalf of a principal, such as shares transferred to a nominee. The principal, when he is the beneficial owner, is entitled to intervene in equity to protect his interests; but he is not entitled to sue at law without joining the legal owner as a party: see *Performing Right Society, Ltd.* v. *London Theatre of Varieties, Ltd.* (14) ([1924] A.C. 1). Here, however, Pakistan was not even the beneficial owner. The only way in which Pakistan might sue the bank alone is if it could show a contract of novation to which it was a principal, with consideration to support it, but none such was ever alleged or proved. In the motion to stay it was only the transfer that was relied on. C D E

In the result I find myself in full agreement with all the judges in the courts below that, on the transfer, the legal title to the debt became vested in the appellant and not in Pakistan. And as Pakistan admittedly had no beneficial interest, I should have thought that it could not sue in its own name at all, but only in the name of the appellant. Howsoever that may be, it by no means disposes of Pakistan's claim. That state says that, even so, the appellant was its agent and it could tell him what to do with the debt, in particular, whether to sue for it or not, and it could require him to collect the money and hand it over. " In effect ", therefore, the property was in Pakistan or at any rate it was in its control. That is a formidable argument which UPJOHN, J., accepted and it was only rejected by the Court of Appeal because it was displaced by new evidence adduced by the Nizam. This was to the effect that the Finance Minister of Hyderabad made the transfer wrongfully in breach of his duty to the Nizam and without any authority from the Nizam in fact. As soon as the Nizam got to know of it—it was within a very few days—and before any money had been withdrawn from the bank, the Nizam gave notice to the bank that the Finance Minister had no authority to make the transfer and asked for it to be re-transferred. The bank did not re-transfer it but they did not hand it to anyone else. They still have the money. F G H I

On this new evidence (which was not controverted) counsel for the Nizam argued before the Court of Appeal that any kind of title or control in Pakistan had disappeared. It had been superseded by the right of the Nizam to recover the money from the appellant in an action for money had and received. He referred to *Buller* v. *Harrison* (4) ((1777), 2 Cowp. 565) for this purpose. Before your Lordships, counsel went further and contended that the Nizam could recover the money at law from the bank likewise. He did not adduce any

A specific authority for that proposition, but I think it is plainly correct. The matter can be tested by taking a fictitious illustration which I only take because it comes from a decided case and throws the legal points into sharp relief. Suppose the Finance Minister had transferred the money to a lady of high standing whose official position was stated on the transfer, the transfer being within his ostensible authority but without actual authority, and it was later discovered that the lady B was his mistress and the transfer made for no consideration. As soon as the bank were told that the transfer was wrongful and unauthorised, they would be bound to return the money to the Nizam. The Nizam could clearly recover the money from the bank, if they still had it in their hands or from the mistress if she had got it, or, indeed, from any person who received it from her, except one who received it in good faith and for valuable consideration. That is shown by the C well-known decision of the Court of Appeal in *Banque Belge Pour L'Etranger* v. *Hambrouck* (15) ([1921] 1 K.B. 321). The gist of it is that an agent, acting within his ostensible authority but without actual authority, handed over his master's money for no consideration. The judgment of ATKIN, L.J., shows that he regarded such a transaction as voidable and not void. The named transferee obtained a title to the money until the plaintiff elected to avoid it, whereupon D the title re-vested in the plaintiff subject to any title acquired in the meantime by any subsequent transferee for value without notice. So, here, when the Nizam elected to avoid this transaction, the title re-vested in him so that he can sue the bank for the money which they still hold, but the appellant ought to be joined as a defendant so that the bank may be protected from any claim by him, and he may have an opportunity of controverting the facts if he wishes to do E so.

Counsel for the Nizam made a further point which appealed particularly to ROMER, L.J. There being no consideration for this transfer, and it not being a gift, the money was clearly held by the legal owner, the appellant, on a resulting trust for the Nizam. That gives the Nizam a right of control over it which overrides any claim which Pakistan may have, as principal, to give directions to F the appellant.

Those arguments of counsel for the Nizam appear to me to be very strong; as they appeared also to the Court of Appeal. Indeed, if it is open to the Nizam to displace the claim of Pakistan by showing a legal title in himself or an equitable title, I think he has done so. He has shown both; and if the matter stopped there, I should have found myself in agreement with the Court of Appeal. But G the question is whether it is open to the Nizam so to displace the claim of Pakistan when that state declines to litigate about it ? This throws us back, I think, to the rules which govern sovereign immunity.

It has sometimes been supposed that there is an absolute rule that a foreign government cannot be impleaded in our courts in any circumstances; and, as a corollary, that it cannot be asked to come to our courts to litigate about its H interest in property. That is supposed to be the result of DICEY's rule* and LORD ATKIN's two set propositions†. But there are difficulties in it. To begin with, the rule about "not impleading a foreign government" is by no means universal or absolute, as I will show. In the next place, the rule about "property" only applies, I think, to property which plainly or admittedly belongs to a foreign sovereign, or plainly or admittedly is in his possession or I control. It is not appropriate in cases such as the present where the question "To whom does this debt belong ?" "Whose property is it ?" is the very question which has to be decided in the action. It cannot also be the question which has to be decided on a summons to stay. It is obvious that, if that is the question to be decided by the courts, it ought to be decided at the trial—or at any rate, at *a* trial—after full discovery and examination of witnesses, instead of being done imperfectly at this preliminary stage with no discovery and on insufficient materials. LORD MAUGHAM was of that opinion*. He thought the foreign government ought to *prove* its title. But, if that is to be done, there is no point in a stay. You might as well have the trial anyway.

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* DICEY'S CONFLICT OF LAWS (6th Edn.) at p. 131.

† See [1938] 1 All E.R. at p. 720.

What is the alternative ? If the foreign government has not to prove its title, will a mere claim by it suffice ? That is the only logical alternative, as SCRUTTON, L.J., perceived. He pointed out that, if the foreign government is not to be impleaded, directly or indirectly, it must not be called on for proof of anything, not even to show good cause: see *The Jupiter* (16) ([1924] P. 236 at p. 243). But the Privy Council have refused to carry the rule about " not impleading a foreign government " to that absolute extreme. It would be far too unjust to a plaintiff in an English court: see *Juan Ysmael & Co. Incorporated* v. *Government of the Republic of Indonesia* (5) ([1954] 3 All E.R. 236). But is there any half-way house ? The Privy Council there said (ibid., at p. 240) that a foreign government is not bound to prove its title " but it must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective ". Even this leaves many questions un-answered. What degree of evidence is needed for this purpose ? And if the foreign government produces some evidence, is it not open to the plaintiff to displace it ? And if the plaintiff does succeed in displacing it (as the Nizam did here)—so that on the uncontroverted affidavits there is no longer an arguable issue—is the foreign government still entitled to a stay ?

Again what does the rule mean when it speaks of " property " and " control " ? Suppose that a legal title is in Pakistan or its agent, does it follow that the debt is " property " which belongs to it ? It can well be argued that Pakistan should not be entitled to sovereign immunity simply because it has a bare legal title without any equitable right. The Court de Cassation in France would not grant immunity on such a ground: see *L'Affaire Vestwig* (17) (1946, Annual Digest and Reports of Public International Law Cases No. 32). And can Pakistan be said to have " control " over the debt when the Nizam has a good equitable title which has priority in the courts over any direction that Pakistan may give to its agent ?

And where is the line to be drawn between an agent who is the " organ or alter ego " of a foreign government and one who is not ? Into which category did the appellant, the High Commissioner, fall ? It is said that, if he was an " organ " of the state, the transfer to him was equivalent to a transfer to the State of Pakistan itself and that automatically entitles it to a stay; whereas, if he was only an agent, it must produce evidence to satisfy the rule about " property ". I agree with the Court of Appeal that the appellant cannot be regarded as an " organ or alter ego ", but I find it difficult to reconcile this with the decision in *Baccus S.R.L.* v. *Servicio Nacional Del Trigo* (18) ([1956] 3 All E.R. 715), as to which I would only say that I should have thought that a separate legal entity which carried on commercial transactions for a state was an agent, and not an organ, of the government; and that it was only if it was an " organ or alter ego " that it could not be impleaded.

And why, I ask, should sovereign immunity depend on the finer points of our domestic law ? It is a strange proposition of international law which depends for its application on whether a satisfied judgment in trover changes the property in the goods (the point which apparently turned the scale in *United States of America & Republic of France* v. *Dollfus Mieg et Compagnie S.A. & Bank of England* (3), [1952] 1 All E.R. 572) or on whether the principal of a transferee can sue in his own name for cash at bank (a point which looms large in the present case). The comity of nations is not offended more or less according to the way such points are resolved.

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* See [1938] 1 All E.R. at p. 738.

Such are the difficulties in the existing rules. I can see no satisfactory answer to them. They are so great that I think we should go back and look for the principles which lie behind the doctrine of sovereign immunity. Search as you will among the accepted sources of international law and you will search in vain for any set propositions. There is no agreed principle except this: that each state ought to have proper respect for the dignity and independence of other states. Beyond that principle there is no common ground. It is left to each state to apply the principle in its own way; and each has applied it differently. Some have adopted a rule of absolute immunity which, if carried to its logical extreme, is in danger of becoming an instrument of injustice. Others have adopted a rule of immunity for public acts but not for private acts which has turned out to be a most elusive test. All admit exceptions. There is no uniform practice. There is no uniform rule. So there is no help there. Search now among the decisions of the English courts and you will not find them consistent. They seem to have different rules about " property " according to the subject-matter. On the one hand there are the cases about ships and other specific chattels. In these cases, the courts have tended to apply the rule of absolute immunity. This rule was formed in the days when no action lay against the sovereign in any circumstances. It was thought to offend the dignity of a sovereign and to impinge on his independence if his subjects were allowed to sue him in his own courts. Likewise if he were sued in the courts of another country. Proper respect for sovereign power, therefore, required that a sovereign should not be impleaded, directly or indirectly, in the courts of his own or any other country without his consent. These cases have received a check lately by *Sultan of Johore* v. *Abubakar Tunku Aris Bendahara* (19) ([1952] 1 All E.R. 1261 at p. 1268), where the Privy Council rejected the notion that there was any absolute rule about " not impleading a foreign government ".

On the other hand there are the decisions about trust funds and other debts. These have a modern look about them. It is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it; and his independence is better ensured by accepting the decisions of courts of acknowledged impartiality than by arbitrarily rejecting their jurisdiction. In all civilised countries there has been a progressive tendency towards making the sovereign liable to be sued in his own courts—notably in England by the Crown Proceedings Act, 1947. Foreign sovereigns should not be in any different position. There is no reason why we should grant to the departments or agencies of foreign governments an immunity which we do not grant our own, provided always that the matter in dispute arises within the jurisdiction of our courts and is properly cognizable by them.

This difference of treatment according to subject-matter is seen very noticeably in the *Dollfus Mieg* case (3) on which both sides relied. Counsel for the appellant relied on the decision of this House about the fifty-one gold bars whereas counsel for the Nizam relied on the decision about the remaining thirteen. It is, indeed, the fact that a stay was granted in respect of the fifty-one gold bars which were still specific chattels, but not in respect of the remaining thirteen which had, by mistake, been sold and melted down, leaving only a chose in action. And there seems, from the report, no difference between them except subject-matter. It must be remembered that the claim against the bank, as finally formulated, was not for delivery of the sixty-four gold bars but for damages for their conversion. The evidence of conversion of the fifty-one was the refusal to deliver them, and of the thirteen was the sale of them. This difference did not affect the substance of the dispute. It did not matter to the rival claimants whether they received the specific gold bars or the equivalent value in cash. Wherein then lies the difference unless it be in subject-matter ? that is, in the difference between specific chattels and a chose in action ? And the speeches in this House bear this out.

The reason for granting immunity in respect of the fifty-one bars was because A
the sovereign governments had the right to immediate possession of them and were entitled to have their bailees kept immune from suit in respect of them, whatever the form of action, whether it was for delivery of the specific fifty-one bars or for damages for their conversion. LORD RADCLIFFE said ([1952] 1 All E.R. at p. 589) that the Admiralty decisions about ships had much more bearing than the Chancery decisions about trust funds. The fifty-one bars were specific chattels, B
and if the plaintiffs obtained damages for conversion of them, the bank would be able to set up the plaintiffs' title against the sovereign governments, and that would materially affect the existing right of the sovereign governments to possession of them.

The reason for refusing immunity in respect of the thirteen bars was because, as LORD TUCKER put it (ibid., at p. 592), the bank, by its own act, had " put an C
end to the bailment which *alone* afforded the protective umbrella of immunity." It is instructive to consider the consequences. The action by the Dollfus Mieg Company was allowed to continue against the bank for conversion of the thirteen bars. Yet it is obvious that the sovereign governments could also bring an action against the bank for conversion of the same thirteen bars, and in that action the bank could not dispute the bailor's title. No system of jurisprudence could D
view with equanimity the prospect of the bank being made liable twice over for one and the same conversion. The bank would have a clear right to interplead by inviting the sovereign governments to come in and either to maintain or relinquish their claim, or else be barred: see R.S.C., Ord. 57, r. 1, r. 3, r. 5, r. 10. The rule about " not impleading a foreign government " would not be applied so rigidly or so absolutely as to obstruct the justice of that course. The sovereign E
governments, having no immunity in respect of the thirteen bars, would, therefore, have been compelled to come in or lose their right. Even if the bank had not sought to interplead and the Dollfus Mieg Company had obtained judgment against the bank (or against the purchasers of the thirteen bars), then on satisfaction by the bank of the judgment (or of the claim of the purchasers for indemnity) the bank could set up the title of the Dollfus Mieg Company against F
the sovereign governments, because a satisfied judgment in trover changes the property in the goods (see *Brinsmead* v. *Harrison* (20) ((1871), L.R. 6 C.P. 584)) and is equivalent to eviction by title paramount: see *Biddle* v. *Bond* (21) ((1865), 6 B. & S. 225). So the sovereign governments would be prejudiced by the continuance of the action. Yet this House allowed it to continue.

I have dwelt at some length with the position of the thirteen bars because it G
seems to me to be a direct decision of this House about a chose in action. So regarded, the decision falls into line with the decisions of the Court of Chancery about a trust fund or a debt. It has been held, I think rightly, that the court must administer a trust fund which is here in the hands of an English trustee, even though a foreign sovereign is known to claim an interest in it. This is only simple justice to the English trustee and beneficiaries. The court cannot allow H
the fund to lie stagnant for ever because one of the claimants is a foreign sovereign. In such a case, the court does not issue process to the foreign sovereign. It simply gives him notice of the proceedings: see *Strousberg* v. *Costa Rica Republic* (22) ((1880), 44 L.T. 199 at p. 201 per JAMES, L.J.). If he, after being given an invitation, does not choose to come to our courts to make good his claim, the court will adjudicate as best it can in his absence, and he will be bound by the I
decision. LORD LANGDALE, M.R., intimated as much in *Duke of Brunswick* v. *King of Hanover* (23) ((1844), 6 Beav. 1 at p. 39) and so did LORD HATHERLEY, L.C., in *Larivière* v. *Morgan* (24) ((1872), 7 Ch. App. 550 at p. 560). Likewise with an English debt due in England to a creditor who comes to our courts to enforce it. If a foreign government wishes to claim the debt, it ought, on being invited, to come to our courts to make good its claim. It cannot ask for the action to be stayed and do nothing more, because that would mean that the debt would

remain unpaid for ever; which would be unjust to all others concerned. The creditor's action must, therefore, be allowed to continue, and in that action the claim of the foreign government can be adjudicated on in its absence: see *Haile Selassie* v. *Cable & Wireless, Ltd.* (2) ([1938] 3 All E.R. at p. 387 per Sir Wilfrid Greene, M.R.). If the English creditor succeeds and is paid, and the foreign government should afterwards seek to make the debtor pay the debt twice over, our courts would not permit it. Seeing that the foreign government had refused to do the debtor the justice of coming in when given the chance, our courts would not permit it " to commit that injustice against him." Those were Lord Eldon, L.C.'s words in *Stevenson* v. *Anderson* (25) ((1814), 2 Ves. & B. 407 at p. 412), a case of interpleader which Lord Hatherley, L.C., said* had a great analogy. And if the foreign government should seek to sue the debtor in any foreign court, I would assume, as Lord Hatherley, L.C., did (7 Ch. App. at p. 561),

> " . . . that the courts of all countries would recognise the decision of a court of competent jurisdiction in a country where the property was situated, and where the rights were properly to be tried."

So much for our English decisions. If it were necessary in this case to choose between the Admiralty decisions and the Chancery decisions, I should have thought that the Chancery decisions had much more bearing. If the Nizam is not allowed to proceed with this action, the money will lie stagnant in the bank and the debt may remain unpaid for ever. The bank cannot safely pay either the appellant or the State of Pakistan because, once it does so, there will clearly thenceforward be no immunity available to protect the bank. The bank must wait until it is sued by the appellant or the State of Pakistan; and, once that is done, that state automatically waives its immunity. If Pakistan succeeds in getting a stay, therefore, it means that it does not choose to sue for the debt itself; and yet, by claiming immunity, it can prevent the Nizam from ever getting the money; and it can prevent the bank from ever getting a good discharge. That would not seem to be right. It creates a stalemate. The only way to break it is to allow the Nizam to continue the action but to protect the bank by having the appellant as a party, which has been done. On this ground also I would have been in favour of supporting the decision of the Court of Appeal but for one thing to which I now come.

I do not think it is right to resolve this case by asking whether it is more like the Admiralty decisions or the Chancery decisions, or whether it is more like the fifty-one gold bars or the thirteen gold bars, or whether it concerns a specific chattel or a chose in action. Such distinctions do not touch the root of the problem. Faced with an inconsistency between two lines of cases, the only course is to see which is more consistent with principle. For this I go back, as Upjohn, J., did, to the words of that great international lawyer Sir Robert Phillimore in *The Charkieh* (6) ((1873), L.R. 4 A. & E. 59 at p. 97) who, after a full review of the authorities, said this:

> " The object of international law, in this as in other matters, is not to work injustice, not to prevent the enforcement of a just demand, but to substitute negotiations between governments, though they may be dilatory and the issue distant and uncertain, for the ordinary use of courts of justice in cases where such use would lessen the dignity or embarrass the functions of the representatives of a foreign state . . . "

Applying this principle it seems to me that at the present time sovereign immunity should not depend on whether a foreign government is impleaded, directly or indirectly, but rather on the nature of the dispute. Not on whether " conflicting rights have to be decided," but on the nature of the conflict. Is it properly cognizable by our courts or not ? If the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so, because it does offend the dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic courts of another country; but if the dispute concerns, for instance, the commercial transactions of a foreign government (whether carried on by its own departments or agencies or by setting up separate legal entities), and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity.

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* In *Larivière* v. *Morgan*, (1872), 7 Ch. App. at p. 560.

Such a test, if accepted, would enable the difficulties presented by the *Dollfus Mieg* case (3) to be resolved. The dispute about the fifty-one gold bars brought into question an international transaction. During the war the bars had been looted by the enemy but re-captured by the Allied forces, and they were held by the sovereign governments in a pool for disposal according to international agreement: see the facts stated in [1949] 1 All E.R. at pp. 949-955. It would not be right for our courts to listen to an attempt to remove them from the pool without the consent of the sovereign governments. Whereas the thirteen bars had been removed from the pool by the bank's own act and the claim of the Dollfus Mieg Company could be regarded as a simple claim for a wrong done by the bank devoid of any international element. It was, therefore, properly cognizable by our courts.

I would, therefore, for myself approach this case somewhat broadly and ask whether the dispute is one properly cognizable by our courts; and I would test it by asking what would be the position if the transaction had taken place, not between the Finance Minister of Hyderabad and the Foreign Secretary of Pakistan, but between the Finance Minister of Hyderabad and the Foreign Secretary of Great Britain, and the money had been transferred not into the name of the High Commissioner of Pakistan but into the name of a high officer such as a Custodian of Property ? Would an action lie in our courts for the return of the money ? Clearly not. The transaction was more in the nature of a treaty than a contract or a trust. Reference would be made to such well-known cases as *Nabob of the Carnatic* v. *East India Co.* (26) ((1793), 2 Ves. 56) and *Civilian War Claimants Assocn., Ltd.* v. *R.* (27) ([1932] A.C. 14) to show that no action would lie for money had and received or on a trust. The court would not listen to an inquiry whether the Finance Minister of Hyderabad had authority to make the transfer. It would say that any representations to that effect must be made to the Crown and not to the courts. If our courts would not in like circumstances entertain an action against our own government or its agent, they should not entertain an action against the State of Pakistan or its agent. UPJOHN, J., put the point in a sentence when he said ([1956] 3 All E.R. at p. 320):

> "The present transaction was an inter-governmental transaction: let it be solved by inter-governmental negotiations."

That is the kernel of the matter. I agree with it and would allow the appeal.

My Lords, I acknowledge that, in the course of this opinion, I have considered some questions and authorities which were not mentioned by counsel. I am sure they gave all the help they could and I have only gone into it further because the law on this subject is of great consequence and, as applied at present, it is held by many to be unsatisfactory. I venture to think that, if there is one place where it should be re-considered on principle—without being tied to particular precedents of a period that is past—it is here in this House; and if there is one time for it to be done, it is now, when the opportunity offers, before the law gets any more enmeshed in its own net. This I have tried to do. Whatever the outcome, I hope I may say, as HOLT, C.J., once did, after he had done much research on his own: "I have stirred these points, which wiser heads in time may settle".

Appeal allowed.

Solicitors: *Sanderson, Lee, Morgan, Price & Co.* (for the appellant); *Bailey & Co.* (for the respondent, the Nizam of Hyderabad); *Freshfields* (for the respondents, Westminster Bank, Ltd.).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

Re THIRLWELL'S WILL TRUSTS.
EVANS *v.* THIRLWELL AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), October 24, 25, 1957.]

Power of Appointment—Exercise—General power—Residuary bequest—Express exercise by will of general powers arising under two different settlements—Will silent as to powers arising under third settlement—Whether contrary intention appeared by the will—Wills Act, 1837 (7 *Will.* 4 *&* 1 *Vict. c.* 26), *s.* 27.

By a settlement made in 1934, to which the testatrix was a party, she was given a general power of appointment, exercisable by deed or will, over a trust fund and trusts were declared in default of her exercising the power. In 1953 she made her will by which she gave her residuary estate to trustees on trust for sale and conversion and declared the beneficial trusts of the proceeds. By two other clauses of her will she expressly exercised general powers of appointment conferred on her by two other settlements. Her will contained no reference to the settlement of 1934 or to the general power of appointment which she was given by it.

Held: by virtue of s. 27 of the Wills Act, 1837, the testatrix' will effectively exercised the general power of appointment given to her by the settlement of 1934, because the burden of proving a contrary intention within s. 27 was on those who sought to show that the power had not been exercised and they had not proved such a contrary intention, since it was not shown by the testatrix' will or by necessary inference from it that she had the settlement in mind.

Dictum of SARGANT, J., in *Re Jarrett* ([1919] 1 Ch. at p. 370) applied.

Thompson v. *Simpson* ((1881), 50 L.J.Ch. 461) considered.

[**Editorial Note.** Two instances of phrases in a will which also have recently been held insufficient to show a contrary intention within s. 27 of the Wills Act, 1837, will be found in the judgment of DANCKWERTS, J., in *Re Waite's Settlement Trusts* ([1957] 1 All E.R. at p. 633, letter G); there, again, the relevant clause in the will did not refer to the general power of appointment that it was held to exercise.

As to a contrary intention sufficient for the purposes of s. 27 of the Wills Act, 1837, see 34 HALSBURY'S LAWS (2nd Edn.) 149, para. 195; and for cases on the subject, see 44 DIGEST 525, *3427*, *3428*.

For s. 27 of the Wills Act, 1837, see 26 HALSBURY'S STATUTES (2nd Edn.) 1347.]

Cases referred to:

(1) *Re Jarrett, Re Vrenegroor, Bird* v. *Green,* [1919] 1 Ch. 366; 88 L.J.Ch. 150; 121 L.T. 119; 44 Digest 525, *3428*.

(2) *Thompson* v. *Simpson,* (1881), 50 L.J.Ch. 461; 44 L.T. 710; 44 Digest 348, *1777*.

Adjourned Summons.

This originating summons was issued by the plaintiff, one of the executors and trustees of the will of the testatrix, Eliza Charlotte Thirlwell, who died on Mar. 26, 1956, for the determination of the question whether on the true construction of her will, the testatrix had thereby exercised her general power of appointment over the funds and interest contained in a deed of settlement dated Jan. 19, 1934, or whether the assets and interests devolved under the trusts of the settlement in default of appointment. The testatrix had not

exercised the general power of appointment, which was a power to appoint A
by deed or will, by deed during her lifetime.

C. F. Fletcher-Cooke for the plaintiff, one of the trustees of the will.

A. P. McNabb for the first defendant, son of the testatrix and a residuary legatee.

M. W. Cockle for the second and third defendants, daughter and grand- B
daughter of the testatrix, residuary legatees and interested under the settlement of 1934.

Arthur Bagnall for the fourth and fifth defendants, trustees of the settlement of 1934.

ROXBURGH, J.: By a settlement dated Jan. 19, 1934, and made between
Philip John Le Riche, Eliza Charlotte Thirlwell and Phyllis Eileen Carruthers C
of the one part, and Eliza Charlotte Thirlwell and Dennis Thirlwell of the other part, it was provided by cl. 3 thereof that from and after the death of the testatrix (Eliza Charlotte Thirlwell) the funds referred to in the said settlement should be held

> " upon trust both as to capital and income thereof for such persons or D
> purposes as the said Eliza Charlotte Thirlwell shall by deed revocable or irrevocable or by will or codicil appoint ",

and in default of appointment on certain trusts. It is important, I think, that there were trusts, but I do not think that it is important to state what
they were. The three things which are derived from that, and which are all E
that I think that I am entitled to derive, are that the testatrix had a general power of appointment, that in 1934, at any rate, she must have known so, because she was a party to the settlement, and that there were trusts in default of appointment.

By cl. 8 of her will, dated Apr. 2, 1953, she gave

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> " all the rest and residue of my property and effects whatsoever and wheresoever and whether real or personal unto my trustees upon trust that they shall sell . . . call in and convert the same into money and shall stand possessed of the proceeds of such sale calling in and conversion and of my ready money (hereinafter called ' my residuary estate ') upon the
> trusts hereinafter declared concerning the same." G

Pausing there, it is clear that there is a prima facie statutory exercise of the power of appointment. In *Re Jarrett, Re Vrenegroor, Bird* v. *Green* (1) ([1919] 1 Ch. 366), SARGANT, J., said (ibid., at p. 370):

> " Prima facie the residuary bequest is effectual to dispose of the property
> subject to the testatrix' general power of appointment together with her H
> own property under s. 27 of the Wills Act ' unless a contrary intention shall appear by the will ', and it is clear that the onus lies on those who assert that the property subject to the general power does not pass under the residuary bequest to prove the contrary intention."

In my view, those words of SARGANT, J., are accurate. There is an onus on I
those who say that the residuary bequest does not operate to exercise the general power to prove the contrary intention from the will. How narrow that is must be obvious. It is indeed extraordinary how few are the cases in which that burden has ever been discharged when there has not been some express reference in the will to the instrument conferring the power, or something of that sort.

The testatrix, as appears from the will itself, had two other general powers of appointment. Clause 11 of the will is:

> " In exercise of the power for this purpose given to me by cl. 4 and cl. 5 of a deed made in pursuance of articles for a settlement executed in contemplation of my marriage with my late husband Dennis Thirlwell and dated July 31, 1895 (hereinafter called 'the first settlement') and of every and any other power enabling me in this behalf I hereby direct and appoint that the trustees for the time being of the first settlement shall forthwith after my death raise out of the moneys, stocks, funds, securities and property held subject to the first settlement the sum of £18,000 if available and if not then so large a sum as is available and shall pay the same to my trustees absolutely to be held as part of 'the combined trust funds' hereinafter mentioned and the trustees of the first settlement shall hold the residue of the capital and income of the trust premises in trust for my son the said George Thirlwell absolutely."

There is in that clause a complete exercise of the general power of appointment conferred by the articles of settlement.

By cl. 12 of the testatrix' will she provided:

> " In exercise of the power given to me by cl. 10 of another deed made in pursuance of articles for a settlement executed in contemplation of my said marriage . . . and dated Mar. 25, 1896 (hereinafter called 'the second settlement') I hereby direct and appoint that the trustees for the time being of the second settlement shall hold all the moneys, stocks, funds, securities and property subject to the trusts of the second settlement upon trust to pay or transfer the same to my trustees absolutely as part of 'the combined trust funds' hereinafter mentioned subject nevertheless to the payment of the annual sum of £500 appointed to be paid to Augusta Beatrice Crossley (formerly Charrington) for her life by the will of my late son Arthur Leslie Charrington under and in pursuance of cl. 9 of the second settlement."

So there is an exercise of the general power under that settlement. By cl. 13 of her will the testatrix directed:

> " My trustees shall hold all the property hereby appointed to them and also my residuary estate and the investments for the time being representing the same (hereinafter called 'the combined trust funds') upon the trusts following . . . ",

and then there are certain trusts. I do not for one moment suggest that the contrary intention need be express. That would be contrary to the whole trend of authority. It is quite clear, however, that some inconsistencies provide sufficient evidence of contrary intention, and where one finds inconsistencies it is, I think, necessary to be very careful. If the question were whether there was any indication that the testatrix intended to exercise the power under the settlement of 1934, the answer would plainly be that there was not; but a contrary intention has to be proved, and in my judgment that can only be proved if it can be shown to the court as a fact that, by reason of the language of the will, or by necessary inference from the language of the will, the testatrix, having in mind the power of appointment, did not intend to exercise it. The words in the Wills Act, 1837, s. 27, are " contrary intention ", and, though the word " intention " has been construed and re-construed, and shaved round and round by judicial decisions in quite a different context, to my mind a person cannot be said to have an intention in relation to something which is not even in his mind. That is the real difficulty in this case.

If it had been proved to my satisfaction, either by something in the will, or by proper inference from something in the will, that the testatrix had the settlement of 1934 in mind, I should certainly have held that she had shown a A contrary intention; but I want to emphasise what SARGANT, J., said in *Re Jarrett* (1) ([1919] 1 Ch. at p. 370), that the burden is on those claiming that the power has not been exercised to prove the contrary intention. This was a carefully drawn document, and it refers specifically to two general powers. It is for those who contend that the power is not exercised to prove it, and it is enough for me to say that they have not proved it, and that I can certainly B say in this case. It seems to me, so far as I am entitled to speculate, that the probability is that the testatrix did not have the settlement in mind at all. This is a very carefully drawn will, obviously drawn by a competent draftsman, either by or on the instructions of a solicitor, and I have no doubt that, if the solicitor had had in his possession or power the settlement of 1934, he would not have been so negligent as not to hand it to counsel, if in fact the will were C drawn by counsel, or would be so negligent as not to look at it himself if he drew it. I do not think any solicitor or counsel who had competence in this matter would have failed to make some reference to the third instrument, and thereby provide an answer to the question categorically. I do not decide this case on speculation, however. My view is that it is the duty of those claiming that the power has not been exercised to prove the contrary intention, and D they are far from having proved it to my satisfaction; so far as I have any views at all my views are to the contrary.

I am certainly not saying that in no circumstances could an inference be drawn from the fact that a testatrix had exercised expressly one general power and had not exercised expressly another. Supposing a will said " Whereas I have three general powers of appointment under settlements A, B, and C E respectively, now I hereby exercise the powers under settlements A and B ", I think the court would infer that the testator did not intend to exercise the power conferred by settlement C. Again, supposing the will read—"I give £500 to James Smith mentioned in settlement A and in exercise of the general power of appointment conferred by settlement B "—and assuming that there was a F general power of appointment in settlement A but the will made no reference to it, I think it is quite possible that in such a case the court might, from that very language, draw the inference that there was a contrary intention shown, and that the general power conferred by settlement A was not exercised.

I want to make that plain, because it is not necessary for me to say or suggest that the case to which I am going to refer, *Thompson* v. *Simpson* (2) ((1881), G 50 L.J.Ch. 461), is wrong; indeed, nobody who has not made some research in the record office can ever know on what grounds the judge in that case reached his opinion. It is quite possible that there were sufficient grounds for the conclusion at which the judge arrived. The case is not well reported anywhere. The headnote says:

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> " By a settlement certain real estate was conveyed to trustees, upon trust to sell, and to pay the proceeds of sale to such persons as A should by deed or will appoint. By a second deed of settlement A appointed that the trustees of the first settlement should stand possessed of the sale moneys in trust for such persons as she should by will appoint. By her will, made previous to the second settlement, A, 'in pursuance of' the power contained in the I first settlement, appointed the property comprised therein (describing it as real estate) to her three sons."

In the judgment KAY, J., said (50 L.J.Ch. at p. 463):

> " Then what was the effect of the will of Elizabeth Simpson? Was it revoked by the subsequent settlement, or did it execute the power contained in that settlement? My impression is, that it was revoked by the

> A subsequent settlement. But, if not revoked, it did not, in my opinion, execute the power in the subsequent settlement, because it expressly refers to the power contained in the first settlement. It was, therefore, inoperative to pass any part of the property."

I have no doubt that there was much more in the judgment, and I have some B reason for thinking that when I compare the reports in the two different series of law reports, the LAW JOURNAL REPORTS and the LAW TIMES REPORTS. They are not the same, and obviously they are both incomplete. I do not think that I need pursue that question further, however, because I have already agreed that it may well be that there are circumstances which are admissible, and also inferences to be drawn from the language of a will itself, which may C lead to the conclusion that in the particular case the reference to one power is enough to negative the intention to exercise another. My decision must depend, however, on the facts of this particular case, and there is no reason to say that the settlement of 1934 was in the mind of the testatrix at the date when she made her will. I am unable to infer that she did not intend to exercise the power which it is not proved that she had in her mind. I appreciate the D argument which counsel for the second and third defendants sought to found on reading cl. 8 and cl. 13 together, but, in my judgment, that is really begging the question. If the court were satisfied that the testatrix had the settlement of 1934 in her mind, then I think it would be true to say that there would be a sufficient contrary intention here, for many reasons. I should expect something to be said about it, and there is nothing said about it. On that basis, it would E be very strange that she should have expressly exercised the two powers and left it to another to exercise the third. One can pursue that right through. One can ask why the testatrix dealt with the two funds separately until she combined them ? If she had the third settlement in mind it would be impossible to answer that question, but if she did not have it in mind the answer is obvious. It seems to me that it all comes back to the matter with which I have tried to F deal. Although this type of case must arise fairly often, with the exception of *Thompson* v. *Simpson* (2), of which the report is most unsatisfactory, there is no case on this point to be found in the books.

The argument has to be tested by the fact that the burden of proof as laid down by s. 27 of the Wills Act, 1837, is very heavy, and can very seldom be expected to be discharged. It has not been discharged in this case.

Declaration accordingly.

Solicitors: *Chalton Hubbard & Co.*, agents for *Marsh & Ferriman*, Worthing (for all parties other than the first defendant); *Robinson & Bradley* (for the first defendant).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

PULLEN *v.* PRISON COMMISSIONERS.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J.), November 4, 5, 6, 1957.]

Factory—Prison—Whether prison workshop is a factory—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 67), *s.* 151.

P. was sentenced to a term of imprisonment which he served between Nov. 9, 1951, and Oct. 31, 1953, in Pentonville prison. He was medically examined before admission to prison and was found fit for normal work. During a considerable part of the period of his imprisonment he was put to work on the manufacture of coir mats in the prison workshop. In that process dust was given off, but a dust extractor was provided. Four months after his release he was found to be suffering from tuberculosis. In an action brought by P. for breach of statutory duty under s. 47 of the Factories Act, 1937, by failing to take measures to protect him from dust and fumes,

Held: the prison workshop was not a factory within the definition of "factory" in the Factories Act, 1937, there being no relationship of master and servant or employment for wages in the case of a prisoner; the action was, therefore, dismissed.

Weston v. *London County Council* ([1941] 1 All E.R. 555) applied.

[As to the definition of "factory" see 17 HALSBURY'S LAWS (3rd Edn.) 11-15, paras. 13, 14; and for cases on the subject, see 24 DIGEST 897-899, *1-13*.

For the Factories Act, 1937, s. 47 and s. 151, see 9 HALSBURY'S STATUTES (2nd Edn.) 1038 and 1113.

For the Prison Act, 1952, see 32 HALSBURY'S STATUTES (2nd Edn.) 623.]

Case referred to:

(1) *Weston* v. *London County Council*, [1941] 1 All E.R. 555; [1941] 1 K.B. 608; 110 L.J.K.B. 332; 165 L.T. 135; 105 J.P. 213; 2nd Digest Supp.

Action.

The plaintiff, George Pullen, claimed damages for personal injuries caused by the negligence or breach of statutory duty of the defendants, H.M. Prison Commissioners, at H.M. Prison, Pentonville. The plaintiff was sentenced to a term of three years' imprisonment and having earned full remission he was in Pentonville prison from Nov. 9, 1951 to Oct. 31, 1953. At his medical examination while on remand he was classified as "Fair. Fit for labour". During a considerable part of the time while he was in prison, he was employed in the prison workshop making coir mats, in the manufacture of which dust was given off. He was diagnosed as suffering from tuberculosis in February, 1954. He alleged (i) that the defendants were in breach of their statutory duty under s. 47 of the Factories Act, 1937, by failing to take measures to protect him from dust and fumes emanating from the manufacture of coir mats; and (ii) that there was negligence in the medical treatment and examinations which he received. The defendants contended that a prison workshop was not a factory within the meaning of s. 151 of the Factories Act, 1937, pleading in answer to any contention based on s. 104 of that Act, s. 104 (3) of the Act.

C. N. Shawcross, Q.C., and *P. J. H. Benenson* for the plaintiff.

The Solicitor-General (*Sir Harry Hylton-Foster, Q.C.*) and *Rodger Winn* for the defendants.

LORD GODDARD, C.J.: This is an action of a somewhat remarkable character and, I think, is in some respects unique. It is an action brought by a man who was undergoing a sentence of three years' imprisonment (which meant that having earned full remission he was kept in prison for two years) against the

Prison Commissioners in respect of his treatment in Pentonville prison, which he alleges was responsible for a condition of tuberculosis from which he was found to be suffering three or four months after his discharge. He was discharged on Oct. 31, 1953, having been sentenced on Oct. 9, 1951. He was examined by a doctor of eminence and repute in February, 1954, when he was found to be suffering from tuberculosis. During a considerable part of the time when he was in prison the plaintiff was employed, as many prisoners are, on the making of coir mats. That involves a certain amount of dust which cannot be avoided, and, although steps can be taken to lessen the quantity of dust, there must always be dust from any such manufacturing process to some extent, but a careful employer, apart from any obligation under the Factory Acts, would see to it that there was not an excessive amount of dust present. There must also always be present a certain amount of waste material cut off from the coir mats and so on.

The matter starts in this way. This man was under remand in Brixton prison for about a month before he was tried at the Central Criminal Court. He was examined at Brixton prison. He was examined more than once, as his record shows. Nothing was found wrong with his health. His health was described as fair or satisfactory. He was then committed, after conviction, and admitted to Pentonville prison. His medical report sheet from Brixton prison would go with him so that the authorities at Pentonville prison would not be put on inquiry by anything that had happened during the time he was under remand that anything was wrong with him when he came to Pentonville. [HIS LORDSHIP reviewed the evidence and continued:] I am quite satisfied on the evidence that I have heard and the books which I have examined that there was nothing to call the attention of the doctors during the time when he was in prison to the fact that he was a tubercular subject.

I ought to say a word about the way in which this action is framed. This action is framed first of all as a breach of the Factories Act, 1937. I am satisfied that on a true construction of the Act I ought not to hold that a prison workshop is a factory. I will content myself with referring to *Weston* v. *London County Council* (1) ([1941] 1 All E.R. 555), in which WROTTESLEY, J., held that a technical institute was not a factory and gave reasons which seem to me to be even more compelling in the case of a prison than they were in the case of a technical institute. The Factories Act, 1937, is an Act which is designed for the protection of persons working in factories, that is to say, it is an Act which is intended to and does put obligations on employers of labour in factories and other places to take various precautions for the protection of their work-people. It applies, as the Solicitor-General submitted, to people working under contract and not to prisoners employed on labour as part of penal discipline.

Section 151 of the Factories Act gives an interpretation of the word " factory " which I need not read. The definition includes premises in which persons are employed for the making of any article, and then s. 151 goes on to say:

> " And (whether or not they are factories by reason of the foregoing definition) the expression ' factory ' also includes the following premises in which persons are employed in manual labour, that is to say ",

and then there is mention of premises such as ships, dry docks, yards and various premises in which certain businesses are carried on, e.g., laundries, which all appear to be factories. If Parliament had intended that a prison should be included, it would be a very remarkable thing if, when they were considering the latter provisions of this sub-section, they should not have included any reference to prisons. If the definition of " factory " is to apply, there must exist (except in certain express cases, for instance, apprentices, for there is a sub-section which deals with apprentices) the relationship of master and servant and employment for wages. There is no employment for wages in the case of prisoners. Prisons are under the control of the Secretary of State, who exercises his control through the Prison Commissioners, and there are also visiting magistrates who visit to see that the provisions of the Prison Act, 1952, are being carried out. A

There are several provisions of the Factories Act, 1937, to which my attention was called which seem to show quite clearly that they cannot possibly apply to prisons. The work which is carried on in prisons is work which is penal in the sense that the prisoners are obliged to work as a consequence of their sentence. B I do not find any section in this Act which faintly indicates in my opinion that a prison workshop can be a factory. The reasons given by WROTTESLEY, J., in *Weston* v. *London County Council* (1) appeal to me and I could not put them better if I were to take much longer in giving this judgment than I am already doing. I think the considerations which he applied to showing that a technical institute was not a factory although work was being carried on there which, if it had been C carried on by persons employed under a contractual relationship, would have made the place a factory, apply in this case; and, if in the case before WROTTESLEY, J., the institute was not a factory, still less is a prison a factory.

The other point made was this. It was said that the prisoner was employed in what might conveniently be described as unhygienic conditions. If I were satisfied that the prisoner was set to work in such conditions that his health was D undermined by the conditions in which he was working, I think it might very well be that when he was discharged from his sentence he might have a cause of action; but I cannot find that here. The only thing that can be suggested about the place in which he was working is that there was a certain amount of dust. An extractor was provided, and no one suggests that it was not a proper extractor. It is said that it was sometimes necessary to clean this extractor out and to move the E accumulation of particles of cut coir which came from the mat cutting machine on which he was working. The answer to that is that there was a shovel provided for him to take that accumulation of particles out. I cannot hold that this was a dangerous occupation or that the conditions under which he worked were such as to cause him ill health, subject to this, that if it had been known that this man was suffering from tuberculosis the doctor would not, I expect, have thought F that this was a suitable place for him to work in but that the man would be better employed elsewhere. Indeed if it had been known that he was suffering from tuberculosis, as to which I am by no means satisfied, it is very likely that he would not have been put on to any work at all.

In my judgment the Factories Act, 1937, does not apply and I can find no ground to show that anybody has been negligent. Therefore on both grounds G this action must be dismissed.

Judgment for the defendants.

Solicitors: *Pollard, Stallabrass & George Martin* (for the plaintiff); *Treasury Solicitor* (for the defendants).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

ROBINSON-SCOTT *v.* ROBINSON-SCOTT.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), May 20, October 28, 29, 30, November 6, 1957.]

Divorce—Foreign decree—Jurisdiction of foreign court based on separate domicil of wife—Wife resident in territory of foreign court for three years preceding commencement of proceedings there—Decree recognised by English court.

The English court can recognise a divorce decree granted by a foreign court to a wife who has resided for three years in the territory of that court, even though the foreign court founded its jurisdiction on a ground not recognised by English law, since the English court would itself accept jurisdiction on proof of a similar residence in England (see p. 478, letters D to G, post).

The parties were married in December, 1950, in Switzerland. The husband was at all times domiciled in England, and at the date of the marriage the wife was domiciled in the canton of Zurich where she had resided for at least seven years. After a honeymoon in Switzerland the husband returned to London where he lived and worked. The wife agreed to join him there but in fact never did so, and the parties never resumed cohabitation. In July, 1951, the wife instituted proceedings for divorce in the district court of Zurich. The husband disputed the Zurich's court jurisdiction but on July 3, 1953, that court, applying the law of the canton of Zurich, found that the wife had acquired a domicil in Zurich by the date of the commencement of proceedings there (and notwithstanding the fact that the husband's domicil remained English), and granted a decree to the wife on the ground, established by the Swiss Civil Code, that the marriage was deeply and irreparably disrupted. The husband now prayed, inter alia, for a declaration that the marriage had been validly dissolved by that decree.

Held: the marriage was validly dissolved by the decree of the Zurich court since the fact that the wife had resided in the territory of that court for at least three years would have entitled the English court, if her residence had been in England, to exercise jurisdiction under the Matrimonial Causes Act, 1950, s. 18 (1) (b), and therefore the English court would recognise the decree notwithstanding that the Zurich court founded itself on a concept of domicil not recognised by English law and exercised a jurisdiction of divorce that did not exist in English law.

Travers v. *Holley & Holley* ([1953] 2 All E.R. 794) considered; *Dunne* v. *Saban* (*formerly Dunne*) ([1954] 3 All E.R. 586) distinguished.

[As to the recognition by English courts of foreign decrees of divorce, see 7 HALSBURY'S LAWS (3rd Edn.) 112, para. 200, note (u); and for cases on the subject, see 11 DIGEST (Repl.) 481-483, *1079-1097*.

For the Matrimonial Causes Act, 1950, s. 18 (1) (b), see 29 HALSBURY'S STATUTES (2nd Edn.) 405.]

Cases referred to:

(1) *Lord Advocate* v. *Jaffrey*, [1921] 1 A.C. 146; 1920 S.C. (H.L.) 171; 89 L.J.P.C. 209; 124 L.T. 129; 11 Digest (Repl.) 356, *253*.

(2) *A.-G. for Alberta* v. *Cook*, [1926] A.C. 444; 95 L.J.P.C. 102; 134 L.T. 717; 11 Digest (Repl.) 472, *1030*.

(3) *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517; 64 L.J.P.C. 97; 72 L.T. 873; 11 Digest (Repl.) 468, *1011*.

(4) *Armitage* v. *A.-G.*, *Gillig* v. *Gillig*, [1906] P. 135; 75 L.J.P. 42; 94 L.T. 614; 11 Digest (Repl.) 483, *1094*.

(5) *Warden* v. *Warden*, 1951 S.C. 508; [1951] S.L.T. 406; 11 Digest (Repl.) 504, *732*.

(6) *Travers* v. *Holley & Holley*, [1953] 2 All E.R. 794; [1953] P. 246; 3rd Digest Supp.

(7) *Jacobs* v. *London County Council*, [1950] 1 All E.R. 737; [1950] A.C. 361; 114 J.P. 204; 30 Digest (Repl.) 212, *545*. A

(8) *Dunne* v. *Saban (formerly Dunne)*, [1954] 3 All E.R. 586; [1955] P. 178; 3rd Digest Supp.

(9) *Carr* v. *Carr*, [1955] 2 All E.R. 61; 3rd Digest Supp.

(10) *Arnold* v. *Arnold*, [1957] 1 All E.R. 570.

B

Petition.

The husband petitioned for a declaration that his marriage had been validly dissolved on July 3, 1953, by a decree of the district court of Zurich in Switzerland, alternatively for a decree of divorce on the ground of his wife's desertion since Feb. 12, 1951. The suit was undefended and came before KARMINSKI, J., on May 20, 1957. Having heard the evidence HIS LORDSHIP adjourned the case for argument by the Queen's Proctor. The facts appear in the judgment. C

J. D. F. Moylan for the husband.

Colin Duncan for the Queen's Proctor.

Cur. adv. vult.

Nov. 6. **KARMINSKI, J.**, read the following judgment: This is a husband's petition which prays for a declaration that the marriage between the wife D and himself was validly dissolved on July 3, 1953, by a decree pronounced on that date by the district court of Zurich in Switzerland. In the alternative the husband prays that if the Swiss decree was ineffective to dissolve his marriage, this court will dissolve his marriage on the ground that the wife deserted him from Feb. 12, 1951, until the date of the presentation of this petition, namely, Feb. 16, 1957. The wife entered no appearance to the petition and was not E represented at the hearing. As it was clear that this case raises a point of law of some difficulty and also of considerable general interest, I adjourned the hearing, after taking the evidence, for argument by the Queen's Proctor. I have now had the great advantage of very full and careful arguments from both Mr. Colin Duncan for the Queen's Proctor and Mr. Moylan for the husband, and I am greatly indebted to both of them for the help that they have given me. F

The material facts in the present case present no difficulty and may be briefly stated. The husband is of British nationality and is, and was at all material times, domiciled in England. At the time of the marriage, the wife was a Swiss national, who had lived in the canton of Zurich from at least 1943 and was domiciled in that canton. The marriage was validly celebrated in Zurich according to the requirements of Swiss law on Dec. 22, 1950. After a short G honeymoon in Switzerland, the husband returned to his duties in London where he lived and worked. The wife agreed to join him in London after a short interval which she required to attend to her personal affairs. In fact the wife never did join the husband, but thereafter lived separate and apart from him. On July 22, 1951, the wife commenced proceedings in the district court of Zurich, praying that her marriage with the husband be declared void, or alter- H natively that her marriage be dissolved. The husband through his English solicitor disputed the jurisdiction of the Zurich court, but on Dec. 8, 1952, he gave evidence before one of the examiners of this court denying certain of the charges against him raised by the wife in the Zurich proceedings. On July 3, 1953, the Zurich court pronounced its findings together with full reasons for them. The Zurich court rejected the wife's prayer for a declaration of nullity, I but granted her a decree of dissolution of her marriage with the husband under art. 142 of the Swiss Civil Code on the ground that the matrimonial relations between the parties were deeply and irreparably disrupted. Dr. Speckert, a Doctor of Laws of the University of Zurich, gave evidence before me on Swiss law, and the following facts emerged from his very helpful evidence. In matrimonial disputes in Switzerland the substantive law is to be found in the Swiss federal code, though procedural law (which includes questions of jurisdiction) is regulated by the law of the canton. Applying the law of the canton of Zurich, the Zurich court found that the wife had in the circumstances of the present case acquired a domicil in Zurich by the date of the commencement of the Zurich proceedings, notwithstanding that the domicil of the husband remained English. In their judgment the Zurich court expressly noticed that by English law the domicil of the wife would remain that of the husband during coverture, notwithstanding her separation from him, but applied the provisions of the Swiss Civil Code which allowed her to acquire a domicil separate from his.

It is at this point that the difficulties of the present case begin. It is now well settled in English law that during coverture a wife retains the domicil of her husband. Desertion by a husband, followed by the acquisition by him of a new domicil of choice, still leaves the deserted wife's domicil that of the husband: *Lord Advocate* v. *Jaffrey* (1) ([1921] 1 A.C. 146). Even a decree of judicial separation pronounced in favour of a wife does not entitle a wife to acquire a domicil of choice different from that of her husband: *A.-G. for Alberta* v. *Cook* (2) ([1926] A.C. 444). In English law the basis of the jurisdiction in suits for dissolution has long been domicil. For many years prior to 1937 it was (except for certain statutory exceptions relating to spouses domiciled in England but residing in India) the sole basis for jurisdiction. In 1895 the law was enunciated by the Judicial Committee of the Privy Council in these terms:

> " . . . according to international law, the domicil for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage "

(per Lord Watson in *Le Mesurier* v. *Le Mesurier* (3), [1895] A.C. 517 at p. 540). Domicil ceased to be the only true test in 1937, when s. 13 of the Matrimonial Causes Act, 1937, enabled the jurisdiction to be exercised provided that the husband had been domiciled in England at the time of his desertion or deportation and notwithstanding any subsequent change in his domicil. The basis of the court's jurisdiction was further broadened by the Matrimonial Causes (War Marriages) Act, 1944, and finally by s. 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1949, which introduced three years' residence in England by the wife immediately preceding the commencement of the proceedings as a basis for jurisdiction. Section 18 of the Matrimonial Causes Act, 1950, has consolidated the earlier statutes.

Until 1937 the English courts recognised foreign decrees of dissolution if pronounced by the courts of the domicil of the spouses, or where (as in *Armitage* v. *A.-G., Gillig* v. *Gillig* (4), [1906] P. 135) the courts of the domicil recognised the validity of a decree pronounced by the courts other than that of the domicil. After 1937 the English courts could entertain suits where at the commencement of the suit the spouses were no longer domiciled in England. This raised the question of recognition by the English courts of decrees pronounced by courts other than the courts of the domicil, but in circumstances where the English courts had themselves the power to entertain jurisdiction. Though this question was a good deal canvassed by learned writers, it does not appear to have been judicially considered before 1951. In *Warden* v. *Warden* (5) (1951 S.C. 508) the wife had obtained a decree of dissolution from the courts of Nevada, though at the time of the institution of her suit the husband was domiciled in Scotland. The wife defended the husband's suit on the ground that the Nevada decree should be recognised by the Scottish courts, since the Nevada courts were exercising a jurisdiction based on residence similar to that conferred on the Scottish courts by s. 2 (1) of the Law Reform (Miscellaneous Provisions) Act, 1949. This plea was rejected by the Lord Ordinary (Lord Strachan) who held that the Act of 1949 which extended the jurisdiction of the Court of Session, made no provision for the recognition of foreign decrees of divorce except when jurisdiction was based on domicil. Lord Strachan further held that there was no real similarity between the provisions of the

Act of 1949 and the grounds on which the Nevada courts assumed jurisdiction. It does not appear that the wife was resident in Nevada for three years immediately preceding the commencement of the proceedings there, so that Lord Strachan was not considering a case where the factual circumstances, namely, three years' residence, would have permitted the Scottish courts to have assumed jurisdiction.

In England the general question was first considered in *Travers* v. *Holley & Holley* (6) ([1953] 2 All E.R. 794). In that case the Court of Appeal had to consider the validity of a decree of dissolution on the grounds of desertion pronounced by the courts of New South Wales. The Court of Appeal held by a majority that the husband had acquired at the material date a domicil of choice in New South Wales and that the courts of that state had therefore jurisdiction on that ground to entertain the wife's suit. The court also held, unanimously, that as both the courts of New South Wales and of England claimed the same jurisdiction under s. 16 (a) of the New South Wales Matrimonial Causes Act, 1899, and under s. 13 of the Matrimonial Causes Act, 1937, respectively, it would be wrong for the English courts to refuse to recognise a jurisdiction which mutatis mutandis they claimed for themselves. It is, I think, clear that the Court of Appeal decided *Travers* v. *Holley & Holley* (6) on two grounds, and that therefore their decision on the second point cannot be treated as obiter dicta but was a material part of their decision; see per Lord Simonds in *Jacobs* v. *London County Council* (7) ([1950] 1 All E.R. 737 at p. 741):

> " . . . there is . . . no justification for regarding as obiter dictum a reason given by a judge for his decision, because he has given another reason also."

In *Travers* v. *Holley & Holley* (6) the relevant provisions of the two Matrimonial Causes Acts differed only in wording; in other respects their provisions were identical. Somervell, L.J., said ([1953] 2 All E.R. at p. 797):

> " On principle it seems to me plain that our courts in this matter should recognise a jurisdiction which they themselves claim. I did not myself really understand on what grounds it was submitted that the result should be otherwise."

Hodson, L.J., said (ibid., at p. 800):

> " . . . where, as here, there is in substance reciprocity, it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognise a jurisdiction which mutatis mutandis they claim for themselves. The principle laid down and followed since the *Le Mesurier* case (3) must, I think, be interpreted in the light of the legislation which has extended the power of the courts of this country in the case of persons not domiciled here."

It is clear that in the present case there can be no question of the Zurich courts exercising a jurisdiction mutatis mutandis on the same basis as the English courts, since the jurisdiction of the Zurich court was based on a concept of domicil wholly unrecognised by English law.

The decision of the Court of Appeal in *Travers* v. *Holley & Holley* (6) has been considered in three subsequent reported cases. In *Dunne* v. *Saban* (*formerly Dunne*) (8) ([1954] 3 All E.R. 586) the wife brought proceedings for dissolution in the Florida courts in 1953, having resided in that state for not more than two years before the proceedings were commenced. At that time the husband had re-acquired an English domicil. He took no part in the Florida proceedings, and the wife in due course obtained from the Florida courts a decree of dissolution. Thereafter, the husband brought proceedings in this court for a declaration that his marriage had been validly dissolved by the Florida courts. Davies, J., dismissed the husband's petition. After a careful examination of the judgments in *Travers* v. *Holley & Holley* (6), he concluded his own judgment in the following terms ([1954] 3 All E.R. at p. 592):

> A "I think the present case falls to be decided on a more precise ground than considerations of that kind. I think the argument of counsel for the Queen's Proctor was plainly right. It seems to me that the statutory exceptions to the law regarding domicil as being the test of the jurisdiction to dissolve a marriage are exceptions and that the rule, apart from those exceptions, remains in full force. In my judgment the observations in B *Travers* v. *Holley & Holley* (6) merely decide that this court will recognise the right of other courts to encroach on the principle of domicil only to the extent to which this court also does. Where, as in the present case, you find a court purporting, no doubt completely properly according to the laws of Florida, to exercise jurisdiction on ninety days' residence, even though that is coupled with something that we do not recognise, namely, C a separate domicil of the wife, the only possible answer which this court can give is to say that the decree of that foreign court was in our law invalid."

It will be observed that DAVIES, J., was dealing with a case where, as here, the foreign court had founded jurisdiction on a basis (there, ninety days' residence in Florida together with a separate domicil by the wife in that state) not recognised in English law. D In the case now before me the wife had been resident in Zurich for over three years, whereas in *Dunne* v. *Saban (formerly Dunne)* (8) the wife had been resident in Florida for only two years. I agree with DAVIES, J., that this court will recognise the right of foreign courts to encroach on the principle of domicil only to the extent to which this court also does. The difficulty in this case is to measure the extent where two systems of law approach E the whole question of jurisdiction in wholly different manners.

Travers v. *Holley & Holley* (6) was next considered and applied in *Carr* v. *Carr* (9) ([1955] 2 All E.R. 61). There the wife had obtained a decree in Northern Ireland on the grounds of the husband's desertion. Subsequently the husband brought proceedings in this court on the grounds of the wife's desertion. She cross-charged the husband with desertion, and further sought a declaration F that her marriage had been validly dissolved by the Northern Irish courts. BARNARD, J., found as a fact that at the time of the proceedings in Northern Ireland the husband was domiciled there. He also considered the provisions of the Matrimonial Causes Act (Northern Ireland), 1939, s. 26, which are similar to the Matrimonial Causes Act, 1950, s. 18 (1) (b), and stated that this country will respect a foreign decree based on provisions similar to our own by reason G of the fact we ourselves will grant a decree in those circumstances. I think that BARNARD, J., was limiting himself in that case to the position before him, namely, a substantial similarity in statutory provisions as to jurisdiction.

In *Arnold* v. *Arnold* (10) ([1957] 1 All E.R. 570) the court had to consider the validity of a decree of dissolution pronounced in favour of a wife by the courts in Finland. There the husband had acquired a domicil of choice in H Finland, but left the wife in 1930 and thereafter re-acquired his English domicil. The wife remained in Finland, and commenced proceedings in the courts of Finland in 1939. The Finland courts found that the husband had deserted the wife in 1930 and pronounced a decree of divorce. Article 8 (b) of the Finnish Act of December, 1929, is in my view similar in its provisions to s. 18 (1) (a) of the Matrimonial Causes Act, 1950, and I am inclined to think that applying the reasoning of the Court of Appeal in *Travers* v. *Holley & Holley* (6), the validity I of the Finnish decree might have been recognised on the ground of statutory similarity. Mr. Commissioner LATEY, Q.C., however, went further, and seems to have based his decision at least in part on s. 18 (1) (b) of the Matrimonial Causes Act, 1950, and used these words (ibid., at pp. 575, 576):

> "The fact that only six weeks' or sixty or ninety days' residence suffices in certain states in the United States of America to found jurisdiction seems to me to be beside the point if in fact there had been, say, two years' residence or more, or even less, if the residence is genuine and bona fide

> and not merely for the purpose of getting a divorce in a convenient court. A The necessity laid down by statute in England for three years' residence, in the case of a wife whose husband is domiciled abroad, is probably due to the notion that our courts should not be used for the convenience of birds of passage and that the court had to satisfy itself that the petitioning wife had chosen her home in England, though by operation of law her domicil was that of her husband domiciled abroad, and living either abroad or in B England."

Whatever may have been the motive of the legislature in insisting on three years' residence under s. 18 (1) (b) of the Matrimonial Causes Act, 1950, I cannot agree with Mr. Commissioner LATEY that the period of residence demanded by the law of a foreign court to found jurisdiction is immaterial. If similarity is the basis of recognition, there must be similarity in fact though not in terminology. C There seems to me to be a profound difference between the two years' residence in Florida found in *Dunne* v. *Saban* (*formerly Dunne*) (8) and the residence of five years and upwards in Zurich in the present case.

I believe that the true question to be answered in this case is whether the courts of this country can recognise a foreign decree where in fact the wife was resident in the territory of the foreign court for three years immediately preceding D the commencement of the proceedings here, even though the jurisdiction of the foreign court was based on different grounds. In my view this question has not yet been asked or answered by our courts, and I am therefore without the guidance of direct authority. Writing in December, 1951, in the HARVARD LAW REVIEW (Vol. 65 at p. 231), an eminent American jurist, DEAN ERWIN GRISWOLD, used these words: E

> "If the heavy hand of the *Le Mesurier* case (3) can be lifted—as to a point which was never decided in that case—the courts should have little difficulty in concluding that a common law state may properly recognise a foreign divorce granted under the factual circumstances where it would itself grant a divorce." F

In 1953 the Court of Appeal in *Travers* v. *Holley & Holley* (6) lifted the heavy hand of the *Le Mesurier* case (3), or at least mitigated its weight.

In my view the correct answer to the question which I have asked myself is this: Where in fact there has been three years' residence by a wife in the territory of the foreign court assuming jurisdiction in a suit for dissolution, the English court should accept that as a ground for exercising jurisdiction because G it would itself accept jurisdiction on proof of similar residence in England. It is not essential for recognition by this court that the foreign court should assume jurisdiction on the grounds laid down by s. 18 of the Matrimonial Causes Act, 1950. It is sufficient that facts exist which would enable the English courts to assume jurisdiction. I find that the Zurich court in the present case had jurisdiction, and that the decree pronounced by that court in favour of the H wife in this suit on July 3, 1953, was valid. Accordingly I declare that the marriage between the husband and the wife was validly dissolved on July 3, 1953, by the decree and judgment of the district court of Zurich.

Declaration accordingly.

Solicitors: *Cartwright, Cunningham* (for the husband); *Queen's Proctor.*

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

INTEROFFICE TELEPHONES, LTD. *v.* ROBERT FREEMAN CO., LTD.

[COURT OF APPEAL (Jenkins, Parker and Pearce, L.JJ.), October 23, 24, 1957.]

Hire—Damages—Measure of damages for breach of contract of hiring—Repudiation of contract by hirer—Owner having sufficient other goods to satisfy demand for hirings.

Contract—Breach—Damages—Measure—Hire of goods—Repudiation of contract by hirer—Owner having sufficient other goods to satisfy demand for hirings.

Hirers agreed to take on hire a telephone installation for a stipulated term of years from owners who agreed to install it, let it at a rental and maintain it without further charge. In June, 1956, when the term of the contractual hiring had still over six years to run, the hirers repudiated the contract and the owners regained possession of the telephone apparatus that had been installed. The owners' business was to let such installations, but, although there was a moderate continuing demand for the hire of installations, the owners always had a supply of telephone equipment sufficient to meet any demand. The owners, having been awarded damages (£338) on the basis of compensation for loss of rental during a reasonable period (six months) in which to hire out the apparatus again, together with the cost of removing it and of reconditioning it, appealed against the award on the ground that the measure of damages should be calculated (at approx. £700) on the basis of compensation for loss of rental over the unexpired period of the contract (six years) less a deduction for reconditioning the apparatus, an allowance for not having to maintain it, and a discount for recovering a lump sum by way of damages in lieu of rental over six years.

Held: since the owners' loss would not be diminished by a re-hiring of the apparatus (they having enough plant to satisfy all demands without recourse to this apparatus), the measure of damages was the loss of rental for the unexpired term of the hiring, less appropriate deductions, so that the owners should be placed so far as possible in the same position as if the contract had been performed by the hirers, there being no difference in the principle applicable between a contract for sale and a contract for hiring; accordingly the damages should be computed on the basis put forward by the owners.

Re Vic Mill, Ltd. ([1913] 1 Ch. 465) and *W. L. Thompson, Ltd.* v. *R. Robinson (Gunmakers), Ltd.* ([1955] 1 All E.R. 154) applied.

British Automatic Co. v. *Haynes* ([1921] 1 K.B. 377) disapproved.

Appeal allowed.

[As to the measure of damages for breach of a contract for the sale of goods where there is no available market, see 29 HALSBURY'S LAWS (2nd Edn.) 192, para. 256; and for cases on the subject, see 39 DIGEST 657, 658, *2501-2503*.

As to the measure of damages for breach of the obligations of a hirer of chattels, see 2 HALSBURY'S LAWS (3rd Edn.) 126, 127, para. 244; and for the measure of damages in contract generally, see title DAMAGES, Vol. 11 (3rd Edn.) 241, para. 409.]

Cases referred to:

(1) *Re Vic Mill, Ltd.*, [1913] 1 Ch. 465; 82 L.J.Ch. 251; 108 L.T. 444; 39 Digest 658, *2502*.

(2) *Thompson (W. L.), Ltd.* v. *Robinson (R.) (Gunmakers), Ltd.*, [1955] 1 All E.R. 154; [1955] Ch. 177; 3rd Digest Supp.

(3) *Charter* v. *Sullivan*, [1957] 1 All E.R. 809.

(4) *British Automatic Co.* v. *Haynes*, [1921] 1 K.B. 377; 90 L.J.K.B. 271; 17 Digest (Repl.) 110, *240*.

(5) *Telephone Rentals, Ltd.* v. *R. C. A. Photophone, Ltd.* (unreported), Feb. 8, 1957. A

(6) *British Westinghouse Electric & Manufacturing Co., Ltd.* v. *Underground Electric Rys. Co. of London, Ltd.*, [1912] A.C. 673; 81 L.J.K.B. 1132; 107 L.T. 325; 39 Digest 480, *1025*.

(7) *Hadley* v. *Baxendale*, (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 156 E.R. 145; 17 Digest (Repl.) 91, *99*. B

Appeal.

The plaintiffs, the owners of telephone installations which they hired out, appealed from the decision of PILCHER, J., dated Feb. 26, 1957, assessing their damages for breach of contract against the defendants at £338. The defendants had hired an installation from the owners for a term of years, but had repudiated the contract of hire when the term had over six years to run, at an aggregate C rental of £261 5s. 4d. per year. In assessing the damages, PILCHER, J., allowed the owners only six months' lost rent, as he held that they should mitigate their damage by re-hiring the installation for the remainder of the term. The facts appear in the judgment of JENKINS, L.J.

H. V. Lloyd-Jones, Q.C., and *P. J. M. Thomas* for the plaintiffs, the owners. D
J. D. May for the defendants, the hirers.

JENKINS, L.J.: This is an appeal by a company called Interoffice Telephones, Ltd. (hereinafter called "the owners"), the plaintiffs in the action, from a judgment of PILCHER, J., dated Feb. 26, 1957, whereby he awarded the owners a sum of £338 damages against the defendants in the action, Robert Freeman Co., Ltd. (hereinafter called the "hirers"), for breach of a contract E under which the hirers agreed to take on hire from the owners certain office telephone equipment.

There is no dispute of any substance on the facts, apart from some questions of quantum. The issue in the case is as to the proper measure to be applied in assessing the damages payable by the hirers to the owners in the circumstances of the case. It is not in dispute that there was a breach of contract. The F contract sued on is dated May 18, 1950, and it was thereby agreed that the owners should install, let and maintain in efficient working order, and that the hirers should take delivery of and hire, obtaining and paying for wayleaves where necessary, a telephone installation consisting of one twenty-five-line auto switchboard with twenty-five automatic telephones at a total basic yearly rental of £165. G

There are various provisions, into which I need not enter in detail. There is a provision in cl. 7 under which it is provided:

> "The [owners] shall maintain the installation in satisfactory working order for the period of the hiring and shall execute without charge all repairs and replacements necessitated by normal usage and fair wear and tear." H

Then there is a provision as to the hirers notifying defects and as to admitting the representatives of the owners to their premises for the purpose of carrying out maintenance and so on. Then cl. 8 provides:

> "This contract shall commence on the signing hereof and shall be for the period ending Dec. 31 after the installation is completed and the following I twelve years. It shall continue annually thereafter at basic rates unless or until either party gives in writing six months' prior notice of termination."

Then there is this provision in cl. 8:

> "In case of default by the [hirers] in payment or observance of any of the terms of the contract or if the contract shall be terminated prematurely at the wish of the [hirers] the [owners] shall be at liberty to remove the installation forthwith. The [hirers] shall then pay to the [owners] in

> settlement of all claims including liquidated damages a sum the equivalent of the rentals still payable or which would have become payable for the remaining term of the contract less an allowance of 10% for maintenance and less a further allowance of 5% for each unexpired year of such term."

There were seven supplementary agreements under which fourteen further telephone instruments were installed in the hirers' premises, making thirty-nine in all. The consequent additions to the rental made a yearly total of £261 5s. 4d., or, in round figures, £260.

Unfortunately, in June, 1956, the hirers, owing to some matter of town planning, had to leave their premises in which the telephone equipment had been installed, with the result that they could no longer continue in occupation of the offices in which the installation had been made. Moreover, though it had at one time been thought that they could remove the installation to their new premises, with the concurrence of the owners, they found that the premises to which they proposed to move were already equipped with an installation of this kind, so that they had no use for anything further in that way. In those circumstances, the hirers repudiated the contract, and on July 5, 1956, a writ was issued by the owners claiming a sum of money under the agreement, and the sum claimed was worked out by applying the formula prescribed in cl. 8.

The matter came before PILCHER, J., and before him the primary argument was whether the provisions of cl. 8 were enforceable or were void as constituting a penalty. It was, I think, in the end really conceded that this clause, inasmuch as it is applicable in a number of different circumstances of varying importance, is one which should be classed as a penalty. The argument therefore proceeded on the footing that the provisions of cl. 8 expressed to be operative in the event of default should be disregarded, and that the owners should be entitled to recover whatever damages, on the proper principles as to the assessment of damages, they could claim to have suffered through the hirers' default. There was evidence given by a Mr. Newcombe, the secretary of the owners' company, and a Mr. Lynfield, their managing director. For the present purpose, the most important part of their evidence is that which shows that the owners always had a supply of the internal telephone equipment, in which they dealt, to meet any demand. As to the character of the business, it seems that it was almost exclusively a hiring business and that the equipment was in fact made for the owners by another company with whom they had some agreement. The demand for these installations seems to have been limited. Mr. Newcombe said that they had running some seventy hire agreements applicable to internal telephones, and that new contracts of hire were entered into at the rate of, say, seven in an average year, and upwards from that to twelve, which would be considered a very good year.

The question then arises: how should the damages be assessed? The view taken of that question by the learned judge was that the owners, being under a duty to mitigate their damages, must be treated as hiring out the installation which had been the subject of the contract with the hirers to a fresh hirer. On that principle, he arrived at this result: The owners must be treated as having, after a reasonable interval in which to find a new customer, hired out to that new customer the installation withdrawn from the defaulting hirers at a similar rent. In that hypothetical state of affairs, the loss suffered by the owners (apart from incidental expenses) would be the rental during some reasonable period to be allowed them for the purpose of finding a new hirer. For that, the learned judge allowed a period of six months, making a sum of £130. He added to that, in respect of expenses, £8 for the cost of removing the installation from the hirers' premises, and £200 (which was a round figure agreed by counsel) for the cost of reconditioning the plant taken back from the defendants' premises, making a figure in all of £338.

That method of calculating the damages is attacked by counsel for the owners. His argument is to this effect—that one must, on any view, begin with the loss of rental over the period which the contract yet had to run at the time when the hirers repudiated. That is the starting figure. Then from that certain deductions ought admittedly to be made. There should be a deduction for maintenance, and it is admitted that fifteen per cent. would be an appropriate figure for that. Then some discount should be allowed off the net rental so ascertained by reason of the fact that the owners would be receiving in one sum an amount which, had the contract run its full length, they would have received only over a period of six years. Then, as against those items, one must set the depreciated value of the installation recovered from the hirers. Apart from the question of discount, the figures would work out broadly in this way. The whole amount of rental for the rest of the term has been calculated at £1,698 4s. 8d. Then an allowance of fifteen per cent. for maintenance comes to £254 14s. 9d. That leaves a net rental over the period in the form of a lump sum of £1,443 9s. 11d. Then, finally, a deduction is required for the depreciated value of the installation. A tentative suggestion was made that, in view of the evidence, it would be reasonable to take as the depreciated value the sum of £700, which was given in evidence as the cost to the owners of a similar installation, less the sum of £200 representing, not as a matter of strict calculation but as a matter of round figure, the cost of reconditioning the installation. That illustrates the method of calculation which counsel for the owners says should be adopted. Those figures would require some adjustment in respect of the discount which I have mentioned, but on which I have not ventured to place a figure.

Counsel for the owners supports his method of calculation in this way: he says that the evidence being that there was always a supply to meet any demand, it cannot be right to bring into account against the owners a notional re-hiring of the installation taken back from the hirers, for the substituted transaction with a new customer would not in truth diminish the loss sustained by the owners at all, inasmuch as that substituted customer would simply be taking on hire the machine taken back from the hirers instead of another machine which, as the evidence shows, the owners could have provided. That proposition is supported by the authority of this court in *Re Vic Mill, Ltd.* (1) ([1913] 1 Ch. 465). In that case a company had ordered certain machines which, owing to supervening liquidation, it was unable to accept. The suppliers of the machines put in a claim for damages. The machines apparently fell into two categories. First, there were machines which had been completed by the creditors before the date of the winding-up, retained by the creditors for a time, then somewhat altered and sold to other customers at a price less than the contract price. Secondly, there were machines which would have been wholly or partially manufactured by the creditors, on which they had done no work, but for some of which they had purchased subordinate parts ready made, which they had afterwards used in fulfilling other orders. In the course of the argument there is this interlocutory observation by HAMILTON, L.J. ([1913] 1 Ch. at p. 468):

> " On the evidence the claimants had room in their works to carry out this contract with the company as well as all their other contracts."

Then in the argument for the claimants one finds this (ibid., at p. 469):

> " The fallacy lies in assuming that the contract for the sale of these machines to the new purchasers was substituted for the contract with the company. It was not so. The contracts were independent of each other. There is nothing to show that we could not have carried out both contracts."

Then HAMILTON, L.J., said this (ibid., at p. 470):

> " There were two classes of goods. The first consisted of four quick traverse winding frames, which at the time of the final breach of the

> contract had been manufactured and were ready for delivery. As to the remainder, they had not been manufactured; some materials for their manufacture were in the makers' hands, but no more. Speaking for myself, although a good deal of discussion has taken place upon the law, I think there is no new question of law involved in this case, but that the appeal is determined by the facts as soon as they are appreciated. Take first the group of items, 2, 3, 4 and 6, as to which the manufacturers claimed to be entitled as for loss of profit to just over £1,000. 'These were various classes of spinning machinery', they say, 'which we had a contract to make, which we could have made, which we were ready and willing to make, and upon which we should have made £1,000 odd of profit; by the failure of the buyers to perform their contract the result is that we lose our £1,000 of profit'. As to this the learned registrar held as follows: 'There is no evidence that the creditors' works were wholly or partially stopped in consequence of their not manufacturing these machines, or that the orders on which the works were employed were of a less remunerative nature than the order in respect of which the claim for damages is made. In the case of this machinery I am of opinion that the creditors are entitled to have the prospective profits taken into account in assessing the damages, but I consider, having regard to the facts stated above, that the loss directly and actually resulting from the breach of contract does not amount to anything approaching the whole of such prospective profits. I assessed the damages in respect of these machines at £250'. On appeal the learned judge took the view that the sellers, the manufacturers, were entitled to have the profits that they had lost, namely, the whole of the profits that they would have made had the contract been performed.
>
> "Now there is no difference between these two propositions as to principle, because the registrar was, in his view, giving the manufacturers the profits that they had lost; but he said, 'I consider, having regard to the facts stated above, that the loss directly and naturally resulting from the breach of the contract does not amount to anything approaching the whole of such prospective profits'. That is to say he considered that, if the profits that would have been made by performing this contract are set against the profits that were made by performing some other contracts, the net loss of profit is reduced to £250. That depends on the proposition that in substance the second class of profits could not have been made if the first contract had been performed and the first class of profits had been made. He thought he had evidence to that effect, but he had none."

I pass to the passage dealing with the four quick traverse winding frames which had been made by the claimants. HAMILTON, L.J., said ([1913] 1 Ch. at p. 473):

> "Having made the four machines in question, and being unable to get delivery of them taken and payment made, what was the seller to do? The only answer to that question is that he was to act reasonably, and then he would be entitled to such damages as would put him in as good a position as if the contract had been performed. It is conceded now that there was no available market in which the goods could have been promptly sold . . . It follows that he was entitled to recover the damages directly and naturally resulting in the ordinary course of events from the buyer's breach of contract. If the goods had been broken up, or sold by auction for what they would fetch, as the learned judge surmised, the consequences to the buyers would have been considerably worse than they are. It so happened that after the repudiation of the contract by the Vic Mill another customer of the makers was prepared to place an order with them for frames of that kind and somewhat of those dimensions. They might have taken that order, fulfilled it, made their profit on it, and dealt with the frames left on their hands in any reasonable way that they could. They did in fact at a small

> cost adapt the frames on their hands, and with them fulfilled the order of this other customer, and so made their profit on his contract. To that extent the buyers in the present case got the benefit of the accident that another customer came forward. That was a reasonable mode of mitigating the damages, but it by no means follows that the damages are confined to the cost, a trivial one, of adapting the machines to the needs of the second customer, and the loss on resale to him, which was only £23, making £28 in all. The fallacy of that is in supposing that the second customer was a substituted customer, that, had all gone well, the makers would not have had both customers, both orders, and both profits."

Cozens-Hardy, M.R., agreed, and Buckley, L.J., put the point in a convenient form in a short concurring judgment. He said ([1913] 1 Ch. at p. 474):

> "I have come to the same conclusion. As regards items 2, 3, 4 and 6 which were not manufactured the respondents are, I think, entitled to the whole profit, because the appellants failed to produce any evidence to show that if the works had been employed to execute the orders under the contract they would have been unable to execute other orders which they had received. Under these circumstances no credit need be given in respect of the employment of the works upon the other operations."

Re Vic Mill, Ltd. (1) was followed by Upjohn, J., in *W. L. Thompson, Ltd.* v. *R. Robinson* (*Gunmakers*), *Ltd.* (2) ([1955] 1 All E.R. 154), which was a case of default by a purchaser of a motor car, where the state of the market was such that supply of the motor cars of the particular make exceeded the demand. In those circumstances, Upjohn, J., applied the principle in *Re Vic Mill, Ltd.* (1). In *Charter* v. *Sullivan* (3) ([1957] 1 All E.R. 809), which was another case of a motor car, *Re Vic Mill, Ltd.* (1) was discussed by this court and recognised as stating the right principle to apply in cases in which the supply of the goods in question exceeds the demand; but on the evidence the market there was the other way, so that a different result was reached.

On the other side, we were referred to *British Automatic Co.* v. *Haynes* (4) ([1921] 1 K.B. 377), which is a decision of Salter, J. The headnote to that case is this:

> "The defendant, in breach of his contract, refused to accept two machines which he had hired from the plaintiffs for three years at a weekly rent. The plaintiffs, whose business it was to let out machines, made no attempt to relet these two machines. At all times material to this contract they had more than two machines in stock:—*Held*, that the measure of damages was not the aggregate of the three years' weekly rents, but (1) the amount of the weekly rents from the time when they became payable under the contract, that is the date when the machines were tendered, until the expiration of such reasonable time as the plaintiffs would have required thereafter in order to relet the machines on hire; (2) the cost of transport of the machines; and (3) the commission to the agent who procured the contract, if payable notwithstanding breach."

Re Vic Mill, Ltd. (1) was not cited in *British Automatic Co.* v. *Haynes* (4), and I confess that, on the facts of that case, so far as they appear from the report, the right decision would, in my opinion, have been a decision in accordance with the principles of *Re Vic Mill, Ltd.* (1), for the evidence appeared to show that the plaintiffs at all times had a stock of machines in hand available to meet the demands of customers. Accordingly, on the principle of *Re Vic Mill, Ltd.* (1), I find difficulty in seeing how the learned judge could rightly arrive at the conclusion he did. In my judgment, so far as it conflicts with *Re Vic Mill, Ltd.* (1), the decision in *British Automatic Co.* v. *Haynes* (4) cannot stand.

There is one point of distinction between *British Automatic Co.* v. *Haynes* (4) and *Re Vic Mill, Ltd.* (1), and that is that *British Automatic Co.* v. *Haynes* (4) was concerned, like the present case, with hiring, while *Re Vic Mill, Ltd.* (1), and also *Thompson* v. *Robinson* (2) ([1955] 1 All E.R. 154), and *Charter* v. *Sullivan* (3) ([1957] 1 All E.R. 809), all dealt with sale of goods. Counsel for the hirers has argued that the principle of *Re Vic Mill, Ltd.* (1) applies only to cases of sales of goods and has no application to hiring. That question was considered by BARRY, J., in *Telephone Rentals, Ltd.* v. *R.C.A. Photophone, Ltd.* (5) (unreported, Feb. 8, 1957). The learned judge came to the conclusion that that was no ground for distinguishing the case before him from *Re Vic Mill, Ltd.* (1). On this aspect of the case, he said this:

> "Giving the matter the best consideration that I can, I can find no substantial difference between the principles which should be applied on the breach of a contract to hire goods from those applicable in claims for damages for breaches of contract to accept and pay for goods. In my judgment, every word said by the lords justices in *Re Vic Mill, Ltd.* (1) applies to the circumstances of the present conflict, and I am satisfied that I should follow *Re Vic Mill, Ltd.* (1) and the decision of UPJOHN, J., in the latter case, *Thompson* v. *Robinson* (2), in preference to *British Automatic Co.* v. *Haynes* (4), if *British Automatic Co.* v. *Haynes* (4) is in fact irreconcilable with the other two decisions."

In my view, that passage in the judgment of BARRY, J., is wholly correct. I cannot see how the circumstance that this case is concerned with a hiring and not with a sale of goods can suffice to displace the principle of *Re Vic Mill, Ltd.* (1).

I would refer to the passage from the speech of VISCOUNT HALDANE, L.C., in *British Westinghouse Electric & Manufacturing Co., Ltd.* v. *Underground Electric Rys. Co. of London, Ltd.* (6) ([1912] A.C. 673), which I find cited in the judgment of UPJOHN, J., in *Thompson* v. *Robinson* (2). VISCOUNT HALDANE, L.C., said this ([1912] A.C. at p. 689):

> "Subject to these observations I think that there are certain broad principles which are quite well settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed."

That is the general rule. It seems to me that that broad general principle is just as much applicable to cases of hiring as to cases of sales of goods.

For the reasons that I have endeavoured to state, I am of opinion that this appeal should be allowed and that the damages should be assessed in accordance with the principles advanced by counsel for the owners, which I have endeavoured to describe in this judgment.

PARKER, L.J.: I agree. It so happens that within a very few days of the decision of PILCHER, J., now under appeal, there were two decisions, first a decision of BARRY, J., in *Telephone Rentals, Ltd.* v. *R.C.A. Photophone, Ltd.* (5) (unreported, Feb. 8, 1957), which dealt in particular with a hiring agreement such as this, and with the judgment of SALTER, J., in *British Automatic Co.* v. *Haynes* (4) ([1921] 1 K.B. 377). Secondly, the very day before, on Feb. 25, 1957, there was a judgment of this court dealing with sale of goods, *Charter* v. *Sullivan* (3) ([1957] 1 All E.R. 809). PILCHER, J., did not have the benefit of either of those decisions. Further, this point, which has been argued fully in this court, really only arose incidentally in the court below, in that the real issue before PILCHER, J., was whether cl. 8 of the agreement was a penalty clause or whether it provided for liquidated damages. In the light of those cases, I have no doubt that this appeal succeeds. I would only add this: counsel for the hirers sought to persuade us that there was in this matter a difference between a hiring agreement and a contract for the sale of goods, and that whereas a loss of profit was a matter which could be contemplated by the parties, within *Hadley* v. *Baxendale* (7) ((1854), 9 Exch. 341), that was not so in the case of a hiring agreement. I find it very difficult to see any such distinction. Whether it be a hiring agreement, or a contract for the sale of goods where the purchaser has failed to take delivery, the defaulting party must contemplate that damages will vary according to the state of the market, including questions of supply and demand. The state of the market, the stock position of the supplier and the demand of the public can in no sense be treated as res inter alios acta, so as to make damages claimed on that basis too remote.

I would allow this appeal.

PEARCE, L.J.: I agree entirely with what my Lords have said.

Appeal allowed. Damages varied to £670.

Solicitors: *Lewis & Dick* (for the plaintiffs, the owners); *John L. Rendall* (for the defendants, the hirers).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

CLARKE *v.* E. R. WRIGHT & SON AND ANOTHER.

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Ormerod, L.JJ.), October 25, 28, 30, 1957.]

Building—Building regulations—Scaffolding—Scaffold erected by contractor—Injury to workman employed by sub-contractor—Duty of employer to take steps to satisfy himself that the scaffold is stable—Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948 *No.* 1145), *reg.* 21.

Costs—Joint tortfeasors—Offer before trial by one defendant to contribute twenty-five per cent. of damages—Offer not accepted—Offeror found twenty per cent. to blame—Liability for costs—R.S.C., Ord. 16A, *r.* 12A.

The plaintiff was employed as a glazier by the first defendants (referred to hereinafter as "the employers"), who had entered into a sub-contract with the second defendants, building contractors (referred to hereinafter as "the contractors"), to glaze a house which the contractors were building. In the course of their work the contractors had erected scaffolding which was made secure by means of cross-pieces passing through the window openings and tied inside the building. Immediately before the plaintiff arrived to carry out the glazing operation, the contractors removed the ties so as to facilitate the plaintiff's work, and the stability of the scaffolding then depended on "braces", that is, supports bolted at an angle to the upright pieces of scaffolding and bedded in the ground at a further distance from the house than the upright pieces. The plaintiff placed a ladder, which he had brought with him, on planks which were placed across transverse pieces of the scaffolding, resting the top of the ladder against the building. The employers did not examine the scaffolding before the plaintiff commenced his work, nor did they make any inquiry of the contractors as to its condition. While the plaintiff was standing on the ladder carrying out his work, the upright pieces of the scaffolding leaned outward from the house owing to the fact that the supporting braces were not resting on a sufficiently firm foundation. As a result, the planks slipped, the plaintiff and the ladder fell to the ground, and the plaintiff was injured. Breach of statutory duty on the part of the contractors was conceded.

A Before trial the employers made a written offer to the contractors in accordance with R.S.C., Ord. 16A, r. 12A*, to contribute one quarter of any damages recovered by the plaintiff.

Held: the first defendants were in breach of reg. 21† of the Regulations of 1948, in that they had failed to take steps to satisfy themselves that the scaffold was stable, and, on the facts, the plaintiff had discharged the onus B which was on him of showing that, on a balance of probabilities, the first defendants' breach of the regulation materially contributed to his injury (dictum of LORD REID in *Bonnington Castings, Ltd.* v. *Wardlaw*, [1956] 1 All E.R. at p. 618 applied); in the circumstances, the blame was apportioned in the proportion of one-fifth to the first defendants and four-fifths to the second defendants.

C Appeal allowed.

Discretion of the court under R.S.C., Ord. 16A, r. 12A, exercised (see p. 496, post).

[As to the burden of proof of causation of injury by breach of statutory duty, see 23 HALSBURY'S LAWS (2nd Edn.) 669, para. 951.

D For the Building (Safety, Health and Welfare) Regulations, 1948, reg. 5 and reg. 21, see 8 HALSBURY'S STATUTORY INSTRUMENTS 213, 218.

For the Rules of the Supreme Court, Ord. 16A, r. 12A, see the ANNUAL PRACTICE, 1957, p. 308.

As to contribution between joint tortfeasors, see 32 HALSBURY'S LAWS (2nd Edn.) 190, para. 284.]

E Case referred to:

(1) *Bonnington Castings, Ltd.* v. *Wardlaw*, [1956] 1 All E.R. 615; [1956] A.C. 613; 3rd Digest Supp.

Appeals.

These were appeals by the plaintiff, Bazil Walter Clarke, and the second F defendants, Wheeler and Son (sued as a firm), from an order of His Honour JUDGE TYLOR, at Southampton County Court, dated June 18, 1957.

The plaintiff, a glazier employed by the first defendants, E. R. Wright & Son (sued as a firm), was injured in the course of his employment by the collapse of scaffolding erected by the second defendants round a house which the second defendants were building. The plaintiff claimed damages (limited to £400) G against the first defendants and the second defendants for breaches of their statutory duty under the Building (Safety, Health and Welfare) Regulations, 1948, and for negligence. The county court judge awarded the plaintiff £200 damages and costs against the second defendants, and dismissed the claim against the first defendants. The plaintiff appealed against the dismissal of the claim against the first defendants and in regard to the amount of damages H awarded to him. The second defendants appealed on the issue of their liability to the plaintiff and also against the dismissal of the claim against the first defendants. The first defendants served a notice of appeal that, in the event of their being held liable in damages to the plaintiff, they would ask for an order of indemnity against the second defendants, or, alternatively, for an order of contribution under the Law Reform (Married Women and Tortfeasors) Act, 1935.

I

E. B. McLellan for the plaintiff.

Stephen Chapman, Q.C., and *F. B. Purchas* for the first defendants, E. R. Wright & Son (sued as a firm).

R. Hughes and *J. R. L. Southam* for the second defendants, Wheeler and Son (sued as a firm).

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* The rule is printed in the footnote at p. 495, post.

† The regulation is printed at p. 490, letter H, post.

LORD EVERSHED, M.R.: These proceedings arose out of an accident A
which occurred on Nov. 19, 1954. The plaintiff, who was injured, was by trade a glazier and in the employment of the first defendants, whose business was that of glazing. The second defendants were building contractors, and the accident occurred at a house which the second defendants were building. They had made a sub-contract with the first defendants whereby the first defendants, through their employees, were to glaze the windows of the house as and when the proper B
time arose in the course of the erection of the house. The nature of the accident and its consequences were these. Scaffolding had been erected by the second defendants, as is commonly the case when houses are being built, and until the day before the accident the scaffolding was kept properly and rigidly in position by the device that certain pieces of the scaffolding passed through at the first floor windows and were there tied by a tie or series of ties inside the building. C
That meant that outward pressure from the wall on to the scaffolding could not throw the uprights of the scaffolding out of true. In order that the glazing operation should take place easily, servants of the second defendants removed the ties shortly before the arrival of the plaintiff. The stability of the scaffolding and its maintenance in an upright position thereafter depended on certain braces, that is to say, on other pieces of scaffolding attached to the upright D
pieces at an angle and resting on the ground at a further distance from the house than the upright pieces.

The plaintiff arrived and his method of operation was this. He had a ladder with him, and he placed it on planks which were put across putlogs or transverse pieces on the scaffolding, the foot of the ladder being on the planks and the top of it resting against the building. He then climbed up the ladder and proceeded E
to do his work. It follows as a matter of elementary dynamics that the result was to cause an outward force or push from the wall at the foot of the ladder. The braces, unfortunately, were not resting on sufficiently firm foundations, so that the outward push caused the upright pieces of the scaffolding to depart to a certain extent from the upright, that is to say, to lean outward from the house, with the result that the planks slipped or became dislodged and the F
ladder and the plaintiff accordingly fell to the ground. He suffered injury which is described in the second of the two agreed medical reports, which was dated Sept. 15, 1956. After the accident he was taken to the Royal South Hants Hospital at Southampton and it was found that he had fractured the right transverse process of the first lumbar vertebra. He had to rest at home for a certain time, then received physio-therapeutic treatment which lasted G
for a considerable number of weeks.

The real trouble arose from the circumstance that the plaintiff was, in fact, suffering from what the expert medical witness, Mr. Langston, a fellow of the Royal College of Surgeons, described as pre-existing degenerative changes in the lumbar spine, what elsewhere he calls spondylosis. He says this:

> " I consider that the X-rays taken in 1954 showed some evidence of pre- H
> existing degenerative changes in the lumbar spine, ante-dating [the plaintiff's] injury, but such degenerative changes can be and remain symptomless for many years, if not indefinitely, whereas an accident of sufficient severity to cause a fracture of a transverse lumbar process may produce symptoms in such a back for the first time which also persist indefinitely, and I think this is what has happened in [the plaintiff's] case." I

After a further discussion of the purely scientific aspect of the case, Mr. Langston expresses his opinion in these terms:

> " I consider, therefore, that [the plaintiff] has a persisting disability consisting of pain in the lower lumbar region on stooping and lifting heavy weights, which makes it impossible for him to lift heavy weights at work. This disability appears to be stationary and is likely to remain permanently. It does not, however, appear to interfere greatly with [the plaintiff's]

> employment or general activities. I do not believe it will cause increasing disability as time goes on."

On those facts, as I have briefly stated them, the learned judge awarded, by way of general damages, the sum of £100, the special damages having been agreed at a like figure, so that the total sum awarded was £200. The award was exclusively against the second defendants, the learned judge being of opinion that the first defendants were not liable either for a breach of the relevant regulations or at common law.

The plaintiff has appealed to this court and his case has been, first, that the learned judge wrongly acquitted the first defendants from all liability. Counsel for the plaintiff put the case both on the ground of breaches of the Building (Safety, Health and Welfare) Regulations, 1948 (reg. 5 and reg. 21, in particular) and at common law. Counsel further submitted that the amount of £100 was a wholly erroneous assessment of the damages appropriate for a man in a case in which the accident had caused something to happen which would render him for all time, not only liable to some discomfort and pain, but under the disability that he would not be able to lift heavy weights in the course of his work. There has also been a cross-appeal on the part of the second defendants. It was said on their behalf that the learned judge wrongly held them to have infringed certain other regulations of the Building Regulations of 1948, but counsel for the second defendants, at an early stage of his argument, decided that he would not and could not pursue that part of his cross-appeal, and he was prudent, I think, to take that course. In the circumstances, therefore, what this court must now determine is: (i) whether the first defendants as well as the second defendants should be held liable to the plaintiff on one or other or both of the grounds put forward by counsel for the plaintiff; (ii) if so, how the damages ought to be apportioned between the two defendants; and (iii) whether the sum of £100 by way of general damages should be displaced by some substantially larger figure, subject to the limit imposed by the county court jurisdiction*.

I have so far stated in general terms how the accident came to happen, but I would like to refer to certain evidence given by Mr. Young, a supervisor of scaffolding, who was called for the second defendants and was by way of being plainly an expert witness, because I, as did the learned judge, attach considerable importance to his evidence. There was a model of scaffolding before the court which Mr. Young said was "all right." In the course of his cross-examination he said:

> "We always tie scaffolding to door or windows. Braces should be against something hard. We would never use braces of this type."

The learned judge, who saw Mr. Young, was completely convinced by what he said. The part of the learned judge's judgment which is relevant reads:

> "The evidence of Mr. Young, an independent expert and supervisor of scaffolding of considerable experience, stated that there were two methods adopted in the erection of scaffolding. The best and safest was to tie the uprights to the building by means of 'putlogs' or cross-pieces, the ends of which penetrated the wall of the building and are bolted to the wall by a cross-bar inside the wall. This ensures that the scaffolding, when subjected to the weight of men working on it and to the consequent outward pressure, will be held securely in an upright position. The other method which is adopted only if it is impracticable to adopt the first method, and where it is not possible to bolt or tie the putlogs to the building, is to rely on supports bolted at an angle to the uprights and bedded in the ground on a solid footing. A solid footing is essential, as, if the supports which are bolted to the uprights sink further into the soil, they fail to support the uprights

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* Under the County Courts Act, 1955, s. 1 and Sch. 1, the limit is £400.

> and tend to drag them out of the perpendicular. I have no hesitation in accepting and acting on Mr. Young's evidence."

I have already said that, shortly before the arrival of the plaintiff to glaze the windows, the servants of the second defendants, for reasons which appeared to them good, removed the ties, which had hitherto held the scaffolding uprights in a firm position, and thereafter allowed the scaffolding to rely for security on the braces. It is clear that, to say the least, they made an error of judgment in doing that, because it was undoubtedly the fact that the supports were not sufficiently firm at their footings that caused the accident to the plaintiff. Counsel for the second defendants no longer disputes his clients' liability for substituting the second method of supporting the scaffolding for the first or preferable method, in circumstances which failed to comply with Mr. Young's requirements, and it must be taken as now conceded that the second defendants were in breach of certain of the Building (Safety, Health and Welfare) Regulations, 1948.

It is now necessary to consider the situation of the first defendants, the plaintiff's employers. Two of the regulations have been relied on, namely, reg. 5 and reg. 21 of the Regulations of 1948. Regulation 5 is opened by the rubric: "Provision of scaffolds and means of access." The regulation reads:

> "Suitable and sufficient scaffolds shall be provided for all work that cannot safely be done on or from the ground or from part of the building, or from part of a permanent structure or from a ladder or other available means of support, and sufficient safe means of access shall so far as is reasonably practicable be provided to every place at which any person has at any time to work."

It was contended, particularly in light of reg. 4, that there was thereby imposed an imperative obligation on all persons who might be concerned as employers of labour or tradesmen with an operation when scaffolding was required. On the other hand, it was said by counsel for the first defendants that, at worst so far as the first defendants were concerned, the regulation could not apply unless it was first established that the work was work which could not safely be done, inter alia, from a ladder or other means of support. In other words, it was his argument that, unless it was shown by appropriate evidence that the glazing could not—and I emphasise the word "could"—be done otherwise than from a scaffolding, then reg. 5 was inapplicable, at any rate to the first defendants.

In the circumstances I do not think that it is necessary to express any view on the application of reg. 5 to the first defendants in this case, because, in my judgment, the first defendants are in any case liable under reg. 21. That regulation opens: "Scaffolds used by workmen of more than one employer". It continues:

> "Where a scaffold or part of a scaffold is to be used by or on behalf of an employer other than the employer for whose workmen it was first erected, the first-mentioned employer shall, before such use, and without prejudice to any other obligations imposed upon him by these regulations, take express steps, either personally or by a competent agent, to satisfy himself that the scaffold or part thereof is stable . . ."

There is no doubt that the regulation is one which is applicable to a case of this character, for here a scaffold was to be used by or on behalf of an employer, namely, the first defendants, being other than the employer, videlicet, the second defendants, for whose workmen the scaffolding was first erected. It, therefore, follows that by this regulation the first defendants were placed under an obligation before such use to take express steps by a competent agent to satisfy themselves that the scaffold was safe. The use of the adjective "express" is somewhat ungrammatical and peculiar. Nobody suggests that it means "quick". I assume the intention was that the steps must be such as were directed, and directed specifically, to the question which had to be determined, namely, whether the scaffold was stable. It is not in doubt that the first defendants took no such steps. They made no inspection and they took no steps, " express " or direct or otherwise, to satisfy themselves of the stability of the scaffold before the plaintiff began his operations on it.

The fact that they failed to take any steps is not, however, the end of the matter, for it is conceded that it is still for the plaintiff to prove that that failure on the first defendants' part was responsible for, or contributed to, the damage which the plaintiff suffered. Counsel for the first defendants drew our attention on that matter to the decision of the House of Lords in *Bonnington Castings, Ltd.* v. *Wardlaw* (1) ([1956] 1 All E.R. 615), where the House laid down the test which has to be applied. In that case a steel dresser had been exposed to silica dust which was alleged to arise from certain grinding. It was proved that the grinders were not kept free from obstruction in accordance with the Grinding of Metals (Miscellaneous Industries) Regulations, 1925, and the question was whether the plaintiff had succeeded in establishing that the pneumoconiosis which he contracted could be attributed to the breach of the regulations. In his speech LORD REID said ([1956] 1 All E.R. at p. 618):

> ". . . the employee must, in all cases, prove his case by the ordinary standard of proof in civil actions; he must make it appear at least that, on a balance of probabilities, the breach of duty caused, or materially contributed to, his injury."

His Lordship had said, earlier in his speech (ibid.), that it was not intended by Parliament that an employee suffering injury could sue his employer merely because there was a breach of duty and it was shown possible that the injury might have been caused by the breach. In that case the House went on to find that the plaintiff had discharged the onus of proof, and I arrive at a similar conclusion in the present case.

On this part of the case the learned judge expressed himself at the end of his judgment briefly as follows. Having said that he doubted whether there had been compliance with reg. 21, he went on to say:

> " But I do not think that, if the first defendants had inspected the scaffolding before the plaintiff used it, they could have discovered that the supports had no proper footing. This could only have been discovered by excavating under all the supports."

That, he thought, would be more than the regulation required. I should perhaps say that the doubt which the learned judge expressed arose because the plaintiff himself had made an inspection and it was argued, therefore, that the first defendants had vicariously discharged their obligation by the plaintiff. That point was not pursued by counsel for the first defendants and must be taken as abandoned.

I observe first that the learned judge expressed the obligation as one of mere " inspection ". He said that inspection would have failed to reveal the defect, the absence of the secure foundation. In my judgment, however, the obligation is more than that of mere inspection; it is an obligation on the employer to take " express " steps to satisfy himself that the scaffolding is stable. Of course, if it were proved that no ordinary reasonable investigation could possibly have disclosed the defect, it might be said that the plaintiff had failed to discharge the onus on him. I do not, however, find any evidence which justifies the conclusion that the first defendants could not, by taking proper steps, have discovered what turned out to be the cause of the accident. I revert to the evidence of Mr. Young, which the learned judge said he had no hesitation in accepting, that the method of supporting the scaffolding by braces was one not to be adopted except in case of necessity, and even then only if the footings of the braces were secured on a solid foundation. One way to find out the facts is to ask questions, simple and straightforward. It seems to me, on the evidence in the present case, that there is no good ground, with all respect, for supporting the learned judge's conclusion that no " express " steps which the first defendants could and, indeed, should have taken would have sufficed to disclose the defect. I accept entirely the way in which the matter is stated by Lord Reid in *Bonnington Castings, Ltd.* v. *Wardlaw* (1); nevertheless, I apprehend that the court would not be astute to look for some escape for an employer who has, beyond a peradventure, failed altogether to comply with an obligation placed on him. If one takes Mr. Young's evidence and the essential inferences from it and bears in mind the absence from the evidence of anything to suggest that the bad footings were in some way concealed, it seems to me that the answer, within the terms of the statement from Lord Reid's speech which I have read, is that, judged by the ordinary standard of proof, on a balance of probabilities this breach of duty did materially contribute to the injury.

I have not forgotten one point which counsel for the first defendants pressed on us, namely, a point arising from the three words " before such use " in reg. 21. It was suggested that the obligation would be satisfied if the employers took the express steps at any time before the use by their servant. I have said already that the removal of the ties occurred only on the morning of the accident, so that it follows that, if the first defendants had, through a competent agent, investigated the scaffolding on the previous day, they would have found that it was erected in accordance with what Mr. Young called the preferable method, namely, that it was secured by ties. It seems to me that the words " before such use " import a reference to the scaffold as it will, in fact, be provided for use by the employers' servant. In other words, if the first defendants had taken the required steps on the previous day, they should obviously have satisfied themselves, among other things, that the scaffolding, as it then appeared, was in the condition in which their servant would use it; and an inquiry would have disclosed the answer, presumably, that the ties were to be removed.

The point is a relatively short one and I do not think I shall improve on it by further exposition. My conclusion is that, on the evidence, the plaintiff has established, on a balance of probabilities, that the failure of his employers, the first defendants, to satisfy themselves as to the stability of the scaffold in the condition in which he used it materially contributed to the accident. I am not satisfied on the evidence that it can properly be concluded that the steps, if taken by a competent agent, could in no circumstances have disclosed the essential frailty of the footings of the braces. If I am right so far, it follows that the plaintiff was entitled to succeed against the first defendants as well as against the second defendants, and to do so by reason of a breach by the first defendants of reg. 21 of the Regulations of 1948. In those circumstances I think it unnecessary to pursue, and I do not, therefore, pursue, the alternative claim that the first defendants were liable at common law. A number of cases was referred to but in the circumstances I shall, I hope, be forgiven if I pass them over. The result, therefore, is, if I am right, that the plaintiff should have recovered judgment against both defendants, and the next question accordingly emerges: In what proportions as between them should they bear responsibility ? Counsel for the second defendants said that, as was the fact, the plaintiff had successfully glazed one window before the collapse occurred and, therefore, there was nothing very obviously wrong. Counsel also said that the second defendants were entitled to have the benefit of the first defendants' experience; that the first defendants were under an obligation to take the steps mentioned in reg. 21 for the benefit of their own employees; and that the second defendants merely did what they thought was best for all concerned. There is, I think, force in that submission, but, on the other hand, I think that counsel for the first defendants is right in saying that substantially the blame for this accident should fall on the second defendants. As a matter of common sense, I think that he is entitled to say that an employer of labour, a glazier, such as were the first defendants, does rely on the competence of the contractor. The scaffolding had been up some time and people had been working on it. Moreover, counsel says that the breach was one of a somewhat technical character. I am not sure that I attach much significance to that. The real trouble was because somebody, no doubt with the best of motives, at a very late hour chose to alter the method whereby the scaffold was held stable and change what had formerly been a perfectly good scaffold for all purposes into one that held in it the element of risk, which unfortunately materialised. Giving the matter the best consideration that I can and thinking, as I do, that the substance of the blame should fall on the second defendants, I would apportion it as to one-fifth to the first defendants and four-fifths to the second defendants.

There remains only the question of general damages. I have said that the special damages amounted to £100, so that the area in which, so to speak, the court can manoeuvre is limited in any event to a maximum of £300*. I have already read the relevant part of the surgeon's report and opinion, and I have emphasised the fact that this accident served to make active and permanently active, so as to confer a partial disability, an inherent defect which might not have troubled the plaintiff for a very long time, if ever. His profession or trade is that of glazing windows. He obviously requires to go about with ladders and to erect them at various places and positions. To be disabled for all time from the capacity to lift heavy weights is, I would have thought, a serious calamity, apart altogether from the pain and suffering which it appears that he will get at times from this spondylosis. If I preface what follows by a repetition of that which fell from JENKINS, L.J., yesterday†, namely, that a change by this court in the quantum of damages awarded is a rare thing, I am not unmindful of the fact that this appears to be the third occasion in a very short time in which it has been done. Nevertheless, I repeat that nothing short of clear proof that there has been either some error of principle, or some wholly erroneous estimate applied, will suffice, and the onus on an appellant seeking to alter the quantum of damages is a very heavy one. I think, however, that in this case there has, with all respect to the learned judge, been a wholly erroneous estimate according to modern standards of the damages which should have been awarded. A man who has suffered an injury which is not only painful, but which is going to have a permanent disabling effect, even though it cannot be regarded as very serious, is not one of whom it can be said that he has suffered only slight injury, and I do not think, with all respect, that £100 is an adequate award. I would substitute for that figure the sum of £250. I, therefore, think that the appeal should be allowed so as to substitute for the judgment a judgment against both defendants with the necessary statement that the liability is to be borne as to one-fifth and four-fifths as between the defendants and that the amount of general damages should be raised from £100 to £250, making a total accordingly of £350 instead of £200.

ROMER, L.J.: I agree so fully with the judgment which LORD EVERSHED, M.R., has delivered that, were it not for the fact that we are taking a different view from that of the learned county court judge, I should have been content to adopt what my Lord has said without more; but out of respect to the learned judge I will make a few observations of my own.

As against the first defendants the plaintiff relied on reg. 5 and reg. 21 of the Building (Safety, Health and Welfare) Regulations, 1948, and alleged in his particulars of claim that the first defendants, his employers, were in breach of them. Regulation 5 apparently was not relied on before the county court judge and was not dealt with by him at all and, therefore, according to the ordinary practice it would be difficult for the plaintiff to rely before this court on a regulation which formed no part of his case in the court below. Apart from that, and as at present advised, I would merely say, and it is unnecessary A to say more, that I am doubtful in the extreme whether reg. 5 has any application to this case, and at that I leave it.

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* See footnote, p. 489, ante.

† In *Phillips* v. *Price* (Oct. 29, 1957), The Times, Oct. 30, 1957.

Regulation 21, however, does, I think, apply to the position which the first defendants occupied in this matter, and they were subject to the obligations which that regulation imposes. My Lord has read the regulation* and I do not propose to read it again. I think that counsel for the first defendants was B prepared to concede that, having regard to the terms in which the regulation was couched, the first defendants were within it, and it was conceded, and it is an undoubted fact, that they took no steps whatever to perform the obligations which the regulation imposes. Counsel submitted, however, that the plaintiff could not rely on that breach by the first defendants unless he could show that the breach was wholly or in part the cause of his accident. I think that C the evidence shows clearly that if the first defendants had taken some such steps as are envisaged in the regulation, it is highly probable that they or their representative would have acquired information which would or might, if acted on, have prevented the accident which occurred. If they had asked the foreman of the second defendants, on the day before, whether the scaffolding as it then existed was going to continue to exist when their employee was working on D it on the following day, I suppose that they would have been told: " No, because we are going to remove the bars from across the windows ". If, on the other hand, they had sent a representative on the following morning, just before the workman started to use the platform, their representative would have seen that the bars had been removed from across the windows and would, I suppose, have taken steps to ensure the safety of their employee accordingly. E It hardly lies in the mouth of the first defendants, having done nothing whatever about it, to say that even if they had made inquiries nothing good to the plaintiff would have come of them. I think, therefore, in agreement with LORD EVERSHED, M.R., that the omission by the first defendants to perform their obligations under reg. 21 did in some measure contribute to the calamity which befell the plaintiff. At the same time I think that there is considerable force in what F counsel for the first defendants said in regard to the proportion of liability as between the first defendants and the second defendants, who undoubtedly were in breach of more than one regulation so far as this matter is concerned. Counsel said that, when work of this kind is going on, generally speaking it is the job of the main contractors to put up the scaffolding and see that it is kept in proper order, and it is not unnatural, although strictly it may be wrong, that other G people who are concerned in the joint operation should rely, to some extent, on the people who put the scaffolding up, and to whom it belongs, to see that it is kept in a proper state. Therefore, although it cannot be said of the first defendants that they were other than in breach of reg. 21 and that that breach to some extent contributed to the accident, I am in agreement with my Lord that by far the greater part of the blame must be shouldered by the second defendants, H who did, with, no doubt, the best possible motives, something which brought them within breach of, at all events, reg. 9 and probably reg. 12 as well, and which resulted in the plaintiff's ladder getting upset and him being cast to the ground. Taking all the relevant circumstances into account, I agree that the proper proportion of blame is one-fifth on the first defendants and four-fifths on the second defendants, and, accordingly, the judgment of the court should give I effect to that apportionment.

The only question which remains is on the quantum of damages, and there again I find myself in complete agreement with the view which LORD EVERSHED, M.R., has expressed, that, having regard to the medical evidence, the statement in the second medical report that the plaintiff has a persisting disability consisting of pain in the lower lumbar region on stooping and lifting heavy weights, which makes it impossible for him to lift heavy weights at work, and that this disability appears to be stationary and is likely to remain permanently, the sum of £100, which was the sum awarded by the learned judge, is far below that which should be awarded and that the sum ought to be increased to £250. I accordingly agree with the order in relation to all the points which have been raised before us which LORD EVERSHED, M.R., has indicated.

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* See p. 490, letter H, ante.

ORMEROD, L.J.: I find myself in complete agreement with the judgments which have been delivered on the three matters which were argued before the court, and the only point on which I would wish to say anything is on the question of the apportionment of blame between the two defendants.

Counsel for the first defendants contended that, even if the first defendants were in breach of reg. 21, that was a purely technical breach, and, therefore, the proportion of responsibility which should be attributed to them should be very small indeed, in fact should be almost nominal. I agree with the view which has already been expressed that in this case the substantial blame for the accident must rest on the second defendants. They were the people on the site; they were the contractors in charge of the site, the main contractors, and they were the contractors who had in the first place erected the scaffolding and under the Building (Safety, Health and Welfare) Regulations, 1948, were responsible, so long as that scaffolding was being used, for its proper maintenance. Unquestionably, in those circumstances, theirs is the substantial blame. On the other hand, it must be remembered that there was a duty on the first defendants. One of their employees was going to work on this site and was going to work on this scaffolding, a matter which might reasonably have been anticipated by his employers. Regulation 21 is a provision for the safety of the work people of any employer whose employees are going to work on a particular site where there is scaffolding. In those circumstances, it cannot be said that the breach by the employers is merely a technical breach and that any proportion of blame which is allotted to them should be purely nominal. I agree that the principal blame must lie on the second defendants, and I also agree that a proper proportion is the proportion of one-fifth to the first defendants and four-fifths to the second defendants.

On the issue of damages there is nothing I wish to say except that in the circumstances I, too, am satisfied that the award made by the learned judge, with all respect to him, was based on a wholly erroneous estimate and that the figure should be increased to one of £250.

[Counsel for the first defendants then brought to the notice of the court an offer made by the first defendants to the second defendants, in accordance with R.S.C., Ord. 16A, r. 12A*, and s. 100† of the County Courts Act, 1934, in a letter dated Oct. 30, 1956, whereby the first defendants offered to contribute twenty-five per cent. of any damages which might be recovered by the plaintiff in the action, and stating that the offer would, if necessary, be brought to the attention of the judge at the trial. The offer, which remained open for a period of ten days from the date of the letter, was not accepted. Counsel asked the court to take the offer into account and to make an order for the first defendants to be indemnified by the second defendants against all the costs in the Court of Appeal and in the county court. After argument on this point:]

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* R.S.C., Ord. 16A, r. 12A, which was added in 1954, reads: " A party to an action who, either as a third party or as one of two or more tortfeasors liable in respect of the same damage, stands to be held liable in the action to another party to contribute towards any debt or damages which may be recovered by the plaintiff in the action, and who, at any time before the trial of the action, makes a written offer to that other party (whether absolute or conditional and whether limited or not as respects the time for acceptance thereof) to contribute to a specified extent to the debt or damages, may, in making that offer, while stipulating that it is to be without prejudice to his defence (whether as against the plaintiff or as against the party to whom the offer is made or as against any other party to the action), nevertheless reserve the right to bring the offer to the attention of the judge at the trial as if it were a payment into court (that is to say, after all questions of liability and amount of debt or damages have been decided); and if such an offer is so brought to the attention of the judge in pursuance of a right so reserved, the judge shall, to such extent, if any, as he may think appropriate in all the circumstances, take the offer into account in exercising his discretion as to costs." Under the former R.S.C., Ord. 30, r. 2 (2) (j), the court had power to treat a written offer of contribution by one joint tortfeasor to another as a notice of payment into court. The former rule was applied in *Basted* v. *Cozens & Sutcliffe, Ltd.* ([1954] 2 All E.R. 735).

† Section 100 of the County Courts Act, 1934, reads: " In any case not expressly provided for by or in pursuance of this Act, the general principles of practice in the High Court may be adopted and applied to proceedings in a county court."

LORD EVERSHED, M.R.: The question of costs is a little complicated and, as always, difficult. The case is one in which the first defendants invoked R.S.C., Ord. 16A, r. 12A, and s. 100 of the County Courts Act, 1934, by an unequivocal offer to contribute twenty-five per cent. of any damages which might be recovered by the plaintiff in the action. In the event, the proportion which this court has held the first defendants ought to contribute as between the two is not twenty-five per cent., but twenty per cent. It is contended by counsel for the first defendants that from the expiration of the ten days after Oct. 30, 1956, he ought to be indemnified by the second defendants against all the costs here and below. The matter is one of discretion on the express terms of R.S.C., Ord. 16A, r. 12A, and I think that such a result would be unduly harsh on the second defendants. As counsel for the second defendants points out, non constat that three sets of costs would have been avoided. It may be that the first defendants would have wished separate representation. The letter does not go on to suggest the contrary; and, even if both had been represented by the same solicitors and counsel, still less does it follow that the bill would have been paid exclusively by the second defendants.

Doing, as one must in these cases, the best that one can to achieve a just result, we think that the best result will be achieved by directing that the appeal be allowed and judgment entered for the plaintiff for £350 with costs against both defendants, and that the contribution as between the two defendants, as regards the plaintiff's judgment debt and costs of action and appeal, be one-fifth of such judgment debt and costs by the first defendants, and four-fifths of such judgment debt and costs by the second defendants. In so far as the first defendants' and the plaintiff's costs of the action and of the appeal have been increased by reason of the rejection by the second defendants of the first defendants' offer made pursuant to R.S.C., Ord. 16A, r. 12A, and s. 100 of the County Courts Act, 1934, $66\frac{2}{3}$ per cent. of any such increased costs which the first defendants are called on to pay to the plaintiff and $66\frac{2}{3}$ per cent. of the first defendants' own costs so increased shall be paid by the second defendants to the first defendants.

Appeal allowed.

Solicitors: *Maltz, Mitchell & Co.*, agents for *Bernard Chill & Axtell*, Southampton (for the plaintiff); *Barlow, Lyde & Gilbert* (for the first defendants); *Park Nelson & Co.* agents for *Footner, Taylor & Lawrence*, Romsey (for the second defendants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

R. *v.* SOLOMON.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Gorman and Pearson, J.J.), November 11, 1957.]

Criminal Law—Trial—Jury—Summoning of jury—All jurors summoned at quarter sessions released by mistake—Twelve jurors secured by praying a tales—Whether jury properly summoned—Whether jury can be entirely composed of talesmen.

Jury—Trial by—Talesmen—Twelve jurors secured by praying a tales—Whether jury can be entirely composed of talesmen.

The appellant having been indicted for larceny, and the case having come on for trial at borough quarter sessions, it was found that the panel of jurors who had been summoned to attend the quarter sessions had inadvertently been released. The clerk of the peace therefore prayed a tales de circumstantibus in that he sent out for, and secured the attendance of, twelve persons at work near the court to form a jury of talesmen and to try the case. Before the trial continued, the clerk told counsel for the appellant that the jury had been summoned in haste and drew attention to the right of challenge, but counsel stated that he had no objection to the jury as a whole. The appellant, having been convicted, appealed against his conviction on the ground that the jury were improperly summoned and the trial was a nullity. Section 37* of the Juries Act, 1825, being inapplicable to quarter sessions, the common law regarding praying a tales applied.

Held: the conviction would be set aside because at common law a jury could not properly be composed entirely of talesmen and in the present case there had been no quales (viz., jurymen duly empanelled and summoned) whose number could properly have been made up to the number of a full jury by praying a tales de circumstantibus.

Per CURIAM: where there is a complete shortage of jurors named in the jury panel, and the trial is to proceed on the same day, the proper course is to require the sheriff to return a further panel of jurors instanter (see p. 499, letter B, post).

Appeal allowed.

[As to making up the numbers of jurors required, see 19 HALSBURY'S LAWS (2nd Edn.) 309, para. 646; and for cases on the subject, see 30 DIGEST (Repl.) 262, 263, *249-264*.]

Appeal against conviction.

The appellant, Donald James Solomon, appealed against his conviction for larceny at Brighton Borough Quarter Sessions on June 21, 1957, on the ground that the jury who tried him were improperly summoned and that the trial was therefore a nullity.

On June 21, when the appellant's case came on for trial, all the jurors summoned at the Brighton Borough Quarter Sessions had been inadvertently released, and the clerk of the peace therefore proceeded to pray a tales de circumstantibus in that he secured the attendance of twelve jurors at random from persons, apparently suitable, who were working in an office near the court. No formal written order to pray a tales was signed by the court, nor was an order pronounced in open court. Before the trial proceeded, the clerk of the peace stated that it was believed that the members of the jury were qualified and liable to act as jurors, but he drew the attention of counsel for the appellant to the fact that the jury had been summoned in haste, and that the right of challenge existed. Counsel for the appellant stated that he had no objection to the jury as a whole, and the trial then continued.

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* Section 37 of the Juries Act, 1825 (13 HALSBURY'S STATUTES (2nd Edn.) 398), provides: "Where a full jury shall not appear before any court of assize . . . or before any of the superior civil courts of the three counties palatine, or before any court of great sessions . . . every such court, upon request made for the King . . . or on request made by the parties . . . shall command the sheriff or other minister to whom the making of the return shall belong to name and appoint, as often as need shall require, so many of such other able men of the county then present as shall make up a full jury . . .". The court of great sessions was not a court of quarter sessions; see p. 498, letter E, post.

Subsequent investigation showed that eight of the jurors were included in the register of electors, but that only two of those had the letter "J" (which indicated that they were qualified to serve as jurors) beside their names. One other juror lived in Brighton, but in a new road and was not therefore in the register of electors, and the three remaining jurors lived outside the Borough of Brighton but within the County of Sussex.

E. Clarke for the appellant.
C. J. T. Pensotti for the Crown.

LORD GODDARD, C.J., having stated the facts regarding the summoning of the jury, and having further stated that in this case it was unnecessary to consider whether the jurors should possess the qualification of living in the Borough of Brighton, continued: The appellant, having been convicted and given an extraordinarily lenient sentence—only a fine and some costs—has now taken the point that the jury by which he was convicted was no jury at all, an improper jury, and that, therefore, the trial was a nullity. This brings up the question of how a tales can be properly prayed and what are the necessities before talesmen can be empanelled as jurors. The law with regard to talesmen is very obscure and may be said to be particularly obscure with regard to proceedings at quarter sessions because s. 37 of the Juries Act, 1825, which deals with tales de circumstantibus, does not apply in terms to quarter sessions. It applies to courts of assize, any of the superior civil courts of the three counties palatine, that is Durham, Lancaster and Chester, " or . . . any court of great sessions ". That is the Court of Great Sessions of Wales, which had existed since the reign of Henry VIII, but it was not a quarter sessions of the peace, which is an entirely English court and not a court of great sessions. Therefore, if tales are prayed at any rate at borough quarter sessions and, I think, county quarter sessions, the common law must prevail, and, as I say, the common law seems to be somewhat obscure on the subject.

We have been referred to passages in HALE*, BLACKSTONE* and HAWKINS' PLEAS OF THE CROWN*. One thing does emerge as certain, and this is that you cannot have a complete jury of talesmen: it is on this that we propose to base our judgment. The procedure for providing juries for quarter sessions is this: two justices of the peace at least send their precept to the sheriff to summon jurors, just as judges who are going on assize send their precept to the sheriff, and the sheriff acting in accordance with the precept must prepare panels. He summons jurors, and he returns the panel to the judge or the clerk of the peace of quarter sessions. It will be known by members of the Bar that at the assizes the crier addresses the sheriff and calls on him " to return the several writs and precepts that my lords the Queen's justices may proceed thereon ", and what the sheriff then hands to the judge is the jury panel. Those are the jurors whom he has summoned. If there is a defect in the jury, that is to say, if a full jury cannot be empanelled from the names on the panel, a tales can be prayed. Whether the talesmen must be actually present in the precincts of the court or can be brought in from the street, we need not inquire because we do not want to give a decision on any point that is immaterial. It seems to the court, however, that one cannot have a jury composed entirely of talesmen because the very fact that it is a tales implies that there must be a quales. Since writs of error were abolished, records are not drawn up, but if the record had been drawn up

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* See HALE, Vol. II, 265; BLACKSTONE (16th Edn.) 4 Comm. 354; HAWKINS' PLEAS OF THE CROWN (8th Edn.) Vol. II, 565, 566, ss. 17, 19; and see also ARCHBOLD (23rd Edn.) 185, para. 332.

A it would have been necessary to set out in it the jury panel, and the names of the jurors who actually were empanelled to try the issue. If there were no jurors who were in the original panel, it would have been plain on the record that twelve people, who had not been summoned, had tried the prisoner, and if a tales is to be summoned there must be, as it seems to the court, a jury composed partly of those who have been summoned, the quales, and added to them, if the B record had been drawn up, such persons standing by as would make up the full jury. In this case all the persons who tried the case had never been summoned. If there is a complete defect or shortage of jurors, as happened in this case, the court desires to say that in their opinion the proper course is to require the sheriff to return a further panel instanter. It may be that at borough quarter sessions it would be impracticable. We have not considered that question, but, I think, C the clerk of the peace summons the jurors; at any rate, if this happens again and the trial is to proceed on the same day, it seems to us that the right course, instead of praying tales, is to require a fresh panel to be empanelled instanter.

We feel bound to say that the people who tried this case were unqualified. There was no qualified person among them. There cannot be a tales without a quales. Therefore, it is as if the trial had taken place before no jury at all. D No objection was taken at the trial and the appellant and his counsel had knowledge of what had taken place, but it does not follow that this court, on a ground such as that of waiver, cannot or ought not to give effect to the present objection, because, so it seems to the court, there was no jury at all. We feel bound, therefore, with great reluctance to say that we must set aside the verdict and judgment that were given in this case. We shall certainly order a venire de E novo to issue, that is to say, we shall order a warrant to be issued for the arrest of the appellant, who can therefore be taken before justices and bailed to appear again at the next sessions because venire de novo is an order for the appellant to be tried over again. The court will therefore give directions to the Master of the Crown Office that a warrant must be issued for his arrest and the justices can proceed to bail him, and he can be tried at the next quarter sessions.

F [Counsel for the appellant then addressed the court on its directions that a warrant be issued, and that the appellant be tried at the next Brighton Quarter Sessions; he submitted that, on the authority of the order made in *R.* v. *Cronin* ([1940] 1 All E.R. 618 at p. 620), it was unnecessary to direct the issue of a warrant, and that the court (which had the same powers as a court of quarter sessions*) had power to order the appellant to be tried at East Sussex Quarter G Sessions in view of the publicity concerning the first trial at Brighton Quarter Sessions and this appeal. In the circumstances of the case, however, the court ordered that a warrant for the appellant's arrest be issued, so that he should be brought before justices for them to consider whether he should be allowed bail. The court doubted whether it had jurisdiction to order trial at East Sussex Quarter Sessions. The appellant could, however, apply to the H Queen's Bench Division under the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 11 (3), for such an order.]

Appeal allowed. Order for a venire de novo to issue.

Solicitors: *Hempsons* (for the appellant); *Town clerk*, Brighton (for the Crown).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

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* Under the Criminal Justice Act, 1925, s. 14 (2), a court of quarter sessions before whom a person has been committed for trial for an indictable offence, may if it is convenient to do so, direct that the trial or a re-trial shall take place before a court of assize or some other court of quarter sessions for the purpose of " expediting the trial or re-trial or the saving of expense or otherwise ", provided the accused will not thereby suffer hardship.

TROTT *v.* W. E. SMITH (ERECTORS), LTD. A

[Court of Appeal (Jenkins, Parker and Pearce, L.JJ.), October 24, 25, 28, 1957.]

Building—Building regulations—Safe means of access—Injury to person skilled in such traverses walking ten feet without handhold along three-inch wide girder twenty feet six inches above ground—Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948 *No.* 1145), *reg.* 5. B

A means of access to a place at which a person has to work is not the "sufficient safe means of access" which, by reg. 5* of the Building (Safety, Health and Welfare) Regulations, 1948, must be provided "so far as is reasonably practicable", if the means of access is a possible cause of injury to anybody acting in a way that a human being of the type who will use the means of access may reasonably be expected to act in circumstances which may reasonably be expected to occur (see p. 505, letter B, and p. 507, C letter B, post).

Sheppey v. *Matthew T. Shaw & Co., Ltd.* ([1952] 1 T.L.R. 1272) adopted and approved.

A steel erector while in the employment of the defendants had to traverse ten feet along a girder three inches wide and twenty feet six inches above the ground, without a handhold, in order to reach the place at which he had to D work. He fell from the girder while making the traverse and was killed. It would have been reasonably practicable to have provided a safer means of access to the place of work, for example, by laying planks across existing transverse girders of the structure at that height, but no means of access about the structure, other than that which the girders afforded, was provided. E There was evidence before the court that a three-inch girder was a satisfactory foothold for a steel erector, that a steel erector would "walk it comfortably without fear" and that planks were not ordinarily used to provide access in operations of the character of this erection.

Held: the employers were in breach of reg. 5 of the Building (Safety, Health and Welfare) Regulations, 1948, because, though it had been reasonably practicable for them to have provided a means of access which would F have been a "sufficient safe means of access" within the standard stated at letter B above, they had not done so.

Appeal dismissed.

[As to the obligation to provide safe means of access in building operations, see 17 Halsbury's Laws (3rd Edn.) 126, para. 206, text and note (b); and for G the Building (Safety, Health and Welfare) Regulations, 1948, reg. 5, see 8 Halsbury's Statutory Instruments 213.]

Cases referred to:

(1) *Edwards* v. *National Coal Board*, [1949] 1 All E.R. 743; [1949] 1 K.B. 704; 2nd Digest Supp.

(2) *Sheppey* v. *Matthew T. Shaw & Co., Ltd.*, [1952] 1 T.L.R. 1272; 3rd Digest Supp. H

(3) *Collins & Bailiss* v. *Western Aircraft*, unreported.

(4) *Walker* v. *Bletchley Flettons, Ltd.*, [1937] 1 All E.R. 170; Digest Supp.

(5) *Wilson* v. *International Combustion, Ltd.*, (July 18, 1956) unreported; see footnote, p. 505, post.

(6) *Montgomery* v. *Monk (A.) & Co., Ltd.*, [1954] 1 All E.R. 252; 3rd Digest I Supp.

(7) *Latimer* v. *A.E.C., Ltd.*, [1953] 2 All E.R. 449; [1953] A.C. 643; 117 J.P. 387; 3rd Digest Supp.

Appeal.

Employers appealed from the decision of Lloyd-Jacob, J., dated Mar. 18, 1957, when he was sitting as an additional judge of the Queen's Bench Division,

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* Regulation 5 is printed at p. 502, letter I, to p. 503, letter A, post.

A that they were liable in damages to the plaintiff, the widow of their deceased workman, under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, for breach of their statutory duty, under reg. 5 of the Building (Safety, Health and Welfare) Regulations, 1948, to provide the deceased with sufficient safe means of access to a place at which he had to work. The facts appear in the judgment of JENKINS, L.J.

B *F. W. Beney, Q.C.*, and *D. P. Croom-Johnson* for the employers, the defendants.
John Thompson, Q.C., and *W. D. Collard* for the widow, the plaintiff.

JENKINS, L.J.: In this case the plaintiff (now respondent) Doris Rose Mary Trott, as widow and administratrix of the estate of Charles John Trott, deceased, sued the defendants (now appellants) W. E. Smith (Erectors), Ltd.
C for damages under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the death of her husband at the age of thirty-two years in an accident which befell him while working as a steel erector in the employment of the defendants.

The plaintiff based her claim on breach by the employers of their statutory duty under the Building (Safety, Health and Welfare) Regulations, 1948, the
D regulations alleged to have been contravened being reg. 5 (which, so far as material, relates to the provisions of safe means of access), reg. 30 (3), which relates to the protection of persons working over open joisting, and reg. 97, which relates to the provision in certain circumstances of safety nets, sheets and belts; and also on negligence at common law. LLOYD-JACOB, J., by whom the action was tried, held that the employers were in breach of reg. 5 and reg. 30 (3),
E and accordingly found it unnecessary to deal with the claim under reg. 97. As to the claim at common law he said, in effect, that if necessary he would have been prepared to hold that the plaintiff was entitled to succeed on this ground also. Accordingly, on Mar. 18, 1957, the learned judge gave judgment for the plaintiff for damages which he assessed at £3,835, and from that judgment the employers now appeal to this court. The appeal relates only to liability, and
F it is not sought, in the event of the learned judge's decision as to liability being upheld, to challenge the amount of the damages awarded.

The work on which the deceased was employed at the time of the accident was the erection of the steel framework for a new school at Tunbridge Wells. It appears that the employers had sub-contracted for the erection of the steel with another company, which had itself sub-contracted for the supply and erection
G of the steelwork with the head contractors for the entire project. The deceased was working as one of a gang consisting at the material time of the foreman, Mr. Golding, the deceased himself, and a man named Harvey. All three were experienced steel erectors. The accident happened in the early afternoon of Saturday, May 14, 1955, when the deceased fell off the structure at a point some twenty feet from the ground, striking his head in the course of his fall on some
H part of the steelwork, and sustaining injuries which most unfortunately proved fatal.

I must next attempt to describe the state of the relevant part of the structure at the time of the accident. It may be regarded as a rectangular section of the entire structure some twenty feet long by some six feet wide, and for convenience of exposition I will treat it as lying lengthways from east to west. On each of
I the long sides of this section of the structure there had been erected three vertical members (termed stanchions), one at either end and one in the middle, the tops of these stanchions being some twenty-three feet seven inches from the ground. The three stanchions on either side of the section had been connected by longitudinal members (termed "channels") running the whole length of the section at a height of twenty feet six inches from the ground. These channels had been connected from north to south by transverse members (termed "trimmers") at the same height, that is to say, some twenty feet six inches from the ground. One of these trimmers ran between the western pair of stanchions, and another

between the central pair of stanchions, while a third connected the eastern pair of stanchions; and finally two more were fixed from channel to channel so as to divide, at equal intervals of a little over a yard, the space between the eastern end of the section and the central pair of stanchions. On either side of the section the top of the western stanchion had been connected with the top of the central stanchion so as to form, in effect, a rail three feet one inch high above the channels placed at the height of twenty feet six inches, but no channels had been fixed on either side between the tops of the central and eastern stanchions. A channel member of the type in use on this site when in position would present to the feet of anyone walking on it a surface of only three inches wide; and I gather that this also applies to a trimmer or transverse member of the type used. A ladder had been set up against the eastern side of the western trimmer and lashed to that member. The ladder being so positioned, it is obvious that a person in the course of ascending it would have his back to, and so would not (unless he turned round) be able to observe the movements of anyone on the eastern part of the structure.

Before the gang went to their dinner on the day of the accident Mr. Golding, the foreman, had decided that the next thing to do would be to fix a channel between the top of the central stanchion on the north side of the relevant section of the structure and the top of the eastern stanchion on the same side. In preparation for this the gang had, before going to dinner, hoisted the appropriate channel member on to the trimmers at the eastern end of the section and laid it across those trimmers close to the side on which it was to be fixed. It is to be observed that, in the circumstances I have stated, anyone having occasion to reach the eastern stanchion on the north side of the relevant section of the building would have to mount the ladder, turn to his right at the top, and gain the channel twenty feet six inches from the ground on the north side of the section. He would then have to turn to the right again, and make his way along that channel, with the channel connecting the tops of the western and central stanchions as a handhold as far as the central stanchion. Then from the central to the eastern stanchion he would have to make his way along the channel twenty feet six inches from the ground and, be it remembered, only three inches wide, for a distance of some ten feet, without any handhold at all.

On returning from their dinner, the deceased and Mr. Harvey set about the task of fixing the channel which had been placed in readiness on the trimmers. The deceased went up the ladder first, clearly intending to go to the eastern stanchion on the north side of the section and attend to that end of the channel, leaving it to Harvey to deal with the inner or western end. The deceased was apparently at the ladder before Harvey started to climb. When Harvey was two-thirds of the way up he heard a noise, looked round and saw the deceased falling, and said: " Oh Christ, Charlie ", and, scrambling down, saw the deceased lying on the ground in Mr. Golding's arms. Harvey said in evidence that he saw the deceased strike his head on one of the beams as he fell, but failed to identify the spot to the satisfaction of the judge. The point from which the deceased fell was, however, fixed by the learned judge as being just to the east of the central stanchion. In the meantime Mr. Golding had been on the ground intent on sorting out nuts and bolts to throw up to the other two at the appropriate moment. The first he knew of the accident was Harvey's shout and a clatter of spanners. He put his hands over his head, and the next he knew the deceased was on top of him.

This being the nature of the accident, should it be held to have been due to the breach by the employers of any of the statutory regulations relied on by the plaintiff? I will read them. Regulation 5 states:

> " Suitable and sufficient scaffolds shall be provided for all work that cannot safely be done on or from the ground or from part of the building, or from part of a permanent structure or from a ladder or other available

> means of support, and sufficient safe means of access shall so far as is reasonably practicable be provided to every place at which any person has at any time to work."

Regulation 30, headed "Openings in roofs, floors and walls; open joisting", provides by para. (3) as follows:

> "Subject to paras. (5) and (6) of this regulation when work is done on or immediately above open joisting through which a person is liable to fall a distance of more than six feet six inches, the joisting shall be securely covered over by temporary boards or other covering where and to the extent necessary to afford safe access to or foothold for the work, or other effective measures shall be taken to prevent persons from falling."

Finally, reg. 97, which is headed "Safety nets, sheets and belts", reads:

> "If the special nature or circumstances of any part of the work render impracticable compliance with the provisions of these regulations designed to prevent the fall of any persons engaged on that part of the work, then those provisions shall be complied with so far as practicable and except for persons for whom there is adequate handhold and foothold either there shall be provided suitable safety nets or safety sheets or there shall be available safety belts or other contrivances which will so far as practicable enable such persons who elect to use them to carry out the work without risk of serious injury."

The argument before us was directed almost entirely to reg. 5 on which the learned judge mainly founded his decision in the plaintiff's favour. It is agreed that the first branch of it is inapplicable. There remains the provision that

> "sufficient safe means of access shall so far as is reasonably practicable be provided to every place at which any person has at any time to work."

It is not in dispute, as I understand the argument, that the eastern stanchion on the north side of the relevant section of the building was for this purpose a place at which the deceased had to work in the fixing of the channel, or that the only means of access he had to that place consisted as to the last ten feet simply of the three-inch wide channel twenty feet six inches from the ground, apart from such dubious assistance as he might derive from the trimmers, spaced as they were over a yard from each other, and themselves only three inches wide; or that for this last ten feet he would have no handhold whatever. Counsel for the employers says that this man was a steel erector accustomed to heights and to keeping his balance on narrow surfaces far above ground. For him the means of access that he had here was to all intents and purposes safe. It would never have occurred to anyone before the accident happened that a steel erector walking along a three-inch wide girder without any handhold might possibly slip and fall. Mr. Golding, the foreman, with his long experience of steel erecting, saw no risk in it, and Mr. Cullum, the employers' outside supervisor, with thirty years' experience in the steel erection trade, said that a three-inch wide girder was a satisfactory foothold for a steel erector, that a steel erector would "walk it comfortably without fear"; and that in all his thirty years' experience he had never known of boards being used to provide access for an operation such as this. Counsel for the employers also laid stress on the absence of evidence of any comparable accident to a steel erector in the past. In sum, his argument comes to this, that for the persons by whom it was to be used (namely, skilled steel erectors) the three-inch means of access was, so far as could reasonably be foreseen before the accident happened, a safe means of access. A means of access which has that degree of safety is a safe means of access within the meaning of reg. 5, and it cannot be reasonably practicable to provide in advance for happenings which cannot reasonably be foreseen. Considerations of this kind are to my mind more cogent where the charge is one of negligence at common law

A than they are in relation to a charge of breach of statutory duty. The regulation here specifically enjoins the provision of safe means of access so far as is reasonably practicable. That seems to me to place on the employer a stricter obligation than is laid on him in relation to comparable matters by the general duty of reasonable care imposed at common law. Given an accident to a skilled steel erector properly using as the means of access provided to his place of work a B girder only three inches wide, then prima facie, as it seems to me, the means of access, being obviously inadequate for anyone other than a person specially skilled in this way, has been shown by the event to be unsafe even for a skilled steel erector; and for the purposes of the statutory duty imposed by reg. 5 the onus is, I should have thought, cast on the employer to show that the means of access was safe so far as it was reasonably practicable to make it so; compare C *Edwards* v. *National Coal Board* (1) ([1949] 1 All E.R. 743). The obligation is, of course, limited to what it is reasonably practicable to do, and I agree that the word " safe " in the regulation cannot mean absolutely safe, since it is seldom, if ever, possible, let alone reasonably practicable, to attain absolute safety. I concede further that, in determining what is safe within the meaning of the regulation, some regard must be had to the capabilities of the persons by whom D the means of access is to be used. But the extent to which the statutory requirement of safety can be qualified on this account has its limits, as is well illustrated by the case tried by PARKER, J., *Sheppey* v. *Matthew T. Shaw & Co., Ltd.* (2) ([1952] 1 T.L.R. 1272), the passages which I have in mind being at pp. 1274 and 1275 of the report. In that case there was an accident to a steel erector, who was engaged with others in painting a steel structure; they had to carry paint E pots and were engaged on work which could not, strictly speaking, be called the ordinary work of a steel erector. Moreover in the course of his ordinary work, a steel erector would have a special carrier for his tools, and would not, as in *Sheppey's* case (2), be encumbered by a paint pot. Nevertheless I find considerable assistance in the following passages from the judgment in that case. PARKER, J., posed the question (ibid., at p. 1274): " What, then, is the true F meaning of the word ' safe ' ", and he said:

> " It cannot mean ' absolutely safe ' in the sense that it must be such means of access that no accident can occur."

Again he cited OLIVER, J., in *Collins & Bailiss* v. *Western Aircraft* (3) as saying:

> " I think that the duckboard was a safe means of access. I cannot G think that ' safe ' means ' entirely safe '. It must mean ' safe for a man who is acting reasonably '. I hold that the duckboard was a safe means of access so far as reasonably practicable."

PARKER, J., continued:

> " It is urged upon me on behalf of the defendants that ' safe ' means H ' reasonably safe ', bearing in mind the type of man who is going to use it, and it is pointed out, as is perfectly true, that steel erectors are used to heights far greater than the height in this case—that they climb, as one witness said, like cats about steelwork at great heights, often with no handhold, and walk along the girders or sit astride of them and work their way along them regardless of the height at which the work is done. The evidence of the I views of those people working in the business was all one way, that from a steel erector's point of view the job was being done in a perfectly safe way."

PARKER, J., further observed:

> " As I have said, reference has been made to passages in decided cases where the duty is said to be one to provide reasonably safe means of access. For myself, with great deference, I get little help from adding the word ' reasonably '. It is not in the regulations. If it is used merely in contradistinction to ' absolutely safe ', I can understand it; but if it is intended

> A to mean 'safe for anybody acting reasonably', in the sense of taking full precautions for their own safety, I cannot agree with it."

He then went on to point out that the regulations are intended, amongst other things, to protect workmen against the results of carelessness or inadvertence. He said (ibid., at p. 1275):

> B "'In considering whether the means of access provided is safe or unsafe, it must not be assumed that everybody will always be careful. A means of access is unsafe if it is a possible cause of injury to anybody acting in a way a human being may be reasonably expected to act in circumstances which may reasonably be expected to occur'."

That was PARKER, J.'s paraphrase and adaptation to the case then before C him of what was said by DU PARCQ, J., in *Walker* v. *Bletchley Flettons, Ltd.* (4) ([1937] 1 All E.R. 170 at p. 176). PARKER, J., went on ([1952] 1 T.L.R. at p. 1275):

> "Adopting that test, I cannot think that a means of access which involves climbing such a lattice girder as I have described, under or over purlins, while manipulating at the same time a paint pot, is a safe means of access, D albeit the man is a steel erector."

Then there is this passage:

> "In considering whether a means of access is safe, it would be right to consider the employment of the people who are going to do the work. It may be that an access would be safe, say, for a steel erector where it would E not be safe for a lawyer; but one must not carry that too far, because otherwise, as Mr. Everett said, you would be testing the safety of access really by the skill of people to avoid the danger. I think that in considering safety you must assume that the means of access will be used by a person experienced in the particular trade in question, and in my view the means in the present case was not safe for a steel erector."

F I also derive assistance from *Wilson* v. *International Combustion, Ltd.* (5) (unreported; C.A., July 18, 1956)*. The matter there under consideration was negligence at common law as distinct from breach of statutory duty, and the task in the course of which the accident happened was of a somewhat special kind. Nevertheless I think that assistance on the question now before us is to be found in the following observations of MORRIS, L.J., in that case. The learned lord G justice said this:

> "Counsel for the employers further submits that there was nothing unusual or difficult for a steel erector in making his way along a girder and that as the appellant [the workman] fell while doing the sort of thing that steel erectors are accustomed to do, his fall did not result from the employers' breach of duty."

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* In *Wilson* v. *International Combustion, Ltd.*, July 18, 1956, a steel erector, who had fallen from a steel joist along which he was walking, appealed against the decision of OLIVER, J., dated Mar. 19, 1956, given at Winchester Assizes (the case having been heard at Dorchester Assizes on Jan. 20, 1956, and judgment reserved) dismissing his claim against his employers for damages for negligence and for breach of their statutory duty under regs. 5 and 30 (3) of the Building (Safety, Health and Welfare) Regulations, I 1948. OLIVER, J., found that the employers were negligent in not providing the workman with a ladder (which would have enabled the workman to reach his place of work without walking along the joist), a scheme of work, or supervision, but held that in walking along the joist the workman was doing his ordinary job as a steel erector, and that the accident was therefore not caused by the employers' negligence. The Court of Appeal (SINGLETON, MORRIS and ROMER, L.JJ.), held that by failing to provide a ladder the employers had exposed the workman to unnecessary risk which was the cause of the accident, and were therefore liable in negligence: principle laid down by LORD HERSCHELL in *Smith* v. *Baker* ([1891] A.C. 325) applied. As negligence was found, neither OLIVER, J., nor the Court of Appeal considered whether there had also been any breach of statutory duty.

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Then MORRIS, L.J., continued:

> "The nature of their work may at times expose them to certain unavoidable risks which they may be willing to take. These circumstances, however, do not alter the fact that in walking along or in straddling joists which are high above the nearest floor level, there is an inherent peril and an inherent risk of falling. Indeed the facts of this case show how a steel erector may fall. As ROMER, L.J., pointed out in the course of the argument this morning, this steel erector fell, although he was not himself guilty of any negligence. It follows, I think, and indeed it is clear, that it must be something perilous to proceed along steel joists when there is an open space on either side and when a fall may not be broken until the floor below is reached . . . It seems to me that it is of no avail to say that the appellant was only doing what steel erectors often do, or to say that the appellant was running risks which steel erectors generally regard as slight. The failure of the respondents directly brought it about that the appellant was subjected to those risks which result when a steel erector goes along girders. The fact that on this occasion those risks materialised may be unfortunate for the respondents, but it is still more unfortunate for the appellant. In my judgment he was exposed to those risks quite unnecessarily, and he would not have been exposed to them but for the respondents' breach of duty. His injuries resulted from risks which he was unnecessarily running, and they were in my judgment caused, and directly caused, by the respondents' negligence."

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The employers' argument in the present case, that the three-inch means of access was safe because a skilled steel erector could negotiate it without mishap, is really tantamount to saying that they did not provide safe means of access for the deceased, but that it was unnecessary to do so, for he was a skilled steel erector well able and fully accustomed to use unsafe means of access, surmounting the attendant dangers by his agility and good balance. This clearly is no answer to the claim under reg. 5. The truth is that the employers provided no means of access in any ordinary sense of that expression, but left it to the gang to make their own way about the structure as best they could. That it was reasonably practicable, in a physical sense, to provide the deceased, if not with absolutely safe means of access, at all events with safer means of access than he actually had, is not open to doubt. Mr. Golding (the foreman) in effect agreed in the course of his evidence that it would have been perfectly practicable to lay a plank or planks across the trimmers between the central and eastern stanchions at the east end of the relevant section of the building, and that if this had been done the deceased would have passed in safety from the central to the eastern stanchion.

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For these reasons I am of opinion that the learned judge was right in holding that the defendants were in breach of their statutory duty under reg. 5. Counsel for the employers criticised some passages in his judgment as indicating the view that absolute safety was the criterion set by reg. 5. I will not go into these passages in detail. Suffice it to say that I cannot regard them, read in their context, as so intended. The view I have formed as to the claim under reg. 5 makes it unnecessary for me to express any opinion on the claim under regs. 30 (3) and 97. I say nothing about them apart from observing that, as at present advised, I am by no means satisfied that the four trimmers at the eastern end of the section were "open joisting" within the meaning of the regulation. I may compare *Montgomery* v. *A. Monk & Co., Ltd.* (6) ([1954] 1 All E.R. 252). It would also be superfluous to express any view on the claim based on negligence at common law. Counsel for the employers criticised the part of the judgment dealing with this aspect of the case on the ground that the learned judge expressed the view (in effect) that liability at common law followed from liability under reg. 5; and counsel cited in this connexion a well-known passage in the

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A speech of LORD TUCKER in *Latimer* v. *A.E.C., Ltd.* (7) ([1953] 2 All E.R. 499 at p. 455). I do not think, however, that the learned judge, in the passage complained of, really meant to say any more than that the standard of care prescribed by reg. 5 approximated to the standard of care set by the common law with respect to the same matter, which, if not absolutely right, is at all events, not very far wrong.

B In the result I hold that this appeal fails and should be dismissed.

PARKER, L.J.: I agree. In my judgment a means of access is not safe within reg. 5 if it is a possible cause of injury to anybody acting in a way that a human being may be reasonably expected to act in circumstances which may reasonably be expected to occur. Further, in applying that test, the person to be C considered is the type of person who will use the means of access. That was the test which I suggested in *Sheppey* v. *Matthew T. Shaw & Co., Ltd.* (2) ([1952] 1 T.L.R. 1272); and, as I understand the position, both counsel in the present case accepted that test as correct. It is true that counsel for the employers sought to base some argument on the word " sufficient " which he read as meaning " sufficiently ", and as qualifying " safe "; but I do not think that D even he sought to depart from the suggested test. For my part, however, I am unable to read " sufficient " in that way. I think that it is merely quantitative, and qualifies " means of access ". Further, both parties accept the judge's finding that the deceased must have slipped while walking on the three-inch flange of a channel at a point where he had no handhold.

In these circumstances, this case, as I see it, turns entirely on the true inference E to be drawn. Counsel for the employers stresses that this man was a highly experienced steel erector; that he was used to doing this type of work at heights; that he must have done this work on this very site many times before; and that so far as these employers were concerned, the evidence was that there had been no previous accident. On the other side counsel for the plaintiff naturally relies on the undoubted fact that human beings, however skilled, are prone to slip, F and that in this operation a slip entails almost certain death or serious injury. For my part I am clear that the only proper inference is that this means of access was not safe within the meaning of reg. 5. Giving all possible weight to the argument of counsel for the employers, it can only mean that steel erectors are at ease at heights, and find no difficulty in walking along a three-inch flange with no handhold. It does not mean that they are immune from the risk of G slipping, however careful they may be.

That, of course, is not the end of the matter because there is no breach of the regulation if it is not " reasonably practicable " to make the means of access " safe " within the meaning of the regulation. Whether or not some precaution is " reasonably practicable " will depend on a number of considerations. Cost is one, and I think that any risk inherent in providing the precaution is another. It is true that in the present case little if any evidence was directed to this issue, H but for my part I can see no difficulty in laying planks on the trimmers. These could be raised and slid into position from a point where the man had a handhold. Alternatively, I can see nothing impracticable in providing a ladder by means of which the deceased could have mounted direct to the end of the channel and the stanchion where he was to work.

Accordingly I would dismiss this appeal, and find it unnecessary to consider I the position under reg. 30 (3) or reg. 97, or at common law.

PEARCE, L.J.: I agree with what my Lords have said.

Appeal dismissed.

Solicitors: *Barlow, Lyde & Gilbert* (for the employers); *W. H. Thompson* (for the widow).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

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Re McNEILL (*deceased*). ROYAL BANK OF SCOTLAND *v.* MACPHERSON.

[Court of Appeal (Lord Evershed, M.R., Romer and Ormerod, L.JJ.), October 3, 4, 7, 29, 1957.]

B

Estate Duty—Incidence—Pecuniary legacies—Duty payable on deaths of successive tenants for life—Deferred legacies payable out of ultimate residue given "free of duty"—Whether deferred legacies should bear rateable proportion of duty—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 8 (4), *s.* 9 (1), *s.* 14 (1).

By his will dated Mar. 23, 1934, a testator who died in 1935 gave his residuary property to his trustee on the usual trusts for sale and conversion, and directed payment of his funeral and testamentary expenses " including all estate duty leviable at my death in respect of my residuary estate " and " debts and the general legacies bequeathed by this my will . . . and all death duties . . . which . . . by virtue of any direction or devise or bequest free of duty contained in this my will . . . are payable out of my general personal estate." By cl. 14 (1) of the testator's will he directed that his trustee should hold one moiety of the residue and the investments representing it on trust to pay the income to A. " during his life free of duty " and after his death to pay the income to E. if she survived A. " during her life free of duty ". Subject to the said life interests, the testator directed (also by cl. 14 (1)) his trustee to pay " free of duty " pecuniary legacies amounting to £53,000 and subject thereto " and to the duty thereon " to divide the said moiety equally between persons named. In 1947 A. died, and in 1956 E. died, and on each death estate duty was payable in respect of the assets then constituting the said moiety. On the question whether the pecuniary legacies which, in the events which happened, became payable on E.'s death should be paid subject to the deduction of a rateable proportion of the estate duty payable on A.'s death and E.'s death,

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Held: (i) on the true construction of the will, the words " free of duty " in cl. 14 (1) related only to legacy duty and did not confer on the pecuniary legatees freedom from liability to bear estate duty.

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Re Turnbull ([1905] 1 Ch. 726) and *Re Snape* ([1915] 2 Ch. 179) considered.

(ii) by virtue of the Finance Act, 1894, s. 8 (4)*, a rateable proportion of the estate duty payable on E.'s death in respect of the said moiety was payable by each of the pecuniary legatees.

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(iii) the pecuniary legatees were not liable to bear any part of the estate duty payable on the death of A. because such liability was not imposed by any statutory provision (and, in particular, was not imposed by the Finance Act, 1894, s. 8 (4), s. 9 (1) or s. 14 (1))*, nor by any expression of testamentary intention, and there was no equitable principle which justified or required that they should be charged with any part of that duty.

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Re Charlesworth's Trusts ([1912] 1 Ch. 319) criticised. *Re Viscount Portman (No. 2)* ([1925] Ch. 294) and *Berry* v. *Gaukroger* ([1903] 2 Ch. 116) considered.

Appeal allowed in part.

[As to the interpretation and effect of " free of duty " provisions, see 16 Halsbury's Laws (3rd Edn.) 384, paras. 750 et seq., particularly note (f) to para. 750; and for cases on the subject, see 21 Digest 35, *219* et seq.

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As to estate duty payable out of property not passing to the executor as such, see 15 Halsbury's Laws (3rd Edn.) 131, para. 269; and for cases on the subject, see 21 Digest 27, 28, 32-34, *155-166*, *198-213*.

For the Finance Act, 1894, s. 8 (4), s. 9 (1) and s. 14 (1), see 9 Halsbury's Statutes (2nd Edn.) 366, 369, 375.]

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* The provisions of s. 8 (4), s. 9 (1) and s.14 (1) are printed at p. 513, letters D to I, post.

Cases referred to:

(1) *Re Turnbull, Skipper* v. *Wade*, [1905] 1 Ch. 726; 74 L.J.Ch. 438; 21 Digest 48, *317*.

(2) *Re Snape, Elam* v. *Phillips*, [1915] 2 Ch. 179; 84 L.J.Ch. 803; 113 L.T. 439; 21 Digest 35, *219*.

(3) *Re Wedgwood, Allen* v. *Public Trustee*, [1921] 1 Ch. 601; 90 L.J.Ch. 322; 125 L.T. 146; 21 Digest 36, *226*.

(4) *Re D'Oyly, Vertue* v. *D'Oyly*, [1917] 1 Ch. 556; 86 L.J.Ch. 373; 116 L.T. 442; 21 Digest 35, *225*.

(5) *Berry* v. *Gaukroger*, [1903] 2 Ch. 116; 72 L.J.Ch. 435; 88 L.T. 521; 21 Digest 27, *155*.

(6) *Re Charlesworth's Trusts, Tew* v. *Briggs*, [1912] 1 Ch. 319; 81 L.J.Ch. 267; 105 L.T. 817; 21 Digest 28, *161*.

(7) *Re Portman* (*Viscount*), *Portman* v. *Portman* (*Viscount*), [1924] 2 Ch. 6; 93 L.J.Ch. 362; 132 L.T. 440; 21 Digest 38, *249*; *subsequent proceedings* sub nom. *Re Portman* (*Viscount*) (*No. 2*), [1925] Ch. 294; 94 L.J.Ch. 329; 133 L.T. 389; Digest Supp.

(8) *Re Hicklin, Public Trustee* v. *Hoare*, [1917] 2 Ch. 278; 86 L.J.Ch. 740; 117 L.T. 403; 21 Digest 28, *157*.

Appeal.

This was an appeal by the first defendant, Anna Elizabeth MacPherson, representing pecuniary legatees under the will of Neil McNeill, deceased, from an order of UPJOHN, J., dated Apr. 5, 1957. The plaintiff, the executor and trustee of the will of the testator, issued an originating summons for the determination of the question (among others) whether the pecuniary legacies payable out of the fund settled by the said will on the testator's brother, Alexander McNeill, for life, and subject thereto on the testator's sister, Eila McNeill, for life, should be paid subject to the deduction of a rateable proportion of the two sets of estate duty which became payable in respect of the said fund on the deaths of the said Alexander McNeill and Eila McNeill. A similar question as to the incidence of estate duty payable in connexion with the death of the said Eila McNeill was raised in relation to pecuniary legacies which then became payable out of the fund, in respect of a fund settled by the said will (in the events which happened) on the said Eila McNeill for life.

UPJOHN, J., held, in answer to the first question mentioned above, that the pecuniary legacies ought to be paid subject to a deduction of a rateable proportion of the estate duty payable on the deaths of both the said Alexander McNeill and Eila McNeill, and, in answer to the second question, held that the pecuniary legacies were similarly liable to bear a rateable proportion of the estate duty.

R. Cozens-Hardy Horne for the first defendant, representing the pecuniary legatees.

J. Bradburn for the remaining defendant, the residuary legatees.

J. A. Wolfe for the plaintiff, the trustee of the will.

Cur. adv. vult.

Oct. 29. **ROMER, L.J.**, read the following judgment of the court. The questions before the court in this appeal emerge from the language of cl. 14 of the will, dated Mar. 23, 1934, of Neil McNeill of London and Gooderstone, Norfolk, who died in 1935. By that clause, the testator made a residuary devise and bequest in favour of his executor and trustee, the Royal Bank of Scotland, on trusts for sale and conversion in the usual form. There followed a direction that his trustee should out of the proceeds of sale pay his funeral and testamentary expenses " including all estate duty leviable at my death in respect of my residuary estate " and " debts and the general legacies bequeathed by this my will . . . and all death duties . . . which . . . by virtue of any direction or devise or bequest free of duty contained in this my will . . . are payable out of my general personal estate ". The testator then directed that his trustee should divide his trust estate into two moieties and (by sub-cl. 1) should hold one moiety on trust to pay the income to his brother (hereafter called Alexander) " during his life free of duty " and after his death to pay the income to his sister (hereafter called Eila) if she survived Alexander (as she did) " during her life free of duty ". Subject to these life interests, that is, in the events which happened, on Eila's death, the testator directed the bank to pay " free of duty " pecuniary legacies amounting in all to £53,000 and subject thereto " and to the duty thereon " to divide the moiety of the trust estate equally between certain named relations. By sub-cl. 2 the testator made provision as regards the other moiety of his trust estate corresponding in all respects to the provision in sub-cl. 1, save that the life interests in favour of Alexander and Eila were reversed in order, and so that the legatees above-mentioned received additional legacies of like amount as those already given. Alexander died in 1947 and Eila in 1956.

The questions which now call for determination concern the incidence of the estate duty which became leviable on the passing of the first moiety of the trust estate on the death of Alexander and of both moieties on the death of Eila. It has been contended on behalf of the residuary legatees and was conceded before Upjohn, J., that unless they were exempted by the direction " free of duty " which we have quoted, the legatees would be bound to pay, or suffer by way of deduction, a part of both sums of estate duty calculated in accordance with the proportion which the legacies bore and bear to the moieties of the trust estate. The extent to which this contention, according to the general law, is well-founded is dealt with later in this judgment. We deal first with the effect of the formula " free of duty " and with the contention of counsel on behalf of the appellant, the defendant Anna Elizabeth MacPherson (who had been appointed by the order of the learned judge to represent all the pecuniary legatees), that such formula on the true construction of this will operates to discharge the legatees from all liability to contribute in any way to those sums of estate duty. It will be appreciated that by virtue of the Finance Act, 1949, legacy duty had ceased to be chargeable in respect of the legacies with which we are concerned before the date when they became payable, namely, on the death of Eila. At that date the only death duty exigible in respect of any part of the testator's estate was the estate duty already mentioned; and the same was true also at the date of the death of Alexander, since the legacies were not then payable.

It was the main premise of the argument of counsel for the pecuniary legatees that the formula " free of duty ", in the absence of some special or limiting context, means " without any deduction (therefrom) by reason or in respect of death duty "; i.e., it imports freedom from all kinds of death duties which might otherwise have the effect of diminishing the gift. This proposition was founded on such cases as *Re Turnbull, Skipper* v. *Wade* (1) ([1905] 1 Ch. 726), before Farwell, J., and *Re Snape, Elam* v. *Phillips* (2) ([1915] 2 Ch. 179), before Eve, J. In the former case the question particularly arose in regard to settlement estate duty which was chargeable in respect of certain legacies in addition to legacy duty. Farwell, J., said ([1905] 1 Ch. at pp. 732, 733):

> " I do not see how I can spell out of that anything other than what it says, namely, that the legacy is to be paid free from duty. The settlement estate duty is charged upon the legacy, no doubt, in a sense, but the executors have to pay it before they pay over the legacy, and they do so as a matter of practice. Not only are they required to retain, but for their own protection they do retain, the duty before they pay over the legacy. I cannot myself see any reason for saying that ' free from duty ' means free from one kind of duty payable by the executors more than from another kind of duty so payable."

The exact scope of formulae of this kind has been considered in relation to particular wills in many cases which have come before the courts, but it appears that the present is the first occasion on which it has been necessary to consider the effect of such exemptions (and also, indeed, strictly, the effect of the general law) in the case of deferred pecuniary legacies.

To the general principle which counsel for the pecuniary legatees invokes from *Re Turnbull* (1) and *Re Snape* (2) two corollaries may here be mentioned. In the first place, it has been decided (see *Re Wedgwood, Allen* v. *Public Trustee* (3), [1921] 1 Ch. 601 at p. 620) that in the case of a legacy given to trustees in trust for persons in succession the exemption conferred by the formula " free of duty " will prima facie be satisfied (and its effect exhausted) by freeing the gift from diminution for death duties when it is first severed from the estate and handed over to the trustees. No question of this kind, however, arises in the present appeal—though the testator did in fact give a settled pecuniary legacy by cl. 9 of his will. The second corollary is to the effect that since the will speaks prima facie from the death the exemption will ordinarily cover new death duties which may be imposed between the dates of the will and of the death; but may, on the other hand, not cover new death duties imposed after the date of the death: see *Re D'Oyly, Vertue* v. *D'Oyly* (4) ([1917] 1 Ch. 556). This principle again is not directly relevant in the present case. On the other hand, as already observed, legacy duty which was operative in respect of the legacies given by the testator and payable on his death had ceased to be operative at the time when Eila died. It seems to us, as a matter of principle, plain enough that if on the true construction of this will the exempting formula " free of duty " was apt and intended only to relieve the legatees from liability in respect of legacy duty (which was an existing tax at the date of the testator's will and death) then it would be wrong, simply because legacy duty had been abolished, to give to the formula an extended meaning in order that it might have some practical effect in favour of pecuniary legatees when their legacies became payable on Eila's death.

We are prepared to accept, at least for the purposes of this judgment, the correctness of the general proposition of counsel for the pecuniary legatees founded on *Re Turnbull* (1) and *Re Snape* (2). But it is trite law that in any given instrument the meaning of any form of words used therein must depend on the context of that instrument and the guidance to interpretation which the instrument itself provides. It becomes necessary, therefore, to look somewhat closely at the testator's will as a whole. It will be observed at once from its form and language that the will was the product of a skilled professional draftsman. We think, therefore, that the interpretation of the phrase " free of duty " where used in the will must be judged against that background: and against the background of knowledge, which we think must be attributed to the draftsman, that at its date legacy duty and succession duty were operative as well as estate duty, and further that, by the general law, estate duty, though a charge on real estate, is payable as regards personalty by the executors as part of their administration expenses.

By the first clause of the will the testator appointed the Royal Bank of Scotland his general executor and trustee and declared that the bank should be entitled to remuneration " free of duties " (plural) out of his estate in accordance with its relevant scale. Clause 2 contained an appointment of executors for the testator's East Indian property with a bequest to them of the proceeds of sale of that property " free of all duties (including estate duty) leviable in England by reason of my death ", which duties he directed to be paid as testamentary expenses. By cl. 3 the testator devised his Norfolk freehold property, with an exception in favour of his game-keeper, to his brother in fee simple, and he directed the bank to pay as testamentary expenses " all the duties (including estate duty) " leviable at his death in regard to his Norfolk property and in exoneration thereof. The clause also contained a devise to the game-keeper of the excepted cottage, expressed to be " free of all duties (including estate duty) ", which were to be paid as part of his testamentary expenses. There followed in cl. 4, cl. 5 and cl. 6 a bequest of leasehold property to his sister and specific legacies to his sister and brother, all expressed to be "free of duty". Clause 7 contained a forgiveness of all debts due to the testator with a direction to the bank to pay as part of his testamentary expenses "all duties (including estate duty)" leviable at his death in respect of any such indebtedness. Clauses 8 to 12 inclusive comprised pecuniary legacies, charitable and otherwise, one settled pecuniary legacy, and certain annuities. In each case the bequest was expressed, simply, to be "free of duty". Clause 13 contained a declaration to the effect that if he had made any gift during his life in respect of which estate duty should be payable at his death, such duty was to be paid out of his personal estate as a testamentary expense. There followed then the residuary gift of cl. 14 which we have already sufficiently cited. A B

The direction in cl. 1 that the bank's remuneration should be "free of duties" may not perhaps for present purposes be of significance one way or the other—it may have been taken from some form provided by the bank. We are not presently concerned with the scope of the exemption intended, but observe none the less that the plural "duties" is used. Of much greater significance, in our judgment, is the language of cl. 2 and cl. 3. Not only is the plural used in both cases—free of all "duties"—but express reference is made to the inclusion of estate duty. The same observation is applicable in regard to cl. 7, even though, as pointed out in argument, the precise effect intended may be more doubtful. It will be noted also that by cl. 13 express reference is made to estate duty in circumstances in which provision for such duty was plain and desirable. Finally, in the first paragraph of cl. 14 there is again found the use of the plural "all death duties" in a context containing express reference to estate duty. In contrast to these provisions, the simple formula and the use of the singular "free of duty" is used in every case in regard to bequests (cl. 4, cl. 5, cl. 6, cl. 8, cl. 9, cl. 10, cl. 11, cl. 12, and the sub-clauses of cl. 14). C D E

Where in a will of this elaborate character, to be judged against the background already mentioned, two distinct formulae are found, it seems to us that prima facie distinct meanings should be attributed to each: and where one formula, namely, the singular "free of duty", is on the face of it less comprehensive than the other, it would seem to follow that by the formula a more limited exemption was intended. It is true that in the first paragraph of cl. 14 the reference to all death duties (in the plural) is followed by the language: F

> "and other moneys which under . . . any direction or devise or bequest free of duty contained in this my will . . . are payable out of my general personal estate." G

We are not satisfied, however, that the use of the phrase "free of duty" in that passage can have the effect of equating in significance the two formulae. The words "free of duty" in the passage just cited are part of a reference to a direction, to be found in several places in the will, for payment of the duty out of the general personal estate—a direction not, however, in fact found in any of the cases in which bequests are given free of duty. In addition, it is important to observe, as did the learned judge, that the only duty to which any sensible reference could have been intended or made in any one of the cases of gifts "free of duty" before cl. 14 must have been legacy duty: and in cl. 14 itself the same is beyond doubt true of the two gifts of life interests to Alexander and Eila respectively. If the phrase "free of duty" in reference to the pecuniary legatees in this clause has the wider intention for which counsel for the pecuniary legatees argues, then it would appear to be used in this one instance in a different sense from that in which it is used elsewhere throughout the will, including cl. 14 itself. H I

Finally, we draw attention, as also did the learned judge, to the words in sub-cl. 1 (b) of cl. 14: "subject to the said legacies . . . *and the duty thereon*". Though it would be sensible and correct to speak of legacy duty being leviable *on* legacies, the same would not really be true or sensible of the estate duty which it is contended the legatees would have to bear in the absence of exemption: for that estate duty is not a duty *on* the legacies. It is a duty leviable on or in respect of the whole estate, and the obligation of the legatees to suffer some part of the levy arises not by reason of any separate charge on the legacies as such, but because the legatees (like those entitled to the residue) are entitled to receive their benefits out of a trust estate which itself must be diminished by the charge for estate duty.

In the context, therefore, of this will, and having regard to its elaborate form and the selection of two distinct formulae, one wider in scope on the face of it than the other, we agreed with the learned judge in thinking that the phrase "free of duty" in cl. 14 (1) and (2) was intended to apply only to exemption from legacy duty and is not apt to exempt the legatees from liability to bear such proportion of the estate duty charges as the general law will otherwise impose on them.

On that view of the matter, the question next to be considered is as to the liability of the legatees in respect of the estate duty which became leviable on the death of Alexander in 1947 and the further estate duty which fell to be paid on Eila's death in 1956. The provisions of the Finance Act, 1894, which are relevant to the determination of this question are s. 8 (4), s. 9 (1), and s. 14 (1). Section 8 (4) provides:

> "Where property passes on the death of the deceased, and his executor is not accountable for the estate duty in respect of such property, every person to whom any property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title shall be accountable for the estate duty on the property, and shall, within the time required by this Act or such later time as the commissioners allow, deliver to the commissioners and verify an account, to the best of his knowledge and belief, of the property: Provided that nothing in this section contained shall render a person accountable for duty who acts merely as agent or bailiff for another person in the management of property."

Section 9 (1) provides:

> "A rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable; provided that the property shall not be so chargeable as against a bona fide purchaser thereof for valuable consideration without notice . . ."

Section 14 (1) provides:

> "In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person, who being authorised or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property (whether as capital or as an annuity or otherwise,) under a disposition not containing any express provision to the contrary."

Inasmuch as Eila's legal personal representatives were not accountable for the estate duty which became payable on her death (for she only had a life interest in her own and in her brother's fund) it is clear that, by virtue of s. 8 (4) of the Act, each legatee is accountable for a rateable part of that duty, ascertainable by reference to the value of his or her legacy, as being a person to whom property passed for a beneficial interest in possession; nor, indeed, was the contrary contended either before the learned judge or before this court. It was, however, assumed in the court below that unless the legatees were exempted from liability to estate duty by reason of their legacies having been given " free of duty ", they should be charged not only with a rateable part of the duty which became payable on Eila's death, but with a similar part of the duty which had become exigible, and had been paid, on the brother's fund, on the death of Alexander. Accordingly, and in default of argument on the point, the learned judge declared

> " that the pecuniary legacies payable out of the brother's fund ought to be paid subject to deduction of a rateable portion of the two sets of estate duty which became payable in respect of the said brother's fund on the deaths of Alexander McNeill (the brother of the testator) and of the said Eila McNeill."

The appellant, representing the pecuniary legatees, did not in her original notice of appeal raise the point that if the learned judge were right in the limited effect which he had attributed to the words " free of duty ", the legatees were at all events not liable for any part of the estate duty which had become payable on the death of Alexander (hereinafter referred to as " the relevant duty "). During the discussion before us it was, however, suggested that an argument to that effect might well be advanced on behalf of the legatees, as alternative to their main contention. We accordingly gave leave to counsel for the pecuniary legatees to amend his notice of appeal in order to raise the point, and this he did by introducing as an additional ground of appeal

> " that the learned judge was wrong in law in holding that any duty payable in respect of the said brother's fund on the death of the said Alexander McNeill was chargeable against the pecuniary legacies payable thereout on the death of the said Eila McNeill."

This point was accordingly argued before us and it is, in our opinion, one of some little difficulty. It is, we think, clear that if the pecuniary legatees are liable to be charged with any part of the relevant duty, it can only be (i) because there is some statutory provision to that effect or (ii) because the testator expressed an intention by his will that the legatees should be so charged or (iii) because of some principle of equity which imposes the liability.

As to the first of these grounds, it was not suggested that any statutory provision is relevant to the matter other than the sections of the Finance Act, 1894, to which we have already referred, viz., s. 8 (4), s. 9 (1) and s. 14 (1). By reason of s. 9 (1), the brother's fund clearly became charged on his death with the estate duty which became payable in respect thereof, as being property which did not pass to Alexander's executor as such. That sub-section, however, does no more than impose the charge; it does not indicate how the charge is to be borne as between the persons who are beneficially interested. Section 8 (4) of the Act specifies the persons who shall be accountable for the estate duty on property which passes on the death of a deceased person whose executor is not accountable for the duty, and there is included in the category " every person to whom any property so passes for any beneficial interest in possession ". It is, we think, clear that the pecuniary legatees did not become accountable on Alexander's death under this sub-section, for, in view of Eila's prior life interest in the brother's fund, it cannot be said that their legacies passed to them for a beneficial interest " in possession ". It is true that on Alexander's death without issue the legacies became indefeasible, whereas they had previously been contingent, but a vested legacy payable in future is not a beneficial interest in possession. Nor, in our judgment, did the legatees become chargeable in respect of estate duty on Alexander's death by virtue of s. 14 (1) of the Act. That subsection only applies where a person is entitled to any sum " charged on " property which does not pass to the executor as such. In our opinion, the legacies given to the appellant and her fellow legatees were not charged on the brother's fund for the purposes of s. 14 (1) of the Act or at all. The legacies were ordinary pecuniary legacies and would become payable in a due course of administration, but the legatees had no rights comparable, for example, to those attaching to a rentcharge.

It accordingly cannot be said, in our judgment, that if the legatees are liable at all to be charged with a rateable part of the relevant duty, they are so liable because of any of the provisions of the Finance Act, 1894. Is there, then, any indication of intention to be found in the testator's will that he intended them to be subject to this liability? Inasmuch as we have expressed the view that the words " free of duty " in the will were confined in their operation to freedom from legacy duty, it may be said that the testator impliedly evinced an intention that the legatees should not also enjoy exemption from any statutory or other liability to estate duty; and that he accordingly intended that they should bear a rateable proportion of the estate duty payable in respect of both funds on Eila's death in accordance with s. 8 (4) of the Act of 1894. Subject, however, to that implication of intention, no guidance appears from the testator's will either one way or the other on the question which we are now considering; and certainly there is no indication that the testator intended to impose any duty on the legatees other than such as might be imposed by law.

It was contended before us, however, that even though no liability to contribute to the relevant duty is imposed either by statute or by virtue of any intention, express or implied, in the will, it should nevertheless be imposed on equitable grounds. Apart from authority, it is difficult to see why the legatees should be subjected to a rateable proportion of estate duty which became payable on a death which brought them no beneficial interest in possession. It was suggested, however, on behalf of the residuary legatees that every time a charge for duty arises on the cesser of a limited interest in a fund, that charge must be rateably borne, according to their respective beneficial interests, by all those amongst whom the fund ultimately falls to be distributed. Accordingly, so it is contended, if legacies are payable out of a fund on the falling in of the last of several successive life interests in the fund the legatees, when finally paid, must suffer a cumulative deduction in respect of the estate duty levied on the death of each life tenant. If this view of the matter be right, it would lead to curious results. In the first place, the argument involves a pecuniary legacy being relegated in those circumstances to the status of an aliquot fraction of the whole estate, which it is not. It is of the essence of a pecuniary legacy that it is paid first, and the residue consists of what is left after the stated legacies have been paid; so here the testator directed that legacies of stated amounts should be paid out of the trust fund as it stood when Eila died, which is quite a different thing to bequeathing an aliquot part of that fund to each legatee on Eila's death. Again, it is difficult to understand why the suggested equity should be applied in the present case for the advantage only of the residuary legatees. During the period of Eila's survivorship of her brother she suffered a diminution of income by reason of the duty which the trustees paid out of the brother's fund on Alexander's death. If the alleged equity exists at all, it would surely have been fair to have applied it in such a way as to have benefited Eila as well as the residuary legatees; this could have been done by valuing the legacies as at Alexander's death and charging the legatees with an appropriate rate of interest on the amounts so ascertained as part compensation to Eila or her estate. Such a course would, however, involve considerable difficulties—which would, of course, have been enhanced had the legacies continued to be contingent after Alexander's death. Another curious position would have arisen, on the argument of the residuary legatees, if the testator had directed the trustees to raise and pay, during Eila's lifetime, the sum of £x for some specific purpose and had charged the sum on the funds; it would surely not be right to subject the legacies to a deduction in respect of this charge when they became payable on Eila's death.

Such considerations as we have mentioned suffice to show the difficulties— A
and indeed hardships—to which the suggested equity would give rise. Nor is it easy to define the equity, if it in truth exists. It is perfectly true that, generally speaking, if a fund is subject to a charge, the burden of that charge must be borne rateably by the persons among whom the fund is divisible in proportion to their respective beneficial interests: and, as was pointed out by COZENS-HARDY, L.J., in *Berry* v. *Gaukroger* (5) ([1903] 2 Ch. 116 at p. 134): B

> "It is an old and well-established principle of equity that, when several persons are liable in respect of one and the same obligation, the rights of the parties inter se are not affected by the circumstance that one of those persons has been called upon to discharge and has discharged the obligation."

But at the time when the legacies in the present case became payable there was C
no charge on the brother's fund at all in respect of the relevant duty; that duty had long since been paid and the charge which had been imposed by s. 9 (1) of the Finance Act, 1894, in respect of it had ceased to exist. Accordingly, the general principle to which we have referred has no application to the present question. No other principle was invoked to support the contention of the residuary legatees and, were the matter free of authority, we should have little D
hesitation in rejecting it; for it does not appear to be founded in reason, would occasion complication in the administration of trusts and would, in some cases at least, produce unfair results.

Counsel for the residuary legatees, however, placed considerable reliance on a decision of JOYCE, J., in *Re Charlesworth's Trusts, Tew* v. *Briggs* (6) ([1912] 1 Ch. 319). In that case a trust fund was settled on trust to pay the income thereof to E
the settlor for his life with remainder to his widow for her life and on the death of the survivor then as to £10,000 as the wife should by will appoint and the remainder of the fund was to fall into the testator's residuary estate disposed of by his will. Estate duty was paid on the fund on the death of the settlor in 1908. The widow survived him and died in 1911, having appointed the £10,000 by her will. JOYCE, J., held that the estate duty which had been paid in 1908 F
should be borne rateably by the appointees and by the settlor's residuary legatees. It is by no means easy to discover from the short judgment which he delivered what was the true ground of his decision. He stated that the decision of this court in *Berry* v. *Gaukroger* (5) applied and that there was indeed no difference between that case and the case before him; but further he seems to have applied the principle of the Finance Act, 1894, s. 14 (1), notwithstanding G
that he was unable to hold that the £10,000 was a charge on the trust fund. In so far as we apprehend the reasons for the decision (and they were carefully considered by ROMER, J., in *Re Viscount Portman* (*No. 2*) (7) ([1925] Ch. 294), to which we refer hereafter), we think that it is true to say that if those reasons were adopted and applied to the present case, the pecuniary legatees would fail; for the learned judge seems to have treated the £10,000 as though it had H
been an ordinary pecuniary legacy payable at a future time, viz., on the widow's death. In truth, however, the judge was in error in thinking that the decision in *Berry* v. *Gaukroger* (5) was conclusive of the case; for it had little, if any, bearing on the question which was before him. In *Berry* v. *Gaukroger* (5), a testator, who died in 1869, gave his residuary realty and personalty to trustees on trust to pay his funeral and testamentary expenses and debts and to invest I
the residue and out of the income to pay his widow an annuity of £500; and he directed that after her death the trust funds should be held on trust to pay thereout certain legacies amounting to £9,000 and to divide the residue among certain persons named in the will. The widow died in 1900, that is to say, after the Finance Act, 1894, came into operation. Under s. 1 of that Act, estate duty was payable on the widow's death on so much of a fund which had been set aside to answer her annuity as represented real estate; but under s. 21 (1) the duty was not payable on the portion representing personal estate. The

proportion representing real estate was taken at 12/17ths of the whole fund and the estate duty on 12/17ths of the £9,000 legacies was £223. The question before the court was whether the pecuniary legatees ought to bear that sum by deduction from their legacies or whether it should be borne by residue. BUCKLEY, J., exonerated the legatees from this burden, but the Court of Appeal held that the £223 ought to be borne by them. This summary of the facts demonstrates the essential difference between that case and *Re Charlesworth* (6); for in the latter case the legacies were not payable on the death on which the liability to estate duty arose, whereas in *Berry* v. *Gaukroger* (5) they were. This distinction was emphasised by ROMER, J., in *Re Viscount Portman* (*No. 2*) (7) ([1925] Ch. at p. 309). The facts of that case were that on the death of the second Viscount Portman in 1919 certain estates in London forming part of the Portman settled estates stood limited to the use of the third Viscount for life with remainders (which subsequently failed) to his first and other sons successively in tail male with remainder, if the defendant, the fourth Viscount, should (as happened) succeed to the title, to the use (so far as material) that the fourth Viscount and his assigns during his life should receive a yearly rentcharge of £50,000 to commence from his succession to the title and to be paid without any deduction except for death duties by equal quarterly payments. Subject as aforesaid, and as to the estates charged with the £50,000 rentcharge, subject thereto, all the Portman settled estates were limited to the use of the plaintiff for life with remainders over. On the death of the second Viscount, estate duty became payable in respect of the London estates by sixteen half-yearly instalments, only seven of which had been paid before the death of the third Viscount, who died in 1923 without ever having had male issue and was thereupon succeeded by his brother, the fourth Viscount. The balance under the nine instalments then due amounted to about £1,300,000. Further estate duty became payable on the death of the third Viscount. The question before the court was what proportion of the aforesaid nine instalments and of the estate duty which became assessable on the death of the third Viscount in respect of the London estates should be borne by the yearly rentcharge of £50,000. At the original hearing of the originating summons (*Re Viscount Portman, Portman* v. *Viscount Portman* (7), [1924] 2 Ch. 6) it was admitted that there was no difference in principle in respect of the nine instalments which remained unpaid at the death of the third Viscount and the estate duty which was assessable on the third Viscount's death; and an order was made on the footing of the liability of the fourth Viscount, in respect of his rentcharge, to contribute, in the manner therein mentioned, to both sets of estate duty. Before the order was drawn up, however, leave was given to withdraw the admission made at the hearing, and it was directed that the question with regard to the liability of the rentcharge in respect of the unpaid instalments should be argued. Inasmuch as (i) the rentcharge was plainly a charge on the London estates which passed on the death of the second Viscount and (ii) the estates did not pass to the second Viscount's executor as such, the argument for the plaintiff was mainly founded on the Finance Act, 1894, s. 14 (1), though reliance was also placed on s. 8 (4). It was argued, however, on behalf of the fourth Viscount that s. 14 (1) is really a procedure section, dealing with the recovery rather than with the incidence of estate duty; and that it is merely complementary to s. 8 (4). ROMER, J., rejected this latter argument and held that s. 14 (1) is not mere machinery but imposes liability under its own provisions*. He then proceeded to inquire whether there was anything in *Berry* v. *Gaukroger* (5) which was inconsistent with that view and came to the conclusion that there was not. He summarised the judgments which were delivered in this court and said that that of VAUGHAN WILLIAMS, L.J., was founded on s. 8 (4) of the Act; that ROMER, L.J., held that the legacies there in question were property which passed on the death of the annuitant for a beneficial interest in possession and that, as under s. 9 (1) the duty assessable as against the legatees became a first charge on the legacies as against the legatees, there was nothing to justify the court in holding that as between the residue and the pecuniary legatees the former ought to indemnify the latter against such duties; and that Cozens-Hardy, L.J., based his judgment on s. 8 (4) and thought that the legacies must be regarded as property which passed to the legatees for a beneficial interest in possession on the death of the annuitant and that the legatees were accountable to the Crown accordingly. The learned judge added that Romer, L.J., had said that it was unnecessary for him to consider the effect of s. 14 (1) and that Cozens-Hardy, L.J., had doubted whether the contention based on that sub-section to the effect that the legacies were charged on the fund belonging to the residuary legatees was well founded, but had found it unnecessary to decide the point. Romer, J., then considered the meaning to be attributed to the word "entitled" in s. 14 (1) and, after indicating five possible meanings, which he specified, he said that the only authority bearing on this question seemed to be *Re Charlesworth* (6). The learned judge recited the facts of that case and said that the question to be decided was whether the £10,000 which the widow had appointed ought to bear any part of the estate duty in question. He then proceeded as follows ([1925] Ch. at p. 309):

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* See *Re Viscount Portman* (*No. 2*) (7) ([1925] Ch. at p. 305).

> "Joyce, J., held that the duty must be borne rateably by the wife's appointees, and the settlor's residuary legatees. In the course of his judgment he expressed himself as follows: 'Why this duty should be borne by one part of the fund and not by the other part, I cannot see. In my opinion *Berry* v. *Gaukroger* (5) applies to this case. When the two cases are compared there is no substantial difference between them. I think that the judgment of Cozens-Hardy, L.J., is conclusive'."

Then Romer, J., after making that citation, proceeded (ibid.):

> "But the judgment of Cozens-Hardy, L.J., in *Berry* v. *Gaukroger* (5) was based upon the fact that the pecuniary legatees in that case became entitled to a beneficial interest in possession immediately upon the death of the person on whose death the estate duty became leviable, and so became personally liable to a proportionate part of the duty under s. 8 (4). In the case before Joyce, J., the £10,000 did not become an interest in possession, or at all, until the death of the wife. With all deference, therefore, to the learned judge, I am unable to see how the judgment of Cozens-Hardy, L.J., was conclusive upon the point. For there was nothing in the sections of the Act preceding s. 14 to impose any liability to the duty upon the persons who ultimately became entitled to the £10,000. Joyce, J., however, continued as follows: 'If it is said that there is a charge and that the £10,000 is to be paid first, then s. 14 (1) is an answer to that. If Mrs. Charlesworth had died before her husband and there had been no intervening life estate, I do not see how the duty could have failed to have been apportioned between the two parts of the fund. In my opinion Mrs. Charlesworth's intervening life estate makes no difference, and I hold that the duty must be borne rateably by those who take the £10,000, and those who take the remainder of the settled fund'. It will be observed that the learned judge did not say that the £10,000 was a charge upon the fund. To have done so would have been to disregard the doubts expressed both by Vaughan Williams, L.J., and Cozens-Hardy, L.J., in *Berry* v. *Gaukroger* (5). But he must undoubtedly have been of the opinion that if the £10,000 did constitute a charge upon the fund it ought to bear a rateable part of the estate duty, although it did not become a charge until after the duty had been paid. He therefore treated the word 'entitled' in s. 14 (1) as meaning entitled at any time."

In the result, Romer, J. held that the fourth Viscount was liable by virtue of s. 14 (1) to contribute towards payment of the outstanding instalments of estate duty which were in question. His actual decision is not, of course, material to the present appeal because the legacies now in question were not charged on the residuary estate and s. 14 (1) therefore has no application. The decision has, however, an important relevance to the present case. The learned judge made it plain that in so far as Joyce, J., founded himself in *Re Charlesworth* (6) on either the decision or the judgments in *Berry* v. *Gaukroger* (5) he was mistaken. We agree with Romer, J.'s criticism of *Re Charlesworth* (6). True it is that Romer, J., said that he thought he ought to follow the decision as it had been given over thirteen years previously and, for aught he knew to the contrary, had been acted on in practice ever since. It is clear, however, that he only followed it in adopting the view which Joyce, J., had apparently expressed as to the meaning of the word "entitled" in s. 14 (1), viz., that it meant (or included) entitled at some future time to any sum charged on settled property. This sufficiently appears from what Romer, J., said in favour of that view. He said ([1925] Ch. at p. 310):

> "Directly you find that a person is entitled to a charge upon property in respect of which estate duty has been paid, the charge being created by a disposition not containing any express provision to the contrary, that person is liable to pay a proper rateable part of the duty";

and he said that that view gave effect to the prima facie meaning of the words in the sub-section. Romer, J., in no way indicated his approval of the apparent application by Joyce, J., of s. 14 (1), by way of analogy, to a case where a legatee is entitled at a future time to payment of a sum which is not charged on a settled fund; and to the extent that Joyce, J.'s decision imposed liability on such a legatee it cannot, in our judgment, be supported. No text-book, so far as we are aware, has treated *Re Charlesworth* (6) as a decision covering such a case as the present. In our judgment, Joyce, J.'s judgment could only be supported (if at all) on the ground that the intention of the settlor in that case was that the £10,000 over which his widow was given a power of appointment was to constitute a fractional part of the entire settled fund so that the recipients of that part should stand in all respects on the same footing as those to whom the rest of the fund was given. Such an approach could not, however, be sustained, in our judgment, in a case, such as the present, where ordinary pecuniary legatees are concerned; for, as we have previously stated, a pecuniary legacy takes precedence over residue, and residue can only be ascertained after the legacies have been paid. Apart from *Re Charlesworth* (6), no case was brought to our attention which affords much assistance in the solution of the present problem. Reference was made to the decision of Astbury, J., in *Re Hicklin, Public Trustee* v. *Hoare* (8) ([1917] 2 Ch. 278). That decision, however, went no further than to apply the general principle (which the learned judge thought, and perhaps rightly, was supported by the judgments of Romer, L.J., and Cozens-Hardy, L.J., in *Berry* v. *Gaukroger* (5)) that where a fund is, at the time of distribution, subject to a charge for estate duty under s. 9 (1) of the Act of 1894, that charge must be borne rateably by the several beneficial interests in the fund. The decision has no application to the present case, for the charge which arose on Alexander's death had ceased to exist before the time for payment of the legacies had arrived.

In our judgment, there is no equitable principle which justifies or requires that the pecuniary legatees under cl. 14 (1) of the testator's will should be charged with any proportion of the relevant duty; and as there is, in our opinion, no statutory provision and no expression of testamentary intention which imposes the liability on the legatees, they are, in our judgment, immune from it. On this point, accordingly, we allow the appeal. A

Appeal allowed in part. Leave to appeal to the House of Lords granted.

Solicitors: *Rider, Heaton, Meredith & Mills* (for all the defendants); *Simon, Haynes, Barlas & Cassels* (for the plaintiff).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*] B

Re LOCKWOOD (*deceased*). C
ATHERTON AND ANOTHER *v.* BROOKE AND ANOTHER.

[CHANCERY DIVISION (Harman, J.), October 16, 17, November 6, 1957.]

Intestacy—Succession—Death after 1952—*Nearest surviving relatives being issue of uncles and aunts of the whole blood who had predeceased intestate—Whether entitled to take—Administration of Estates Act,* 1925 (15 *Geo.* 5 *c.* 23), *s.* 46 (1) (v), *s.* 47 (1) (i), *s.* 47 (3), *and s.* 47 (5) *as added by the Intestates' Estates Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 64), *s.* 1, *s.* 4, *and Sch.* 1. D

Statutes—Construction—Construction to avoid absurdity—Administration of Estates Act, 1925 (15 *Geo.* 5 *c.* 23), *s.* 47 (5), *added by the Intestates' Estates Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 64), *s.* 1, *s.* 4, *and Sch.* 1. E

Though s. 47 (5)* of the Administration of Estates Act, 1925 (which was added by s. 1 (3) (c) of the Intestates' Estates Act, 1952) provides that "where the trusts in favour of any class of relatives of the intestate . . . fail by reason of no member of that class attaining an absolutely vested interest" the residuary estate of the intestate is to devolve "as if the intestate had died without leaving any member of that class, or issue of any member of that class, living at the death of the intestate", nevertheless issue of such relatives (viz., relatives who do not themselves attain a vested interest) are not thereby excluded from beneficial participation in the residuary estate either in favour of more remote relatives or their issue, or in favour of the Crown's right to bona vacantia. F

The nearest surviving relatives of an intestate, who died in 1954 without having married, were grandchildren of her uncles and aunts of the whole blood. The uncles and aunts had predeceased the intestate. The question arose whether their grandchildren were entitled to the residuary estate of the intestate or whether s. 47 (5) of the Act of 1925, as amended, excluded issue of the uncles and aunts, with the consequence that the Crown, in default of uncles or aunts of the half blood or their issue, would ultimately be entitled to the residuary estate as bona vacantia. G H

Held: the residuary estate of the intestate was held on the statutory trust for the issue of her uncles and aunts of the whole blood in accordance with s. 46 (1) (v) and s. 47 (1) (i) and s. 47 (3) of the Act of 1925 as amended by the Act of 1952, the court being entitled to ignore the strict sense of words of s. 47 (5) so as to avoid the absurdity and inconsistency of preferring the right of the Crown to bona vacantia, or of uncles and aunts of the half blood or their issue, to those of issue of uncles and aunts of the whole blood. I

[For the Administration of Estates Act, 1925, s. 46, s. 47, as originally enacted, see 9 HALSBURY'S STATUTES (2nd Edn.) 751, 754, and for the sections as substituted by the Intestates' Estates Act, 1952, see 32 HALSBURY'S STATUTES (2nd Edn.) 123-127.]

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* The terms of s. 47 (5) are printed at p. 522, letter F, post.

A Cases referred to:

(1) *Rowlls* v. *Bebb, Re Rowlls, Walters* v. *Treasury Solicitor*, [1900] 2 Ch. 107; 69 L.J.Ch. 562; 82 L.T. 633; 43 Digest 618, *589*.

(2) *Grey* v. *Pearson*, (1857), 6 H.L. Cas. 61; 26 L.J.Ch. 473; 29 L.T.O.S. 67; 10 E.R. 1216; 42 Digest 626, *277*.

B **Originating Summons.**

By their originating summons dated June 3, 1957, the plaintiffs, as the administratrices of the estate of Maud Emily Lockwood, deceased, asked (i) for the determination of the question (referred to as question 1) whether, in the events which had happened, the residuary estate of the intestate was held by the administratrices (a) on the statutory trusts for the issue of the uncles and aunts C of the intestate (being issue of brothers or sisters of the whole blood of a parent of the intestate); or (b) on trust for the Crown as bona vacantia; or (c) on some other and what trusts; and (ii) if question 1 was answered in the sense of para. (a) thereof, that an inquiry be directed as to who on the death of the intestate on Jan. 2, 1954, became beneficially entitled to any property of hers as to which she died intestate.

D *Oliver Lodge* for the plaintiffs, the administratrices (two grand-daughters of a paternal uncle of the intestate).

Nigel Warren for the first defendant, the grandson of a paternal aunt of the intestate.

Denys B. Buckley for the Crown.

Cur. adv. vult.

E Nov. 6. **HARMAN, J.**, read the following judgment: Maud Emily Lockwood, with whose estate this application is concerned, died a spinster and intestate in the year 1954 at the age of seventy-six. The plaintiffs, to whom letters of administration have issued, are grandchildren of one of her uncles on the paternal side. The first defendant is a grandchild of an aunt on the same side. The estate in the plaintiffs' hands is of a value of some £6,000. The F evidence as to pedigree is by no means complete, but, so far as it has gone, it appears to show that the deceased, a spinster, left no parent, no brothers or sisters and no grandparents, and that her nearest of kin would be the class of persons claiming under her uncles and aunts of the whole blood. It further appears that no uncle or aunt of the whole blood survived her, and the present summons raises the question whether in that event, having regard to an amend-G ment of the Administration of Estates Act, 1925, by the Intestates' Estates Act, 1952, descendants of uncles and aunts are cut out in favour of the Crown, represented here by the second defendant, the Treasury Solicitor. This, if it be right, would be surprising enough, but, when it is realised that a further result of this construction of the amending statute is that, if there were a surviving uncle or aunt of the half blood (as possibly there may be), descendants of uncles and aunts H of the half blood would take in preference to similar relations of the whole blood, it is clear that so anomalous a result cannot have been intended by the legislature. The object of the two statutes was to distribute the estate of the intestate among her next of kin, and not to prefer the more to the less remote. Even more striking is the fact that a like result would ensue where the primary class is brothers and sisters, so that cousins would be preferred to nephews and nieces.

I If the intestate had died in any of the years between 1926 and 1952, the position would have been clear enough. Under s. 46 (1) (v) of the Administration of Estates Act, 1925, there being no issue or parent, no brother or sister or descendants of theirs, uncles and aunts of the whole blood would come next, and the estate, being held on the statutory trusts for them, would, under s. 47 (1) (i) and (3), be held in trust for the living issue of uncles and aunts attaining twenty-one or marrying, and taking per stirpes. Thus, the plaintiffs and the defendant would be members of the class to take, to the exclusion of uncles and aunts of the half blood and their issue.

The Act of 1952* amended s. 46 and s. 47 of the Act of 1925, and these sections A as amended are set out in Sch. 1 to the Act of 1952. The main change is designed to improve the position of a surviving spouse, and s. 46 (1) (i), as amended, has attached to it a table providing for the event of a husband or wife surviving. The statutory trusts are mentioned in this table. Paragraphs (ii), (iii), (iv) and (v) of s. 46 (1), as amended, apply in the event of no spouse surviving. These paragraphs repeat paragraphs bearing the same numbers in the original s. 46 (1), B omitting any references in the original paragraphs to a surviving spouse, the reason for this, of course, being that the position of the spouse has already been dealt with in the new s. 46 (1) (i), as substituted by the Act of 1952. So far, then, the only alteration lies in the promotion of the surviving spouse. The new s. 47, as substituted by the Act of 1952, repeats the original s. 47, as enacted by the Act of 1925, but contains two further sub-sections, (4) and (5). It C is to be observed that under both the old and the new sub-s. (3) the statutory trusts are made applicable to any class of relatives of the intestate other than issue, so that, if sub-s. (5) were omitted, the position under both statutes would be that descendants of uncles and aunts would take, whether or no an uncle or aunt survived the intestate. The new sub-s. (4) of s. 47 that was added by the Act of 1952 was made necesssary by the altered form of s. 46 (1), and is D designed to fill a gap in cases where an intestate leaves, or does not leave, a member of

> " the class consisting of brothers or sisters of the whole blood of the intestate and issue of brothers or sisters of the whole blood of the intestate . . ."

E

in cases where no member of that class attains an absolutely vested interest, that is to say, attains the age of twenty-one or marries under that age. It is to be noticed that here brothers and sisters and their issue are treated as one class. So far, no alteration in the law is made except as above referred to in the case of a surviving spouse.

The difficulty is caused by s. 47 (5), which is in these terms: F

> "It is hereby declared that, where the trusts in favour of any class of relatives of the intestate, other than issue of the intestate, fail by reason of no member of that class attaining an absolutely vested interest, the residuary estate of the intestate and the income thereof and all statutory accumulations, if any, of the income thereof, or so much thereof as may not have been paid or applied under any power affecting the same, shall, by virtue of sub-s. (2) G and sub-s. (3) of this section, go, devolve and be held under the provisions of this Part of this Act as if the intestate had died without leaving any member of that class, or issue of any member of that class, living at the death of the intestate."

It is suggested that, by reason of the words " any member of that class, or issue of any member of that class ", it is impossible in this sub-section to treat relatives H and their issue as a composite class, as is done in s. 47 (4), and that the effect of s. 47 (5) is that, if no member of the primary class—that is to say, in this case, uncles and aunts—survive, the intestate is to be treated as having died without leaving any of the composite class surviving. The result would be that, if any uncle or aunt survive, then uncles and aunts and issue of uncles and aunts would take per stirpes as before, but, if no uncle or aunt survive (as seems likely here), I then their issue are all cut out. This is a result so capricious and absurd and, moreover, so contradictory of s. 47 (3), that the court is entitled to strain every nerve to avoid it.

It is to be observed first that s. 47 (5) apparently sets out to be declaratory of the law laid down by s. 47 (2) and s. 47 (3). It is quite inappropriate to change the law by a sub-section beginning with the words " It is hereby declared ", or to declare the meaning of sub-s. (3) by altering it. It is true that sub-s. (5) is not altogether contradictory of sub-s. (3), for the statutory trusts will still operate in a case where any member of the primary class survives, but sub-s. (5) drastically cuts down the effect of the earlier sub-section. Moreover, as I observed at the beginning of this judgment, if this be the right construction, s. 46 (1) (v), heading " Fifthly ", will, in a case where no uncle or aunt of the whole blood survives but there is a surviving uncle or aunt of the half blood, let in relations of the half blood at the expense of relations of the same degree of the whole blood. Moreover, if no brother or sister survive, issue of theirs will be excluded in favour of uncles and aunts and their issue.

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* The relevant sections of the Intestates' Estates Act, 1952, were s. 1 and s. 4.

The only expedient suggested to me by which this result might be avoided was that I should, in construing s. 47 (5), ignore altogether the words "or issue of any member of that class ". The difficulty about this is that, if it be done, there does not appear to be any effect to be given to the sub-section. It is, however, as I have said, a declaratory sub-section, and must be treated as inserted to clear up some doubt as to the meaning of sub-s. (2) and sub-s. (3). I have not been able to see what doubt was raised by those sub-sections, or to find that sub-s. (5), ignoring the words which I have just quoted, has any effect at all. It is said, therefore, that the court may only ignore or cut out words where to do so is to give the statute some effect which the court can see to have been intended, and that this process is not legitimate where it reduces the section from having some meaning, however absurd or capricious, to having no meaning at all. This is a formidable argument, but its effect is, I think, somewhat diminished by looking back to sub-s. (2), where, so far as I can see, para. (a) has no effect at all, the whole object of the section being effected by para. (b) and para. (c), so that one may strike out para. (a) altogether without altering the effect of the statute. If this be right, it is a sorry comment on modern legislation.

The difficulty was not appreciated for some years after 1952, as appears from the fact that the article in 16 HALSBURY'S LAWS OF ENGLAND (3rd Edn.), published in 1956 under the title " Executors and Administrators " assumes that the law as laid down by the statute of 1925 remains in this respect unaltered by the Act of 1952. This is apparent from the table of distribution on intestacy (ibid., at p. 496). The same assumption is implicit in r. 21 (2) of the Non-contentious Probate Rules, 1954 (S.I. 1954 No. 796), under which, I suppose, the existing grant of letters of administration issued. In the autumn of 1956, however, the difficulty was espied by what LINDLEY, M.R., in *Rowlls* v. *Bebb*, *Re Rowlls*, *Walters* v. *Treasury Solicitor* (1) ([1900] 2 Ch. 107 at p. 115), described as " the keen eyes of an equity lawyer ". These words were, I understand, spoken of the late Mr. Percy Walters, whose mantle has fallen on counsel for the plaintiffs in the present case, for he disclosed his discovery to the profession in an article* in THE CONVEYANCER AND PROPERTY LAWYER (Vol. 20) (1956), p. 399, out of which, no doubt, the present summons arose.

A judge in these circumstances is confronted with a familiar dilemma: How far may he go in modifying the terms of a statute in order to make it conform to what he is convinced must have been the intention of the legislature? Counsel for the Crown argued with his usual force that to ignore the offending words here would be an instance of legislation by construction, and that it is for Parliament to repair the blunder if there be one. MAXWELL ON INTERPRETATION OF STATUTES (10th Edn.) (1953) has much to say on this topic, notably (ibid., at p. 258) the words of SIR FRANCIS BACON (wrongly there styled LORD BACON, a title which he never had†): " non est interpretatio, sed divinatio, quae recedit a literâ " (cited from " Advancement of Learning "). Counsel for the Crown contended that to ignore words is only legitimate in order to make sense of what is otherwise nonsense, that here the sub-section (s. 47 (5)), as it stands, has A an effect not absolutely repugnant to the rest of the statute, while, if the words be ignored, the sub-section has no effect at all. Further, he says that a treatment so drastic can only be justified where the court can see what the legislature did intend, whereas here no plain intention can be gathered. I feel the force of this line of reasoning, although it leads to a most lame and impotent conclusion. As MAXWELL ON INTERPRETATION OF STATUTES pungently puts it (at p. 7): B

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* The article is entitled " Caprice in the Law of Intestate Succession."

† Sir Francis Bacon was made Baron Verulam in 1617/8 and was created Viscount St. Albans in 1620/1.

> " The difficulty lies in deciding between words that are plain but absurd, and words that are so absurd as not to be deemed plain."

On the whole, I have come to the conclusion that I am entitled to ignore the words " or issue of any member of that class ", or, rather, to treat them as not binding me to construe the word " class " in the earlier part of the sub-section C as confined to the primary class of aunts and uncles. I take this course because I am convinced that Parliament, in laying down rules for ascertaining next of kin, cannot have intended to promote those more remote over those nearer in blood. I decline to come to a conclusion which would necessitate holding that first cousins twice removed should be preferred to nephews and nieces.

The authorities are well summed up in MAXWELL ON INTERPRETATION OF D STATUTES in these words (ibid., at p. 252):

> " It has been asserted that no modification of the language of a statute is ever allowable in construction except to avoid an absurdity which appears to be so not to the mind of the expositor merely, but to that of the legislature, that is, when it takes the form of a repugnancy. In this case the legislature shows in one passage that it did not mean what its words signify in another, E and a modification is therefore called for, and sanctioned beforehand, as it were, by the author. But the authorities do not appear to support this restricted view. They would seem rather to establish that the judicial interpreter may deal with careless and inaccurate words and phrases in the same spirit as a critic deals with an obscure or corrupt text, when satisfied, on solid grounds, from the context or history of the enactment, or from the F injustice, inconvenience, or absurdity of the consequences to which it would lead, that the language thus treated does not really express the intention and that this amendment probably does."

A number of cases was cited to me, but each of them is only useful to illustrate the principle which perhaps was best expressed by LORD WENSLEYDALE in *Grey* v. *Pearson* (2) ((1857), 6 H.L. Cas. 61 at p. 106) in these words: G

> ". . . in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther." H

In my judgment, therefore, the answer to question 1 of the originating summons should be in the terms of para. (a)*.

Declaration, and inquiry, accordingly.

Solicitors: *Kingsford, Dorman & Co.*, agents for *Wade & Co.*, Bradford (for the plaintiffs and the first defendant); *Treasury Solicitor.*

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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* The terms of para. (a) are at p. 521, letter B, ante.

WILSON *v.* PILLEY.

[Court of Appeal (Lord Evershed, M.R., Romer and Ormerod, L.JJ.), October 21, 22, 1957.]

County Court—Appeal—Damages—Personal injury—Inadequate damages—Test for intervention by appellate court.

Damages—Measure of damages—Personal injury—Permanent effect—Quantum.

On Sept. 19, 1956, the plaintiff, a married woman aged twenty-one, was knocked down by the defendant riding a motor cycle. She received a penetrating wound on her right ankle and minor injuries to her left shin. On the same day she underwent an operation, her leg was immobilised in a plaster which was removed at the end of October. She was away from work for eight weeks. On Nov. 8 her right ankle was still stiff, and in May, 1957, it had still a tendency to swell; the plaintiff was likely to have for the rest of her life some discomfort in cold and wet weather. As a result of her injury she had to give up the sport of " motor cycle scrambling " which she had formerly enjoyed with her husband. In an action for damages of negligence, in which the plaintiff claimed £300 damages, the county court judge awarded her £75 as general damages. On appeal,

Held: although the onus on an appellant seeking to interfere with a comparatively small award of damages was a very heavy one, the judge had in the present case proceeded on a wholly erroneous estimate, and £200 should have been awarded.

Appeal allowed.

[**Editorial Note.** It is very rarely that the Court of Appeal will interfere with awards of damages in cases within the jurisdiction of county courts (see p. 526, letter D, and p. 528, letter E, post). In *Henderson* v. *Clifford Watmough & Co.* ((1939), 161 L.T. 233) the Court of Appeal declined to interfere with an inadequate award of damages as being in that case a decision of fact; cf., *Shave* v. *J. W. Lees (Brewers), Ltd.* ([1954] 3 All E.R. 249). Those decisions were prior to the creation of a right of appeal from a county court on a question of fact in an action of tort where the damages claimed exceed £200 (County Courts Act, 1955, s. 12 (1), (2) (a) (i)). In the present case, where after the commencement of that Act there was a claim for damages of £300, the Court of Appeal rectified an assessment of damages which, it was satisfied, was wholly erroneous, thus proceeding, it seems, in accordance with the principle approved in *Davies* v. *Powell Duffryn Associated Collieries, Ltd.* ([1942] 1 All E.R. at p. 664, letter H, per Lord Wright), in relation to an appeal from the decision of a judge in an action begun in the High Court.

As to the alteration of awards of damages on appeals from a judge alone, see 11 Halsbury's Laws (3rd Edn.) 312, para. 508; and for cases on appeals as to damages, see 17 Digest (Repl.) 193, 194, *913-918*.]

Appeal.

This was an appeal from a judgment of His Honour Judge Reid at Kingston-on-Thames County Court, given on May 16, 1957.

On Sept. 19, 1956, the plaintiff was crossing a main road at Staines when she was knocked down by the defendant who was riding a motor bicycle. The plaintiff suffered injury and brought proceedings in the county court alleging that the defendant had been negligent and claiming damages in the sum of £300. The defendant by his defence denied negligence and alleged negligence on the part of the plaintiff. The plaintiff's claim for special damages was agreed at £55 3s. 8d. The county court judge found that both parties had been negligent and apportioned the blame equally. He assessed the general damages at £75; the total damages thus amounting to £130 3s. 8d., the judge gave judgment for the plaintiff for half that sum, namely, £65 1s. 10d. The defendant had paid into court £75 and accordingly the judge awarded the plaintiff costs on scale 3 up to the date of payment in and the defendant costs on scale 4 thereafter. The plaintiff appealed against both the finding of negligence on her part and the assessment of damages.

The case is reported only on the latter question.

J. D. Stocker for the plaintiff.
A. M. Lee for the defendant.

LORD EVERSHED, M.R., stated the facts and continued: I am satisfied on the facts, as I have stated them, that it would be wrong for this court to interfere, as the plaintiff has asked us to do, with the finding that she herself was at fault; and, having reached that stage, it is to my mind equally clear that we could not and should not interfere with the apportionment, a matter which, as has many times been pointed out, is pre-eminently one for the estimate of the trial judge. That part of the appeal was in truth put in second place by counsel for the plaintiff whose main complaint was as regards the award of damages. Leaving aside the special damages, which were agreed at £55 3s. 8d. the general damages which the learned judge awarded to the plaintiff were £75.

Again let me emphasise that interference by this court with an award of damages by the trial judge must be a rare thing, and may I say that it should be perhaps even rarer in relatively small cases tried in the county court. No one would suggest that, because this court thought that the damages, small in any case, were rather on the low side, this court could consider for a moment slightly raising the figure or adopting the converse course in a different kind of case. In other words, the onus on an appellant seeking to interfere with an award of damages, particularly within this sort of scale, is a very heavy one. No question here arises of any admission of inadmissible evidence or exclusion of evidence which should have been taken into account. It must be established plainly by the plaintiff that the learned judge here proceeded on a wholly erroneous estimate. I have come in the present case to the conclusion, with some anxiety, that that question must be answered affirmatively. I think, with all respect to this very careful judge, that, judging by modern standards of award in this type of case, the learned judge did proceed on a wholly erroneous estimate.

There was before the judge agreed medical evidence, and to that I must make some reference. According to the first report dated Nov. 29, 1956, made by Mr. Ward of the Ashford County Hospital, a fellow of the Royal College of Surgeons, [the plaintiff]

> "sustained a penetrating wound of her right ankle and minor injuries to the left shin. She underwent operation the same day."

There was an irregular dirty wound which entered the ankle joint, a few pieces of the external malleolus being torn off, together with further bone injuries. The ligament was reconstituted later and the leg immobilised in a plaster. At a later date a walking plaster was applied, which had to be modified, because she was developing a sore. That plaster was removed at the end of October, and then she had to attend for exercises. Mr. Ward continues:

> "When examined on Nov. 8 she was complaining of some discomfort and stiffness in the right ankle and some tenderness of the left shin and ankle."

She suffered pain which interfered with her sleep for a period. He goes on:

> "Her complaint was of stiffness of the ankle particularly on going downstairs and that the ankle tended to give way as she walked along but she had been able to walk half an hour on level ground."

Then he said that she walked with a slight limp; and there follow more technical details of the nature of the injuries.

> "In my opinion [the plaintiff] is making a very satisfactory progress from a severe injury to the right ankle and I told her that she was fit to work on Monday, Nov. 12. Further improvement is likely to occur in the function of the right ankle though at a later date it is possible that improvement in function may result from manipulation."

The surgeon then refers to the fact that the plaintiff was in the habit of indulging, with her husband, in what is said to be a sport or pastime known as "motor cycle scrambling," a procedure which involves on the part of the passenger acrobatic feats of a somewhat terrifying kind, and, not unnaturally, this injury has interfered with this pastime. I should perhaps have said that she was a young woman of twenty-one years of age. Though the pastime is one of which I have no personal knowledge whatever, it is a fair point to make that, of course, for a young married woman it is not a light matter that she is prevented from partaking, with her husband, in what they regard as their chosen pastime. She was examined again by Mr. Ward some seven months later, on May 8, 1957, shortly before the trial. Mr. Ward in the second report says:

> "She still has a tendency for the right ankle to turn over outwards and her doctor has ordered an elastic anklet which affords some relief and which acts principally by protecting the scar against minor injury. There is still a tendency for the right ankle to swell during the hot weather."

Then he observes that she resumed this somewhat temerarious pastime, but was not able to finish the course. He later proceeds to say that there has been some shrinkage of the right calf as compared with the left, and he concludes with these words:

> "In my opinion, [the plaintiff] has made a very satisfactory recovery from a penetrating wound of the right ankle and minor injuries to the left leg. She is always likely to have some discomfort in the right ankle in cold and wet weather but she should regain full function within the next six months and her present minor symptoms will have, by then, abated."

That was the expert evidence. The learned judge, of course, also saw and heard the plaintiff herself, and he states his conclusion of fact on this aspect of the matter in the following language:

> "There remains the question of damages. Special damages are agreed at £55 3s. 8d. The plaintiff received a very nasty injury to her right ankle and a lesser injury to her left leg. She is young and happily she has made a good recovery. But she was away from work for eight weeks and her ankle may be expected to give her a certain amount of trouble in adverse weather for the rest of her life."

In my judgment, that conclusion is plainly justified. It in fact omits to mention, though I do not suggest that the learned judge forgot, the earlier discomfort, including the operation which she underwent; but, as the judge makes plain, this could not be called a minor or slight injury. To use the learned judge's own words, she had a very nasty injury. Speaking some nine months after the accident, when she was still suffering from a certain disability in the right ankle, the learned judge prophesies, on evidence which would justify the prophecy, that she may expect to have a certain amount of trouble, that is pain and discomfort, though not to any great extent, for the rest of her life, in this ankle.

In those circumstances, and having regard to the modern scale in awarding damages in this kind of case, what of the figure of £75? As I have indicated, I feel forced to the conclusion that that is really a wholly erroneous estimate. I have taken occasion to refer to THE QUANTUM OF DAMAGES IN PERSONAL INJURY CLAIMS by MR. and MRS. KEMP in which are put together the results

A of a number of cases of personal injuries, which give some guide to the kind of scale which in modern times is applied. So far as the infinite variety of the circumstances in individual cases permits, it does seem to my mind desirable that there should not be wide disformity in the kind of sums awarded. I must also acknowledge my debt to ORMEROD, L.J., who in this class of case is far more experienced than I am. Giving the matter the best consideration that I can, my conclusion would be that £75 for general damages would be appropriate, B and appropriate only, to compensate pain and suffering and damages generally in cases which, if not trifling, could be properly classified as slight and such as would be likely to have no future effects of a lasting nature, still less of a permanent character. With all respect, it does not seem to me, as I follow the evidence and the judge's clear conclusion, that this injury is of that character; and I would therefore have awarded, and think this court should award, as C general damages, in lieu of the figure stated by the learned judge, the sum of £200. To that extent I would allow the appeal.

ROMER, L.J.: I agree that £200 is the appropriate sum to award in the present case, having regard to the medical evidence, which shows that the plaintiff did suffer considerable pain and discomfort for a number of weeks and D had a thoroughly disagreeable and unpleasant time generally. In addition, there is the evidence in the medical reports and which appears in the learned judge's judgment that she is likely always to have some discomfort in the right ankle in cold and wet weather in the future. In those circumstances, as I say, I agree that £200 is the appropriate and proper sum to award.

At the same time I should like to associate myself with what LORD EVERSHED, E M.R., has said with regard to appeals from county courts in this class of case. It would be very unfortunate, I think, if in comparatively slight cases (and by "comparatively slight" I mean by comparison with the dreadful cases of personal injury that so often come before the courts), where the learned judge has come to the conclusion that the injury is small and can be compensated for by a comparatively small sum of money, the matter should be brought to this F court. As LORD EVERSHED, M.R., has said, the onus is a heavy one on any plaintiff who is awarded a small sum of money by a county court judge and comes to the Court of Appeal in the hope of getting more. In the circumstances of this case, however, I do think that £75 falls far short of what ought to be awarded, and that the sum should be increased in the way LORD EVERSHED, M.R., has indicated. On the question of liability, I think that the learned judge was per- G fectly right, and that this court has no ground for interfering.

ORMEROD, L.J.: I agree for the reasons which have already been given in full that this sum of £75 should be increased to £200.

Appeal allowed.

Solicitors: *Hugh V. Harraway & Son*, agents for *Edmund Evans*, Kingston- H on-Thames (for the plaintiff); *G. Howard & Co.* (for the defendant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

FRANCIS *v.* YIEWSLEY AND WEST DRAYTON URBAN DISTRICT COUNCIL.

[COURT OF APPEAL (Jenkins, Parker and Pearce, L.JJ.), November 11, 12, 1957.]

Town and Country Planning—Enforcement notice—Validity—Wrong factual basis—Development alleged to have been carried out without planning permission—Permission originally granted for a limited period, since expired—No appeal to justices against notice—Right to question validity in High Court—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6 *c.* 51), *s.* 23 (2), (4).

On Feb. 1, 1949, F. began to use his land as a caravan site. This constituted development of the land within the meaning of the Town and Country Planning Act, 1947. It was necessary for F. to obtain planning permission from the local planning authority if he should continue such use for more than twenty-eight days in a calendar year. On Mar. 1, 1949, F. applied for permission, but the local planning authority refused it. F. appealed to the Minister who, on Feb. 22, 1950, granted F. permission to use the land as a caravan site for six months. F. continued to use the land as a caravan site after the six months had expired, and on July 23, 1952, the local planning authority served him with an enforcement notice which alleged that " on or about Feb. 1, 1949 [F.'s land] was developed by placing thereon caravans for residential purposes. And . . . such development before mentioned was carried out without the grant of planning permission required under Part 3 " of the Act of 1947. The notice continued: " Now therefore [the local planning authority] in exercise of the powers contained in s. 23 and s. 24 of the . . . Act of 1947 . . . give you notice to remove all caravans from the site within " a specified period after the time when the notice took effect, viz., twenty-eight days after service. F. did not appeal against the notice to a court of summary jurisdiction as he was entitled to, under s. 23 (4) of the Act of 1947, and he continued to use the land in contravention of the notice. No steps were taken by the local planning authority to prosecute F. under s. 24 (3) of the Act. On Dec. 29, 1955, F. brought an action for a declaration that the enforcement notice was invalid.

Held: (i) the enforcement notice was invalid because, although it sufficiently specified the development complained of for the purpose of s. 23 (2)* of the Act of 1947, it falsely stated that the development was carried out without planning permission (when in fact the Minister had granted permission, albeit only for six months and subsequently to the carrying out of the development) and the notice, therefore, proceeded on a wholly false basis of fact, and so failed to set out the real grounds of the complaint or claim against F. (see p. 537, letters E and F, and p. 539, letter F, post).

East Riding County Council v. *Park Estate* (*Bridlington*), *Ltd.* ([1956] 2 All E.R. 669) applied.

(ii) the fact that F. did not appeal under s. 23 (4) of the Act of 1947 against the enforcement notice did not preclude him from maintaining in the present action his claim for a declaration that the notice was invalid (see p. 538, letters D and H, p. 539, letter H, and p. 540, letters D and E, post).

Perrins v. *Perrins* ([1951] 1 All E.R. 1075) overruled.

Norris v. *Edmonton Corpn.* ([1957] 2 All E.R. 801) considered.

Decision of McNAIR, J. ([1957] 1 All E.R. 825) affirmed.

[**Editorial Note.** The development order that was in force at the date when the land was first used by the respondent to this appeal as a caravan site was the Town and Country Planning (General Development) Order, 1948 (S.I. 1948

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* For the terms of this sub-section, see p. 532, letter G, post.

No. 958). That was revoked and superseded on May 22, 1950 (before the service of the enforcement notice and before the expiry of the Minister's permission) by the Town and Country Planning General Development Order, etc., 1950 (S.I. 1950 No. 728). The words of Class IV of Sch. 1 to these orders (which permitted movable structures to be on land for twenty-eight days in a calendar year) differ, but both prescribed the same twenty-eight day period and thus were similar for the purposes of this appeal. The Minister's permission given in February, 1950, continued effective under the Order of 1950 (S.I. 1950 No. 728) Part 1, art. 14 (1).

For the Town and Country Planning Act, 1947, s. 12, s. 13, s. 14, s. 15, s. 16, s. 18, s. 23, s. 24, see 25 Halsbury's Statutes (2nd Edn.) 506, 509, 511, 513, 516, 524, 527.

For the Town and Country Planning (General Development) Order, 1950, art. 3 (1), Sch. 1, Class IV, para. 2, art. 14 (1), see 21 Halsbury's Statutory Instruments 146, 158, 155, 156.]

Cases referred to:

(1) *East Riding County Council* v. *Park Estate (Bridlington), Ltd.*, [1956] 2 All E.R. 669; [1957] A.C. 223; 3rd Digest Supp.

(2) *Perrins* v. *Perrins*, [1951] 1 All E.R. 1075; [1951] 2 K.B. 414; 115 J.P. 346; 2nd Digest Supp.

(3) *Norris* v. *Edmonton Corpn.*, [1957] 2 All E.R. 801.

(4) *Keats* v. *London County Council*, [1954] 3 All E.R. 303; 118 J.P. 548; 3rd Digest Supp.

Appeal.

This was an appeal by the defendants, Yiewsley and West Drayton Urban District Council, to whom the relevant powers of the local planning authority had been delegated by the Middlesex County Council, against the decision of McNair, J., dated Mar. 8, 1957, and reported [1957] 1 All E.R. 825, declaring that an enforcement notice under the Town and Country Planning Act, 1947, s. 23, served by the defendants on the plaintiff, Kenneth John Roy Francis, the occupier of certain land within the area of the authority, requiring him to discontinue the use of his land as a caravan site, was invalid. The facts appear in the judgment of Jenkins, L.J.

J. P. Widgery for the local authority, the appellants.
D. G. H. Frank for the occupier, the respondent.

JENKINS, L.J.: This is an appeal by the defendants, Yiewsley and West Drayton Urban District Council, from a judgment of McNair, J., whereby he granted to the plaintiff, Mr. Francis, a declaration to the effect that an enforcement notice served on him by the defendants, in pursuance or purported pursuance of the provisions of the Town and Country Planning Act, 1947, was invalid.

The facts are short, and are not in dispute; but before I refer to them, it will be convenient to notice some of the provisions of the Act of 1947. One can begin with s. 12 which provides:

> " (1) Subject to the provisions of this section and to the following provisions of this Act, permission shall be required under this Part of this Act in respect of any development of land which is carried out after the appointed day.
>
> " (2) In this Act, except where the context otherwise requires, the expression ' development ' means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land: . . ."

The last words " or the making of any material change in the use of any buildings or other land " are the material words for the purpose of the present case. Section 13 (1) of the Act of 1947 provides:

> " The Minister shall by order provide for the grant of permission for the development of land under this Part of this Act, and such permission may be granted—(a) in the case of any development specified in any such order, or in the case of development of any class so specified, by that order itself; . . ."

I think that I do not need to read any more of that section. Section 14 provides by sub-ss. (1), (2):

> " (1) Subject to the provisions of this and the next following section, where application is made to the local planning authority for permission to develop land, that authority may grant permission either unconditionally or subject to such conditions as they think fit, or may refuse permission; and in dealing with any such application the local planning authority shall have regard to the provisions of the development plan, so far as material thereto, and to any other material considerations.
>
> " (2) Without prejudice to the generality of the foregoing sub-section, conditions may be imposed on the grant of permission to develop land thereunder—. . . (b) for requiring the removal of any buildings or works authorised by the permission, or the discontinuance of any use of land so authorised, at the expiration of a specified period, and the carrying out of any works required for the re-instatement of land at the expiration of that period; and any permission granted subject to any such condition as is mentioned in para. (b) of this sub-section is in this Act referred to as permission granted for a limited period only."

Section 15 provides by sub-ss. (1), (2):

> " (1) The Minister may give directions to any local planning authority, or to local planning authorities generally, requiring that any application for permission to develop land, or all such applications of any class specified in the directions, shall be referred to the Minister instead of being dealt with by the local planning authority, and any such application shall be so referred accordingly.
>
> " (2) Where an application for permission to develop land is referred to the Minister under this section, the provisions of sub-ss. (1) and (2) of the last foregoing section shall apply, subject to any necessary modifications, in relation to the determination of the application by the Minister as they apply in relation to the determination of such an application by the local planning authority: . . ."

Section 16 of the Town and Country Planning Act, 1947, contains provisions for appeals to the Minister and provides by sub-s. (1):

> " Where application is made under this Part of this Act to a local planning authority for permission to develop land, or for any approval of that authority required under a development order, and that permission or approval is refused by that authority, or is granted by them subject to conditions, then if the applicant is aggrieved by their decision he may by notice served within the time, not being less than twenty-eight days from the receipt of notification of their decision, and in the manner prescribed by the development order, appeal to the Minister . . ."

Then there is a proviso which I can omit, and s. 16 (2) provides:

> " Where an appeal is brought under this section from a decision of the local planning authority the Minister may allow or dismiss the appeal or may reverse or vary any part of the decision of the local planning authority, whether or not the appeal relates to that part, and deal with the application

> as if it had been made to him in the first instance; and the provisions of the last foregoing section shall apply, subject to any necessary modifications, in relation to the determination of an application by the Minister on appeal under this section as they apply in relation to the determination by the Minister of an application referred to him under that section."

I should also refer to s. 18 which provides by sub-ss. (1), (2):

> " (1) The power to grant permission to develop land under this Part of this Act shall include power to grant permission for the retention on land of any buildings or works constructed or carried out thereon before the date of the application, or for the continuance of any use of land instituted before that date (whether without permission granted under this Part of this Act or in accordance with permission so granted for a limited period only); and references in this Part of this Act to permission to develop land or to carry out any development of land, and to applications for such permission, shall be construed accordingly.
>
> " (2) Any such permission as is mentioned in the foregoing sub-section may be granted so as to take effect from the date on which the buildings or works were constructed or carried out, or the use was instituted, or from the expiration of the said period, as the case may be."

I can next go to s. 23 which deals with the enforcement of planning control, and contains the provisions as to enforcement notices with which we are immediately concerned. Section 23 provides:

> " (1) If it appears to the local planning authority that any development of land has been carried out after the appointed day without the grant of permission required in that behalf under this Part of this Act, or that any conditions subject to which such permission was granted in respect of any development have not been complied with, then, subject to any directions given by the Minister, the local planning authority may within four years of such development being carried out . . .* if they consider it expedient so to do having regard to the provisions of the development plan and to any other material considerations, serve on the owner and occupier of the land a notice under this section.
>
> " (2) Any notice served under this section (hereinafter called an ' enforcement notice ') shall specify the development which is alleged to have been carried out without the grant of such permission as aforesaid or, as the case may be, the matters in respect of which it is alleged that any such conditions as aforesaid have not been complied with, and may require such steps as may be specified in the notice to be taken within such period as may be so specified for restoring the land to its condition before the development took place, or for securing compliance with the conditions, as the case may be; and in particular any such notice may, for the purpose aforesaid, require the demolition or alteration of any buildings or works, the discontinuance of any use of land, or the carrying out on land of any building or other operations.
>
> " (3) Subject to the provisions of the next following sub-section, an enforcement notice shall take effect at the expiration of such period (not being less than twenty-eight days after the service thereof) as may be specified therein:
>
> " Provided that—(a) if within the period aforesaid an application is made to the local planning authority under this Part of this Act for permission for the retention on the land of any buildings or works, or for the continuance of any use of the land . . . [a certain time is allowed during which the notice is of no effect]; (b) if within the period aforesaid an appeal is made to the court under the following provisions of this section by a person on

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* Words, not material in deciding this appeal, were inserted here with retrospective effect by the Town and Country Planning (Amendment) Act, 1951, s. 2.

> A whom the enforcement notice was served, the notice shall be of no effect pending the final determination or withdrawal of the appeal.
>
> "(4) If any person on whom an enforcement notice is served under this section is aggrieved by the notice, he may, at any time within the period mentioned in the last foregoing sub-section, appeal against the notice to a court of summary jurisdiction for the petty sessional division or place within B which the land to which the notice relates is situated; and on any such appeal the court—(a) if satisfied that permission was granted under this Part of this Act for the development to which the notice relates, or that no such permission was required in respect thereof, or, as the case may be, that the conditions subject to which such permission was granted have been complied with, shall quash the notice to which the appeal relates; (b) if not so C satisfied, but satisfied that the requirements of the notice exceed what is necessary for restoring land to its condition before the development took place, or for securing compliance with the conditions, as the case may be, shall vary the notice accordingly; (c) in any other case shall dismiss the appeal: . . .
>
> "(5) Any person aggrieved by a decision of a court of summary jurisdic- D tion under the last foregoing sub-section may appeal against that decision to a court of quarter sessions."

There are certain supplementary provisions as to enforcement. Section 24 (1) and s. 24 (3) provide:

> "(1) If within the period specified in an enforcement notice, or within E such extended period as the local planning authority may allow, any steps required by the notice to be taken (other than the discontinuance of any use of land) have not been taken, the local planning authority may enter on the land and take those steps, and may recover as a simple contract debt in any court of competent jurisdiction from the person who is then the owner of the land any expenses reasonably incurred by them in that behalf; and if F that person, having been entitled to appeal to the court under the last foregoing section, failed to make such an appeal, he shall not be entitled in proceedings under this sub-section to dispute the validity of the action taken by the local planning authority upon any ground which could have been raised by such an appeal.
>
> "(3) Where, by virtue of an enforcement notice, any use of land is G required to be discontinued, or any conditions are required to be complied with in respect of any use of land or in respect of the carrying out of any operations thereon, then if any person, without the grant of permission in that behalf under this Part of this Act, uses the land or causes or permits the land to be used, or carries out or causes or permits to be carried out those operations, in contravention of the notice, he shall be guilty of an offence and H liable on summary conviction to a fine not exceeding £50; and if the use is continued after the conviction, he shall be guilty of a further offence and liable on summary conviction to a fine not exceeding £20 for every day on which the use is so continued."

Then I should note that by the Town and Country Planning General Development Order and Development Charge Applications Regulations, 1950, art. 3, I permission is in effect granted, under the provisions of s. 13 of the Act, for certain types of development specified in Sch. 1 to the order; and one of these permitted types of development is thus stated in para. 2 of Class IV of Sch. 1:

> "The use of land (other than a building or the curtilage of a building or the site or curtilage of a building which has been demolished in consequence of war damage) for any purpose on not more than twenty-eight days in total in any calendar year, and the erection or placing of movable structures on the land for the purposes of that use."

Those, I think, are the relevant statutory provisions, and I now turn to the facts. The plaintiff ("the occupier") occupies land at West Drayton, within the defendants' (the authority's) district. On or about Feb. 1, 1949, the occupier began to use the land as a caravan site, and a number of caravans were brought on the land and kept there. The occupier did not obtain any permission under the Town and Country Planning Act, 1947, to make this change of use which, in the view of the authority, was a material change of use, and as such amounted to development within the meaning of s. 12 (2) of the Act. The occupier was alive to this, and it seems that on Mar. 1, 1949, he applied to the authority for planning permission. The period between the bringing of the caravans on the land on or about Feb. 1, 1949, and the application for permission on Mar. 1, 1949, approximates to the period of twenty-eight days allowed under the provisions of the General Development Order*.

On May 10, 1949, the authority refused the permission sought by the occupier, and the occupier appealed to the Minister. The Minister in due course directed a public inquiry; and ultimately on Feb. 22, 1950, he announced his decision thus:

> "Sir, Town and Country Planning Act 1947. I am directed by the Minister of Town and Country Planning to state that he has considered the report of his inspector, Mr. K. Cummings, A.R.I.B.A., following the local inquiry into the appeal by Mr. K. J. R. Francis against the refusal of your council†, acting on behalf of the local planning authority, to permit the use, as a caravan site, of land situated at Thorney Lane, West Drayton, and shown on the submitted plan.
>
> "The Minister has considered the facts and representations before him. The site forms part of an open belt of country, recommended in the Greater London Plan for preservation as open space, and the Minister understands that it is the intention of the council to acquire the site for use as a public open space. In these circumstances, and having regard to the situation of the site in full view from the adjoining Class B road and to the likelihood of drainage difficulties on this low-lying riverside land, the Minister feels no doubt that the decision of the council was justified.
>
> "He notes, however, that there are at present some sixteen occupied caravans on the site, and he is of opinion that the occupants of these caravans should be given reasonable time in which to find alternative sites or accommodation. For this reason alone, he has decided to allow the appeal to the extent that he permits the use under appeal for a period of six months from the date of this letter, which is issued by the Minister as his formal decision."

Then there is a reference to bye-laws and other enactments with which I need not trouble, and the letter is signed by a person stated to be authorised by the Minister to sign in that behalf.

The occupier in fact continued his user of the land up to, during and after the six months' permission granted by the Minister, and as matters then stood it appears that the authority were not anxious to insist on the occupier's compliance, owing to the difficulty of finding other accommodation for the people residing in the caravans. There seems to have been some correspondence between the parties, but the next matter of any materiality was the service by the authority on the occupier of the enforcement notice to which the action relates. That notice is dated July 23, 1952, and was served on or about the same day, and I should read it in full. Omitting the heading it runs as follows:

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* The instrument relevant at this date was the Town and Country Planning (General Development) Order, 1948 (S.I. 1948 No. 958); the same total period of twenty-eight days was allowed under art. 3 of, and Class IV of Sch. 1 to, that order as under the superseding order, S.I. 1950 No. 728, relevant to subsequent proceedings, referred to at p. 533, letter I, ante.

† The letter was addressed to the clerk to the appellants; as regards the delegation of the county council's planning functions to them, see p. 530, letter E, ante.

> "Whereas you are the owner and/or occupier of land situate at south of and fronting Thorney Mill Road, West Drayton, and bounded on the east and south by the River Colne, and known as 'Riverside' And whereas on or about Feb. 1, 1949 the land above described was developed by placing thereon caravans for residential purposes. And whereas such development before-mentioned was carried out without the grant of planning permission required under Part 3 of the Town and Country Planning Act, 1947. Now therefore the Urban District Council of Yiewsley and West Drayton on behalf of the County Council of the Administrative County of Middlesex as local planning authority in exercise of the powers contained in s. 23 and s. 24 of the said Act of 1947 Hereby give you notice to remove all caravans from the site within fifty-five days of the date on which this notice takes effect. This notice shall subject to the provisions of s. 23 of the said Act take effect on the expiration of twenty-eight days after the service thereof upon you."

On receipt of that notice, the occupier did not appeal. He did apparently make a further application for permission to use the land as a caravan site, but that met with refusal. The authority on their part took no action by way of prosecuting the occupier for his non-compliance with the enforcement notice. Finally the writ in this action was issued by the occupier on Dec. 29, 1955. The importance of the matter to the authority is that, as will have been observed, under s. 23 (1) of the Act the right for a local planning authority to serve an enforcement notice is limited to the period of four years from the date of the relevant development. If, therefore, the notice served on July 23, 1952, is held invalid, the result to the authority will be that they will be out of time, the four year period having passed, and so will not be able to regularise the matter by the simple expedient of starting again with a fresh enforcement notice.

The points taken before the learned judge and argued in this court are substantially these. First, it is said that the notice was bad because it did not sufficiently specify the development alleged to have been carried out, or say whether it was in respect of development without permission, or was in respect of breach of conditions. In presenting that argument before us, counsel for the occupier concentrated on the objection that the development was not sufficiently specified. He pointed out that any enforcement notice served must, by s. 23 (2), specify the development which is alleged to have been carried out; and he said that this requirement is not sufficiently complied with by the recitals in the enforcement notice in the present case:

> "whereas on or about Feb. 1, 1949 the land above described was developed by placing thereon caravans for residential purposes. And whereas such development before-mentioned was carried out without the grant of planning permission required under Part 3 of the Town and Country Planning Act, 1947."

Counsel for the occupier contends that notwithstanding the express reference to the placing on the land of caravans for residential purposes, even though that is described in terms as a development—the allegation being that "the land above described was developed by placing thereon caravans for residential purposes"—nevertheless the development is not sufficiently specified because the owner of the land is not told what material changes of user are alleged. He says further that the mere placing of caravans on land does not amount to a development; it may depend on a variety of matters, including the presence or absence of caravans on the land before the date of the alleged development.

I cannot accept this branch of the argument of counsel for the occupier. It is no doubt true that notices which may have penal results, and which are served

A pursuant to legislation which has the effect of curtailing ordinary proprietary rights, should be strictly construed, and the court should be careful to see that they are adequate documents having regard to the terms of the legislation. To my mind, however, this criticism of the present notice goes too far. It seems to me to be reasonably plain that it tells the owner that something has happened on his land which the authority allege to be a development, namely, the placing B thereon of caravans for residential purposes. I think that by including in their notice recitals to that effect the authority sufficiently complied with the requirement in s. 23 (2) that the notice should specify the development. Accordingly I reject that ground.

The second ground, which was the one on which the learned judge decided in the occupier's favour—having, as I have done, rejected the first argument— C affords to my mind a far more formidable objection. At the date of the enforcement notice, the position was this. The development had taken place in February, 1949. No prior permission had been obtained; but on the other hand for the first twenty-eight days of this user no permission was required over and above the permission given by the General Development Order*. From the expiration of that period of twenty-eight days there was no further permission D in respect of the development until the Minister's decision; and the Minister had, by his decision on Feb. 22, 1950, allowed the occupier's appeal to the extent that he permitted the use under appeal for a period of six months from the date of his letter; and the period of six months during which that permission endured had expired on Aug. 22, 1950†. Those were the surrounding circumstances in the light of which the validity of this notice must be considered.

E I return again to s. 23 (1):

> "If it appears to the local planning authority that any development of land has been carried out after the appointed day without the grant of permission required in that behalf under this Part of this Act, or that any conditions subject to which such permission was granted in respect of any development have not been complied with . . ."

F then the notice may be served within four years. In the circumstances that I have stated, could it appear to the authority that the development in the present case had been carried out after the appointed day without the grant of permission required in that behalf under the Act? Counsel for the authority says that this question should be answered in the affirmative, and as I understand it, he puts G his argument thus. He says that this placing of caravans on the land was a development carried out after the appointed day. He says moreover that it was carried out without the grant of permission required under the Act, inasmuch as no prior permission was obtained. Therefore the enforcement notice was perfectly right in reciting that the development in question was carried out without the grant of planning permission; and the defendants could properly H so state in their notice, thus complying with s. 23 (1). So counsel for the authority in that way arrives at the conclusion that the notice is good, and complies with the terms of the section, when considered in the light of the facts, simply as a notice dealing with a case in which there has been a development in respect of which no permission at all has been given. As to the Minister's direction, counsel for the authority in effect said that the permission granted by I the Minister (granted as it was only for the limited period of six months) was spent long before this notice was served. It was thus no longer relevant, and could be disregarded, though no doubt it would have been open to the authority, if so minded, to frame the notice as given in respect of a breach of a condition

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* See footnote, p. 534, ante.

† The Order of 1950, S.I. 1950 No. 728, came into operation on May 22, 1950, by ibid. Part 3, and by ibid., Part 1, art. 14 (1), determinations made and permissions given before that date were not prejudiced by the revocation of the previous order, S.I. 1948 No. 958.

A imposed by the Minister's permission to the effect that the use was to be discontinued at the end of the six months from Feb. 22, 1950. I cannot accept this argument.

Counsel for the occupier puts the matter in a way which he complicates somewhat by the introduction of the permission under the General Development Order, 1950, in respect of twenty-eight days in any calendar year for certain B types of development, such as the caravans in this case. He says that it is wholly wrong and untrue to say that the development here in question was carried out after the appointed day without the grant of permission. He says that there was permission in two respects, or at two stages: first, there was the statutory permission to use the land for such purposes for twenty-eight days. Secondly, when that twenty-eight days ran out, albeit there was an interval when C there was no permission in force, permission was ultimately granted by the Minister to continue the user for six months from Feb. 22, 1950, so that there had in fact been permission, and to state otherwise was to state an untruth.

I do not propose to examine the mysteries of the General Development Order or the precise quality of the twenty-eight days in any calendar year for which user is allowed without permission other than the permission granted by the D order itself. I am content to deal with the matter simply by reference to the permission granted by the Minister. The words of s. 23 (1) refer to the grant of permission required in that behalf under the Act; and in my judgment that reference to permission must include (as indeed s. 18 indicates) permission given after the development has been carried out; and if one construes the reference to permission in s. 23 (1) in that way, it is clear that it could not be said of this E development that it was carried out after the appointed day without the grant of permission. Permission was granted, albeit not prior permission, but permission subsequent to the carrying out of the development. That being, however, in the view I take, permission within the meaning of the Act, it necessarily follows that there is a misstatement in the recitals of the enforcement notice. That, I think, is all that I need say on this second point. It is a very F short one when reached, although the reaching of it involves consideration of several sections of the Act. It follows from what I have said that the notice proceeded (as the learned judge said in effect) on a wholly false basis of fact; and inasmuch as it proceeded on a wholly false basis and, so to speak, charged the occupier with an offence other than the offence which he had actually committed, it cannot stand. An owner of land whose rights are to be affected by the G service of a notice of this sort is, in my opinion, entitled to a proper notice setting out the real grounds of the complaint or claim against him, whatever it may be. I think that that view is borne out by the speeches in the House of Lords in *East Riding County Council* v. *Park Estate (Bridlington), Ltd.* (1) ([1956] 2 All E.R. 669).

Finally the point was taken that, however strong the occupier's case might be H on the merits, this action could not be maintained owing to the provisions of ss. 23 and 24 of the Town and Country Planning Act, 1947. It will be remembered that s. 23 (3) provides:

> " Subject to the provisions of the next following sub-section, an enforcement notice shall take effect at the expiration of such period (not being less than twenty-eight days after the service thereof) as may be specified I therein."

It will further be remembered that there was no appeal by the occupier against the enforcement notice in exercise of the right of appeal conferred by s. 23 (4). It was said that the occupier, having failed to avail himself on his right of appeal, could not now litigate the matter before the learned judge or in this court. The time for appeal having run out, the provision in the Act that the enforcement notice shall take effect, according to this view, concludes the matter. That is a view which I cannot accept. Whatever the result might be of an unqualified

provision that after a certain time an enforcement notice should take effect, A
s. 24 (1) contains an express provision limiting to a qualified extent the right of the party aggrieved to litigate the matter. That limitation is expressed in these words:

> " and if that person, having been entitled to appeal to the court under the last foregoing section, failed to make such an appeal, he shall not be entitled B
> in proceedings under this sub-section to dispute the validity of the action taken by the local planning authority upon any ground which could have been raised by such an appeal."

That is quite inconsistent with any general bar, and it should be noted that it is limited to " proceedings under this sub-section ". " This sub-section ", namely, s. 24 (1), deals with development other than development by material change in C
user, and it contains provisions under which the local planning authority may enter on the land, and in effect take the necessary steps to put an end to the development in question, and, having taken those steps, may recover as a simple contract debt in any court of competent jurisdiction from the person who is then the owner of the land any expenses reasonably incurred by them in that behalf. The relevant provision in this case, however, is not s. 24 (1), but s. 24 (3). That D
provides for the prosecution and punishment by fine of persons who fail to carry out an enforcement notice in cases in which, by virtue of an enforcement notice, any use of land is required to be discontinued. That sub-section contains no limitation at all on the arguments that the person prosecuted can put forward, whether or not they are arguments which he might have taken on an appeal. In these circumstances, I cannot accept the view that the occupier is barred E
from the remedy that he seeks by way of declaration.

I appreciate that that view is in conflict with the decision in *Perrins* v. *Perrins* (2) ([1951] 1 All E.R. 1075). In that case (which was also a case of change of user) the defendants, who had been served with an enforcement notice requiring them to discontinue the use of the land in question as a camping site, took none of the steps required in the notice, and lodged no appeal against it. They were F
charged under s. 24 (3) of the Act with using the land in contravention of the notice. The justices acquitted them of that offence on the ground that the land in question had been used as a camping site before and on the appointed day and that the prosecutor had therefore not proved that there had been any development as alleged in the notice. On the prosecutor's appeal it was held that, whether the planning authority were right or wrong in the view which they took G
of the development of the land, the effect of s. 23 (3) of the Act of 1947 was that an enforcement notice which was not appealed within twenty-eight days became effective, and that the justices could not then question its validity. Having regard to the views that I have endeavoured to express as to the construction of ss. 23 and 24 of the Act, I cannot agree with that conclusion. The learned judge found it possible, while accepting the decision in *Perrins* v. *Perrins* (2)— H
a case which was binding on him—to reach the same conclusion as I have with respect to the admissibility of the present claim for a declaration. I say nothing further about that aspect of his judgment because it seems to me that the simple answer is that *Perrins* v. *Perrins* (2) was wrongly decided.

I have now dealt with the essential points in the case, and for the reasons I have endeavoured to state I hold that this appeal fails, and should be dismissed. I

PARKER, L.J.: I have come to the same conclusion, and I will add only a few words in deference to counsel for the authority's argument on what I may call the second point, namely, as to the factual basis of the enforcement notice. Under s. 23 (1) of the Town and Country Planning Act, 1947, it is clear that there are two alternative conditions precedent to the service of an enforcement notice. It must either appear

> " to the local planning authority that any development of land has been

> carried out after the appointed day without the grant of permission required in that behalf under this Part of this Act ",

or it must appear to the local planning authority

> " that any conditions subject to which such permission was granted in respect of any development have not been complied with . . ."

Here it is to my mind clear that there has been a breach of condition. The Minister by his decision of Feb. 22, 1950, has permitted the user of this land as a caravan site for a period of six months. It is said (and said with some force) that no express condition is therein set out that at the end of the six months' period the caravans are to be removed. As I read it, however, such a condition must be implied. For one reason, it seems to me that the Minister had otherwise no power to give any such permission. Under the relevant section (s. 16), which gives the Minister his powers on appeal, his powers are those which he would have had under s. 15 if he had, as it were, called in the case and dealt with it himself from the beginning; and his powers under s. 15 carry one back to s. 14, and set out the powers of the local planning authority, which are either to grant the permission, or to refuse the permission, or to grant permission subject to condition. Those were the only powers of the Minister.

Indeed, as I understand it, counsel for the authority is really forced to concede that this decision of the Minister should properly be regarded as a conditional permission. He did suggest that it might be read as a direction under s. 23 which empowers the Minister to give directions to a local planning authority not to serve a notice. If, however, that were the object and intention, the Minister could not have allowed the appeal. Counsel for the authority is accordingly forced to say that in this case he had a choice as to which of the conditions precedent to which I have referred he should allege. He says that he could have proceeded under either. At first sight that would be a surprising conclusion if it were true, because it seems impossible to allege that a person has broken a condition, and at the same time be able to say that no permission was ever granted. The answer, however, is that on the facts of this case the authority cannot bring themselves within the first condition precedent, which is the only condition they have alleged. As my Lord has said, the words " without the grant of permission required in that behalf " must be read as including permissions whether given before or after the development in question; and that is made clear by s. 18, to which he has referred, which specifically includes a power in the Minister to make a decision retrospective. Accordingly, in my view, the factual basis that has been referred to in this notice is false.

I should add that I desire to make no comments as to the so called permission, given by the development order itself, for user on twenty-eight days, and as to the effect of that permission.

Lastly, in regard to *Perrins* v. *Perrins* (2) ([1951] 1 All E.R. 1075), like my Lord I feel constrained to say that that case was wrongly decided; and I am less diffident in doing so because another Divisional Court in *Norris* v. *Edmonton Corpn.* (3) ([1957] 2 All E.R. 801) clearly had in mind some doubt. LORD GODDARD, C.J., himself—who, of course, had sat in the first court—said (ibid., at p. 805):

> "As this is a criminal cause or matter (the appellant being summoned on an information and dealt with for a default) it is a great misfortune, I think, that this case cannot go to the House of Lords. There are still obscure questions under this section, and now that I have called attention prominently to *Keats* v. *London County Council* (4) ([1954] 3 All E.R. 303), it is very desirable that an opportunity should be given to their Lordships

> to consider that case. Unfortunately, the law does not allow an appeal from this court in a criminal cause or matter, but I hope that possibly some opportunity may be taken to try to clear up by legislation the obscure position which arises under this Act."

Slade, J., said ([1957] 2 All E.R. at p. 806):

> " I respectfully agree with my Lord that this court is bound by its decision in *Perrins* v. *Perrins* (2) ([1951] 1 All E.R. 1075). Had the matter been res integra I should have required to hear argument on the true construction of s. 24 (1) and (3) ",

and the learned judge went on to refer to s. 24 (1) where the bar is expressed as one in proceedings " under this sub-section ".

For the rest I entirely agree with what my Lord has said, and for these reasons I would dismiss this appeal.

PEARCE, L.J.: I agree with what my Lords have said. I would only add this in regard to s. 24 of the Town and Country Planning Act, 1947, since we are differing from the view expressed in *Perrins* v. *Perrins* (2) ([1951] 1 All E.R. 1075). The insertion of the words in question in s. 24 (1) and their omission from sub-s. (3) indicate a deliberate intention to create a difference in that respect between the two sub-sections. Further, those words are suitable in sub-s. (1), but are not apt for transplantation into sub-s. (3). Moreover, the probabilities indorse this view. It would seem reasonable to create an estoppel in cases where the authority has done work on the basis of the unchallenged validity of the notice, and is seeking to recover the costs as a debt. In such a case the court hearing comes at a stage that is inconveniently late for questioning the validity of the notice. In cases, however, where the authority are prosecuting an owner or occupier for continuing some unpermitted use, there seems less necessity for preventing an investigation of the question whether the notice was a good one; and it may well have been thought undesirable to deprive a defendant of what might be a valid defence against conviction.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Clerk to the Yiewsley and West Drayton U.D.C.* (for the local authority, the appellants); *Speechly, Mumford & Craig*, agents for *Woodbridge & Sons*, Uxbridge (for the occupier, the respondent).

[*Reported by* Henry Summerfield, Esq., *Barrister-at-Law.*]

PRACTICE DIRECTION.

Sale of Land—Sale by court—Auctioneer's remuneration.

The Lord Chancellor has directed that the scale of remuneration authorised to be allowed in the Chancery Division to surveyors, auctioneers and estate agents for their professional services in respect of a sale of freehold or leasehold property under the direction of the court shall remain unchanged. But the judge may in any particular case authorise a fee up to but not exceeding the scale fee recognised by the governing bodies of those professions as one proper to be charged where work, other than court work, is involved.

MAURICE WILLMOTT,
Chief Master, Chancery Division.

Nov. 18, 1957.

TAYLOR *v.* JOHN SUMMERS & SONS, LTD.

[COURT OF APPEAL (Jenkins, Parker and Pearce, L.JJ.), November 11, 1957.]

Court of Appeal—Notice of appeal—Grounds of appeal—Particulars required—Rules of the Supreme Court (Appeals), 1955 (*S.I.* 1955 *No.* 1885)—*R.S.C., Ord.* 58, *r.* 3 (2).

The grounds of appeal set out in a notice of appeal by a plaintiff, a workman, against a judgment dismissing his claim for damages for injury caused by the alleged negligence and breach of their statutory duty under s. 26 (2) of the Factories Act, 1937, of the defendants, his employers, were that the trial judge " (1) . . . misdirected himself in law and on the facts, (2) . . . was wrong in holding that the defendants their servants or agents were not guilty of negligence as alleged (3) . . . was wrong in holding that the defendants their servants or agents were not in breach of s. 26 (2) . . . as alleged (4) . . . ought to have held that the defendants their servants or agents were in breach of duty towards the plaintiff in each of the foregoing respects and that such breaches were the cause of the accident sustained by the plaintiff," and " (5) that the plaintiff was in the premises aforesaid entitled to recover damages against the defendants." On an application for further and better particulars of this notice of appeal the defendants contended that the plaintiff failed sufficiently to " specify the grounds of the appeal " as required by R.S.C., Ord. 58, r. 3 (2).

Held: the grounds of appeal were sufficiently stated in the notice of appeal and accordingly the defendants were not entitled to further or better particulars, because—

(i) each of grounds (2) and (3) stated with sufficient particularity the point that was intended to be raised, particularly as the words " as alleged " in (2) and (3) brought into the grounds of appeal the allegations in the statement of claim, and

(ii) therefore, though ground (1) would have been insufficient by itself (*Pfeiffer* v. *Midland Ry. Co.* (1886), 18 Q.B.D. 243, and *Murfett* v. *Smith* (1887), 12 P.D. 116, applied), the grounds stated, taken as a whole, were sufficient, as grounds (2) and (3), with the ancillary grounds (4) and (5), embraced the whole of the issues of law and fact raised in the action.

Dictum of DENNING, L.J., in *Sansom* v. *Sansom* ([1956] 3 All E.R. 446n.) applied.

Per CURIAM: applications for particulars of grounds of appeal are by no means to be encouraged (see p. 544, letter C, post).

Application refused.

[As to notice of appeal to the Court of Appeal, see 26 HALSBURY'S LAWS (2nd Edn.) 118, para. 231.

For a notice of motion specifying grounds (of an application for new trial), see 2 ENCY. COURT FORMS 343.]

Cases referred to:

(1) *Pfeiffer* v. *Midland Ry. Co.*, (1886), 18 Q.B.D. 243; Digest (Practice) 591, *2324*.

(2) *Murfett* v. *Smith*, (1887), 12 P.D. 116; 57 L.T. 498; 51 J.P. 374; Digest (Practice) 591, *2325*.

(3) *Sansom* v. *Sansom*, [1956] 3 All E.R. 446n.; 3rd Digest Supp.

Application for particulars.

The defendant employers applied for further and better particulars of the plaintiff workman's notice of appeal from a judgment dismissing his claim against the defendants for damages for their alleged negligence and breach of statutory duty. The facts appear in the judgment of JENKINS, L.J.

W. L. Mars-Jones, Q.C., and *Esyr Lewis* for the defendants.

N. G. L. Richards, Q.C., and *R. E. G. Howe* for the plaintiff.

JENKINS, L.J.: This interlocutory application arises in an appeal by the plaintiff in the action dismissing his claim against his employers (the defendants) for damages for personal injury. The claim was put on two grounds. First, it was said that the injury was brought about by a breach of the defendants' statutory duty; and secondly, it was said that the defendants were guilty of negligence at common law. Those were the two issues. As regards the claim for breach of statutory duty, the defendants rely inter alia on a contention that the place where the accident happened was not a factory, and they propose to raise that contention by way of cross notice. The application with which we are now concerned is an application by the defendants for further and better particulars of the notice of appeal.

R.S.C., Ord. 58, r. 3, in its new form*, provides by para. (2):

> "Notice of appeal may be given either in respect of the whole or in respect of any specified part of the judgment or order of the court below; and every such notice shall specify the grounds of the appeal and the precise form of the order which the appellant proposes to ask the Court of Appeal to make."

So that the rule, as it now stands, requires the grounds of appeal to be specified in the notice of appeal.

In the present case the grounds of appeal are thus stated:

> "(1) That the learned judge misdirected himself in law and on the facts. (2) That the learned judge was wrong in holding that the defendants their servants or agents were not guilty of negligence as alleged. (3) That the learned judge was wrong in holding that the defendants their servants or agents were not in breach of s. 26 (2) of the Factories Act, 1937, as alleged. (4) That the learned judge ought to have held that the defendants their servants or agents were in breach of duty towards the plaintiff in each of the foregoing respects and that such breaches were the cause of the accident sustained by the plaintiff. (5) That the plaintiff was in the premises aforesaid entitled to recover damages against the defendants."

Particulars are sought under each of those paragraphs.

> "(1) Under para. 1. Of 'That the learned judge misdirected himself in law and on the facts', stating in what respects it is contended that the learned judge misdirected himself (i) in law and (ii) on the facts. (2) Under para. 2. Of 'That the learned judge was wrong in holding that the defendants their servants or agents were not guilty of negligence as alleged', stating the grounds on which it is alleged that the learned judge was wrong. (3) Under para. 3. Of 'That the learned judge was wrong in holding that the defendants their servants or agents were not in breach of s. 26 (2) of the Factories Act, 1937, as alleged', stating the grounds on which it is alleged that the learned judge was wrong. (4) Under para. 4. Of 'That the learned judge ought to have held that the defendants their servants or agents were in breach of duty towards the plaintiff in each of the foregoing respects . . .', stating the grounds on which it is alleged that the learned judge ought so to have held."

Those particulars, if complied with, would greatly increase the length of the notice of appeal, and add their quota to the costs of the proceedings. Counsel for the defendants says that the notice of appeal, as it stands, does not sufficiently particularise the grounds of appeal, and that it is necessary that particulars should be given in order that his clients may not be taken by surprise. He relies in particular on para. 1 of the grounds of appeal: "That the learned judge misdirected himself in law and on the facts"; and he draws an analogy between the particulars required in a notice of appeal under this new rule, and the particulars required on a motion for a new trial. He has referred us to *Pfeiffer* v. *Midland Ry. Co.* (1) ((1886), 18 Q.B.D. 243), where it was held that:

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* R.S.C., Ord. 58, r. 3, was enacted in its present form by R.S.C. (Appeals), 1955 (S.I. 1955 No. 1885), which came into force on Apr. 10, 1956.

> " A notice of motion for a new trial on the ground of misdirection should state how and in what matter the judge misdirected the jury ";

and it appears from the judgment of HUDDLESTON, B., that the only objection stated in the original notice of motion was misdirection. One can appreciate that a general allegation of misdirection, without saying in what respect the judge misdirected the jury, might well be held (as it was held in that case) to be insufficient.

Similarly, in *Murfett* v. *Smith* (2) ((1887), 12 P.D. 116) there was a motion for a new trial of a probate suit tried before SIR J. HANNEN, P., and a common jury, and a notice of motion for a new trial was served in the following form: It asked that the judgment should

> ". . . be set aside and a new trial had between the parties on the ground that the judge misdirected the jury and that the verdict was against the weight of evidence."

There again those general allegations of misdirection, and that the verdict was against the weight of evidence, were considered an insufficient statement of the grounds for the motion.

From those authorities it seems to me to be reasonably plain (if authority were needed) that if the only ground alleged in the notice of appeal in this case had been the first—namely, that the learned judge misdirected himself in law and on the facts—that, standing alone, would not have been a sufficient notice of the grounds of appeal. However, it does not stand alone. It is followed up by grounds 2, 3, 4 and 5; and I am satisfied that those grounds each state with sufficient particularity the point which it is intended to raise. It will be noticed that in ground 2:

> " The learned judge was wrong in holding that the defendants, their servants or agents, were not guilty of negligence as alleged ",

the words " as alleged " clearly bring in the allegations in the statement of claim; and again what the second ground is saying quite clearly is that the plaintiff is going to contend that the learned judge ought to have held that the defendants were guilty of negligence in the respects alleged in the statement of claim. Similarly, one finds the words " as alleged " at the end of the third ground, which is the allegation that the learned judge was wrong in holding that the defendants were not in breach of s. 26 (2) of the Factories Act, 1937. It seems to me that that also is a ground which is perfectly sufficient in point of particularity. Then ground 4 really does no more than recapitulate grounds 2 and 3; and ground 5: " That the plaintiff was in the premises aforesaid entitled to recover damages " is consequential. It seems to me, therefore, that grounds 2 to 5 are each stated with sufficient particularity.

On an application of this sort one must have some regard to the intention of the rule; and on that I refer to what was said by DENNING, L.J., in *Sansom* v. *Sansom**. DENNING, L.J., said:

> " I am sorry that these new rules take more time. This is the second case today in which an application and more expense have been incurred because of the new rules. It is not intended that there should be elaborate grounds of appeal set out at great length. They should be short and simple. The object of the rule is to eliminate points which are no longer in controversy so that the parties need not go to the expense of copying documents or preparing the case on these points."

Bearing in minds those observations of DENNING, L.J., it seems to me that the grounds of appeal here stated are plainly sufficient, with one reservation. I have some doubt as regards the first ground; and if that had been the sole ground of appeal I think there would have been some substance in this application. Counsel for the plaintiff disclaims, however, any intention of raising on ground 1 any matter which is not already particularised in grounds 2, 3, 4 and 5; and I think that that is not only a very proper statement to make, but it is really a statement which counsel was bound to make, not by way of concession but for the reason that the remaining grounds of appeal embrace between them the whole of the issues of law and of fact raised in the action, so that ground 1 cannot add anything to the grounds specifically given. Ground 1, in effect, is mere surplusage, which would have been better left out, or perhaps would better have appeared at the end of the grounds of appeal introduced by the words in the premises, or by some language of that sort, showing that it was merely a collecting and sweeping up of that which had gone before.

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* See [1956] 3 All E.R. 446n.

These applications for particulars of grounds of appeal are by no means to be encouraged. Having given the best consideration I can to this application, I have come to the conclusion that there is no substance in it, and that it should be refused. In my view also the costs of the application should be the plaintiff's in any event.

PARKER, L.J.: I entirely agree.

PEARCE, L.J.: I agree.

Application refused; costs to be plaintiff's in any event.

Solicitors: *Carpenters*, agents for *Laces & Co.*, Liverpool (for the defendants); *Russell Jones & Walker* (for the plaintiff).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

BENTON *v.* BENTON.

[COURT OF APPEAL (Hodson, Morris and Sellers, L.JJ.), October 21, 22, 23, 1957.]

Divorce—Condonation—Cruelty—Revival—Conduct not amounting to cruelty—Conduct not causing breakdown of marriage.

In the absence of fraud, or consent induced by fraud, the voluntary act of sexual intercourse by a husband with his wife is conclusive of condonation of her cruelty, although the intercourse was induced by her conduct (see p. 548, letter C, post).

Dictum of VISCOUNT SIMON, L.C., in *Henderson* v. *Henderson & Crellin* ([1944] 1 All E.R. at p. 45) applied.

After petitioning for divorce on the ground of cruelty, the husband condoned the cruelty by having sexual intercourse with his wife on May 27, 1956, but he did not subsequently withdraw the petition. In her answer on June 8, the wife alleged against the husband cruelty, sodomy on her and attempts at sodomy, and adultery. In his reply on Aug. 10 the husband denied the charges. In an amendment of his reply dated Dec. 31, he said that, if the act of sexual intercourse amounted to condonation, the cruelty had been revived by the wife's "false accusation against him of attempted sodomy on the same occasion" in her answer. In November, 1956, and January, 1957, the husband saw the wife on several occasions when visiting the children of the marriage and remained in her company for hours when they were not there. He never showed resentment at the charges or claimed then or in evidence at the trial that they had made the continuance of married life impossible. At the trial, during the final speech of counsel for the wife, counsel for the husband applied for leave to amend the amended pleading by substituting false accusations knowingly made against him of sodomy and attempted sodomy for the false accusation of attempted sodomy. The judge allowed the amendment. He dismissed the wife's charges, found the husband's charge of cruelty proved, and held that the cruelty had been condoned but revived by the wife's wilfully false accusations and granted a decree nisi for divorce. On appeal,

Held: the decree nisi must be discharged because, although charges of sodomy knowingly falsely made would be sufficient to revive condoned cruelty, yet in the present case the charges had not caused the husband to refuse to consider continuing married life with the wife, and so had not been responsible for the breakdown of the marriage.

Dicta of PHILLIMORE, L.J., in *Moss* v. *Moss* ([1916] P. at p. 161) and of BUCKNILL and DENNING, L.JJ., in *Richardson* v. *Richardson* ([1949] 2 All E.R. at pp. 332, 333) applied.

Appeal allowed.

[As to the revival of condoned matrimonial offences, see 12 HALSBURY'S LAWS (3rd Edn.) 306, 307, paras. 608-610; and for cases on the revival of condoned cruelty, see 27 Digest (Repl.) 411, *3394-3402*.]

Cases referred to:

(1) *Henderson* v. *Henderson & Crellin*, [1944] 1 All E.R. 44; [1944] A.C. 49; 113 L.J.P. 1; 170 L.T. 84; 27 Digest (Repl.) 397, *3271*.

(2) *Roberts* v. *Roberts & Temple*, (1917), 117 L.T. 157; 27 Digest (Repl.) 399, *3281*.

(3) *Snow* v. *Snow*, (1842), 2 Notes of Cases, Supp. i; 6 Jur. 285; 27 Digest (Repl.) 404, *3339*.

(4) *Popkin* v. *Popkin*, (1794), 1 Hag. Ecc. 765n; 162 E.R. 745; 27 Digest (Repl.) 297, *2423*.

(5) *Tildesley* v. *Harper*, (1878), 10 Ch.D. 393; 48 L.J.Ch. 495; 39 L.T. 552; Digest (Pleading) 47, *386*.

(6) *Russell* v. *Russell*, [1897] A.C. 395; 66 L.J.P. 122; 77 L.T. 249; 61 J.P. 771; 27 Digest (Repl.) 307, *2551*.

(7) *Moss* v. *Moss*, [1916] P. 155; 85 L.J.P. 182; 114 L.T. 1147; 27 Digest (Repl.) 408, *3375*.

(8) *Richardson* v. *Richardson*, [1949] 2 All E.R. 330; [1950] P. 16; 27 Digest (Repl.) 409, *3384*.

(9) *Thompson* v. *Thompson*, [1957] 1 All E.R. 161; [1957] P. 19.

(10) *Beard* v. *Beard*, [1945] 2 All E.R. 306; [1946] P. 8; 114 L.J.P. 33; 174 L.T. 65; 27 Digest (Repl.) 408, *3369*.

Appeal.

The wife appealed against a judgment of Mr. Commissioner GRAZEBROOK, dated Apr. 3, 1957, pronouncing a decree of divorce in favour of the husband petitioner on the ground of the wife's cruelty. The commissioner held that the cruelty had been condoned by the husband's intercourse with the wife on May 27, 1956, but that it had been revived by the wife's subsequent charges of sodomy against the husband contained in her answer to the petition. The wife contended, inter alia, that the cruelty had not been so revived.

Harold Brown, Q.C., and *H. B. Grant* for the wife.

G. H. Crispin for the husband.

HODSON, L.J.: This is an appeal from a judgment of Mr. Commissioner GRAZEBROOK, dated Apr. 3, 1957, in which he pronounced a decree of divorce in favour of a husband petitioner, based on the cruelty of the wife. The wife had filed an answer in which she defended herself against the charges of cruelty and made cross-charges against her husband, to which I shall refer, and also said that any offence which she had committed had been condoned. The husband put in a reply to the answer to which also I shall have to refer. In this court the position is this: The wife, through her counsel, has accepted the findings of cruelty made against her—not that she willingly accepted those findings but because she recognised that the commissioner who had heard her case was entitled to come to the conclusion that he did on the veracity of herself and her husband and other witnesses who were called and then to find, on the facts proved, that there was cruelty. The appeal has been directed first of all to the question whether the cruelty on her part, if any, was condoned, and the subsidiary question whether, if it was condoned, it was revived by anything she did afterwards so as to destroy the effect of the condonation.

In order to deal with the first issue, that of condonation, it is unnecessary for me to go beyond the petition itself, the answer (in so far as the answer referred to condonation), and the reply (again in so far as it referred to condonation). The parties were married in 1944, and they had two children, both boys, one born in January, 1945, and the other born in June, 1946. The parties lived together until 1956. In January, 1956, the wife was finally left by her husband. On or about Jan. 28, he left the home where he had lived with the wife, and they have never had a home together since. His case (accepted by the commissioner) was that throughout the marriage his wife had been a very heavy consumer of alcohol, that latterly drunkenness had become habitual so that she became really an addict to alcohol, and that, while in that condition, she had behaved towards him in an aggressive, violent and disgusting manner so that his health had been injured. He called evidence to the effect that he had been on the verge of a nervous breakdown, and he said that he had lost a great deal of weight, which he attributed to his wife's conduct. He succeeded on that. To be fair to the husband, it is not a case in which he has said that drink was abhorrent to him. He has admitted that he was himself a man who consumed considerable quantities of liquor—gin, so far as the evidence goes—in his wife's presence and as a preliminary to sexual intercourse. He refers in his letters to their enjoyment of drink together; and after the parting he drank with his wife when he met her, although she herself was not drinking alcohol.

I have mentioned those matters because I think they may have some slight bearing on the issue of condonation—which is the relevant issue which we have to determine; because admittedly, after the parting, the husband visited his wife frequently, principally in order to see his children, and spent a great deal of time in her company, not all of which, by any means, was spent with the children; he spent time with her alone. On one occasion he was alone with her in a motor car in a lane in the country for some time, and on another occasion, in January of this year, he was alone with her, without the children, in the place in which he was then living in London. He said that he had taken her back there in order to refute her remarks made to him that she was living in squalor while he was living in luxury. He said: " Come back and see where I do live ". However, they were together some time, and he saw her to the station eventually. I am dealing with this case on the basis of the husband's evidence because that is the evidence that was accepted.

After the petition (which was dated Apr. 16, 1956) had been put in, in her answer, dated June 8, the wife said that the cruelty, if any, had been condoned. The answer includes particulars of occasions when (according to her) she and her husband had sexual intercourse together, not only right up to Jan. 23, 1956, when they were last living together—i.e., five days before the husband left home and the day on which the wife left to go into a private home—but also on occasions after the separation, on Apr. 8, 1956, in the motor car in the lane; in April, 1956, at a hotel; and on four occasions in a caravan where she was living in May; and by a subsequent amendment she said that intercourse also took place at a house, " Penshurst ", on one or two occasions in November, on another occasion in January, 1957, and finally (at the address in London to which I have referred) on Jan. 22, 1957.

So far as sexual intercourse was concerned, her evidence was rejected and that of the husband accepted, but on his own case, he did have sexual intercourse with his wife on May 27, 1956, in the wife's caravan. In his reply he deals

A specifically with this occasion, on which, he agreed, there had been intercourse, and he admits that he had visited his wife on the occasions referred to in the earlier of those particulars, for the purpose of seeing his children. He said that on those visits his wife, when alone with him, fondled and caressed him, undressed in front of him, and made suggestions so as to get him to have sexual intercourse with her. Then he makes this admission:

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> "The petitioner admits that on one occasion in the respondent's caravan at Caravan Park Field, Langton when under the influence of a drug largactil he had sexual intercourse with the respondent but will say that this was as a result of the respondent's said conduct and the influence of the said drug and was not, nor as the respondent well knew, was it intended to be, a C condonation of the respondent's said cruelty."

That is how the reply stood as it was originally drawn. Particulars were given of that as follows:

> "The drug largactil had been medically prescribed for the petitioner to be taken in doses of two tablets three times a day at four-hourly intervals. Under persuasion by the respondent shortly before being seduced by her D on the occasion referred to, he had taken five tablets in one dose, but does not know the total drug content thereby involved. Evidence will be given that the effect of a large dosage of largactil is to produce a sense of diminished responsibility comparable to a drunken condition."

In his pleading (as I understand it), therefore, the petitioner does not allege E that the act of intercourse which he had with his wife was not a voluntary act; and his comparison with drunkenness is remarkable when one remembers that he made charges against his wife that, although they both drank, she drank so much that she behaved in a way which he was entitled to complain was cruelty to him; he does not say that, because she was drunk, she was not responsible and therefore there is no ground for relief. Similarly, he says with regard to F his condition that it was like that of a drunken man; and that was the highest that his evidence on this matter can be put. He was cross-examined closely about the occasion when he admittedly had intercourse with his wife and he said clearly that he knew what he was doing. He described in detail the events of that day—how his wife had undressed before him so that he knew she was trying to get him to have relations with her as a husband with a wife; and he said that G he remembered protesting at one stage by saying "Don't be silly: of course we can't". The act was completed, and he describes in detail exactly what took place and the steps that he took to avoid the risk of conception, and, further, what happened after that—how long he remained in the caravan with her, dozing for hours, until he finally left. He had said in his earlier evidence that he did not really appreciate what he was doing; but, coupled with those answers H in cross-examination, the effect of his evidence—not in any way treating him as a man who was not to be relied on as truthful—is that he knew perfectly well what he was doing and that this act of intercourse between himself and his wife was a voluntary act.

He sought to support the argument that really this was an involuntary act by calling Dr. Larkin, who had prescribed this drug for him. The commissioner I referred to the doctor's evidence in connexion with the injury to health of which the husband complained, but did not refer to it specifically in connexion with this drug, and rejected the evidence of the doctor called by the wife which dealt with the effects of this drug. But I take it that the commissioner accepted the evidence of Dr. Larkin, which was to the effect that this drug, although described as a "tranquilliser", taken in large doses (in a time which I think is uncertain), would have an effect comparable with the effects of drunkenness in removing the emotional inhibitions which people of normal sensitivity have, i.e., causing them to feel less restrained in their actions than they would if they had not taken drink. But he never suggested that the reasoning powers of this man would be affected, and indeed the evidence shows that they were not. So that, in my judgment, on the evidence the act was a voluntary act. The commissioner came to a different conclusion, but, on this evidence, I think that any other conclusion is quite impossible.

The argument on the topic in this court has been perhaps a little more extended than it was below, and it has been said that all the surrounding circumstances when this act took place must be taken into consideration. The husband (whose evidence was believed) said that his wife had induced him to take these extra tablets of this tranquillising drug, saying that they were no good anyway and that she knew all about them because she had had them when she was in the home where she had to go because she was addicted to drink; in consequence of that he took an extra dose. I have read the particulars where the husband says that he was persuaded by his wife to take the extra dose. It is now said that, because the wife induced the husband to take to excess something which affected his mental state or emotional state in the shape of these tranquillising drugs, therefore, the act was not truly a voluntary act. It is not alleged that there was fraud on the part of the wife: the highest that it is put against her is that there was persuasion. If a case of fraud had been sought to be made out it would have had to be alleged. It was not, and indeed it is not so contended. In the absence of fraud, or consent induced by fraud, in my opinion, the voluntary act of sexual intercourse is conclusive against the petitioner, settling the question of condonation.

Henderson v. *Henderson & Crellin* (1) ([1944] 1 All E.R. 44) in the House of Lords was a case of condonation of adultery by a man, where his wife had been received back into the position of wife in the home and where further intercourse had taken place. VISCOUNT SIMON, L.C., said (ibid., at p. 45):

> ". . . this will, subject to one exception, amount to clear proof that the husband has carried his forgiveness into effect. The exception is that, if the intercourse was induced by a fraudulent misstatement of fact by the wife, that circumstance will prevent the husband's actions from having the effect of condonation; for example, in *Roberts* v. *Roberts & Temple* (2) ((1917), 117 L.T. 157) . . ."

I have referred to the argument put forward on behalf of the husband in this case, which was, that the act of intercourse could be ignored because of the persuasion of the wife, which is referred to in the pleadings.

LORD SIMON ([1944] 1 All E.R. at p. 45) draws a contrast between wives and husbands, and points out that, although an act of intercourse is conclusive against a husband on the issue of condonation, it is not conclusive against a wife, for reasons which have frequently been stated. He continued (ibid.):

> " It has been more than once pointed out that the conclusion of condonation by an innocent wife of her husband's previous misconduct is not in all cases so strictly drawn from the fact of subsequent intercourse, for there may be instances where the innocent wife, owing to the difficulties of her situation, may have no means of immediately breaking off relations. In *Snow* v. *Snow* (3) ((1842), 2 Notes of Cases, Supp. i), DR. LUSHINGTON discusses at length whether, where a husband has been guilty of cruelty, a wife can ever maintain a suit where cohabitation was continued after the last act, and he concludes that subsequent cohabitation is not universally a bar to the wife's suit for the reason above stated. But I know of nothing in the earlier decisions, either in the ecclesiastical courts or in the Divorce Court in England, which supports the view that a husband who has intercourse, which is not induced by the fraud of the wife, after knowledge of the facts of his wife's adultery, should not thereby be regarded as condoning his wife's misconduct."

The word "misconduct" is used twice in that paragraph, and it is used, I think, intentionally by the noble Lord (who was exceedingly exact in the use of language) in order to cover both cruelty (which was the subject-matter of the *Snow* case (3)) and adultery (which was the subject-matter of the *Henderson* case (1)). In my view he was clearly of opinion that the same consideration applied, where men are concerned, in condonation of cruelty as in condonation of adultery. For my part, I see no reason to distinguish the two matters; and no argument relevant to that point has really been addressed to this court. Indeed, counsel for the husband conceded that in what might be called the straightforward case of cruelty—possibly based on one terrible act of violence—it would be difficult to see why there should be any distinction between the two so far as condonation is concerned.

LORD SIMON, who had had his attention drawn to *Snow* v. *Snow* (3) must have had in mind the very careful considered judgment of DR. LUSHINGTON, who was considering the difficult situation of a wife who, though treated with cruelty, was unable to leave her husband because they were travelling abroad, and the question was whether she must be taken to have condoned his cruelty or not. DR. LUSHINGTON quotes (2 Notes of Cases, Supp. at p. 17) the opinion of LORD STOWELL in a previous case of *Popkin* v. *Popkin* (4) ((1794), 1 Hag. Ecc. 765n. at p. 768n.):

> "'The acts of violence are not objected to; but it is said, she consented to live with him. It is not, however, necessary for the wife to withdraw from cohabitation on the first or second instance of misconduct. It is legal and meritorious in her to submit to no inconsiderable degree of ill-treatment; to be patient as long as possible. Such forbearance is not permitted to weaken her title to relief. But here, the cruelty is carried down to the latest period of the cohabitation'."

There the word "misconduct" is used in relation to cruelty, and that was the case that LORD SIMON had looked at when he made the speech which he made in *Henderson's* case (1). It is quite true that, so far as cruelty is concerned, any references to condonation of cruelty as such in the *Henderson* case (1) are obiter; but there is no reason in principle (as I have already said) to differentiate between the two so far as I am aware. Therefore in my judgment, on the evidence of the husband in this case—because that is the evidence on which this case falls to be determined—there was condonation.

The learned commissioner supported his conclusion that there was no real condonation because the sexual intercourse

> "occurred in a caravan where the wife was then living and it could not possibly, by any stretch of the imagination or otherwise, be said to be a return to connubial cohabitation."

I confess that I see no substance in that circumstance, and indeed it has not been pressed before us in this court.

The position after May 27, 1956, was that the husband, having condoned the cruelty of the wife, had reinstated her, but he did not admit that that was the position, because he has maintained throughout that he never had any intention of doing anything of the kind; and the suit continued. The answer of the wife was put in on June 8, 1956. In that answer she not only alleged cruelty against her husband but also alleged sodomy on her—the full offence—and attempts at sodomy, and adultery. All those charges failed.

As it originally stood the reply of the husband, which was dated Aug. 10, 1956, denied the condonation and denied the charges which the wife had made against him; but the commissioner decided the case in his favour, if he were wrong on the issue of condonation, by saying that, by reason of the false charges of sodomy which the wife had made, the cruelty had been revived. As the pleadings originally stood, there was no allegation of revival, and, although the charge of sodomy and the other charges had been made in June, 1956, it was not until

Dec. 31 that any amendment was made to the reply to set up revival. That amendment was in this form: A

> "Further, if, which is denied, the said act of sexual intercourse (which occurred on May 27, 1956) amounted in law to a condonation of the respondent's cruelty as pleaded in the petition herein, the petitioner will say that the action of the respondent in making by para. 21 (18) of her answer herein dated June 8, 1956, a false accusation against him of attempted sodomy on the same occasion has revived the cruelty so condoned." B

Paragraph 21 (18) of the answer, the only matter referred to, was as follows:

> "That on the night of May 27, 1956, at the respondent's caravan at the address mentioned in para. 20 (D) hereof the petitioner attempted to commit sodomy upon the person of the respondent notwithstanding that C he well knew that the said offence caused her considerable pain and distress. By reason of the petitioner's conduct as aforesaid the respondent has from time to time been in fear of the petitioner and has suffered in her health."

That was the state of the pleadings when the matter came to trial. It looked as if the only complaint that the husband was then making was limited to this one matter. When, in his final speech, counsel for the wife was addressing the court D on this topic and pointing out that the wife had said in her evidence that on this particular occasion, when sexual intercourse admittedly took place, the wife was giving the husband the benefit of the doubt and saying that he might have appeared to be making an attempt at sodomy whereas it was not really so, counsel for the husband rose and applied for leave to amend the reply so as to include, not only this allegation of an attempt on one occasion, but also false E accusations knowingly made against the husband of sodomy and attempted sodomy. So the amendment sought included the word "knowingly", which was not there before, and included the word "sodomy", and was not limited to the one occasion. That amendment was not consented to, but leave was given. The first question which arises is whether this case ought to be dealt with on the footing that that amendment was rightly made. F

The learned commissioner gave judgment on the amendment of the pleading and expressed his conclusion in these words:

> "I can imagine nothing more serious or calculated to upset the husband than the malicious and invented charge of sodomy as there has been made in this case."

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The rule as to amendments I need not read, but I think that the general principle was fairly stated by BRAMWELL, L.J., in *Tildesley* v. *Harper* (5) ((1878), 10 Ch.D. 393 at pp. 396 and 397), when he concluded his observations by saying that the amendment should be allowed if it could be made without injustice to the other side, and that there was no injustice if the other side could be compensated by costs. In this case, it is true that the evidence was not in the main directed to H the issue whether or not this charge of sodomy had been knowingly made by a woman who knew that it was untrue; but it is right to say that counsel for the husband put it to the wife quite straightly in cross-examination that her evidence on this matter was a wicked invention.

It is unfortunate that the matter was not crystallised at an earlier stage in the pleadings. I have in mind the situation as it was in the case which is well-known in I history—*Russell* v. *Russell* (6) ([1897] A.C. 395)—where the wife had made and persisted in unjustified charges of the same character against her husband. They were of the same character although the sodomy alleged was with another man and not (as in this case) with the wife herself. But the issue had been plainly put to the jury

> "whether the countess did the acts in question honestly believing that she was making a charge that was true, or whether she did them not honestly believing that they were true, but for some ulterior purpose.

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> On this the jury found that in her conduct and correspondence subsequent to the first trial she did not act bona fide."

In this case, that issue was not clearly formulated until a very late date; but the evidence which the wife had given and the cross-examination administered to her on behalf of the petitioner and her answers were before the commissioner,
B and I am not prepared to say that an injustice was done to her by allowing the amendment, even at that stage, so as to make it right for this court to allow the appeal on that ground alone; so that I think we must deal with the case on the footing that the allegation was properly considered by the commissioner in its enlarged form. On the face of it, the form in which it was originally drafted is not a very sensible form, because it looks as if the husband was prepared to
C swallow the larger charge of sodomy while complaining of the lesser charge of an attempt; and we were told the the pleading came to be drawn in this particular way because of some mistake. But, dealing with the matter on the merits, we have the fact that, although he had characterised the wife's evidence as false, the commissioner had in some parts of his judgment referred to the possibility of her having imagined things. In this part of his judgment he came to the clear
D conclusion that she knew that what she was saying was false. This is a matter which ought to have been more carefully considered, because it is quite obvious that charges may be made and may fail because they are not proved without necessarily any conclusion adverse to the person making the charges being made. There are cases, for example, where the court comes to the conclusion that the person making the statements has not invented them but has been honestly
E mistaken, and acted on false information or even imagined things. The conclusion having been reached, however, on this part of the case—albeit by a rather unsatisfactory route—one has to consider how the matter now stands.

There is no doubt in my mind but that a charge of this kind is of such a nature that it is capable of reviving antecedent cruelty. The charge was considered in *Russell* v. *Russell* (6) as being, on the face of it, a very serious one. The actual
F decision in the House of Lords was that a false charge of this kind was not sufficient evidence of cruelty in the absence of proof of injury to health or apprehension of such injury. The Court of Appeal had previously held that a charge of that kind, persisted in against the husband, who was protesting his innocence and showing his resentment of the charge, was a justification for his refusing to live with his wife and an answer to a suit for restitution of conjugal rights brought
G by her. That matter was not discussed in the House of Lords; but LORD SHAND, one of the majority of their Lordships, said ([1897] A.C. at p. 466):

> "The persistence in gross charges of foul immorality, the truth of which she did not believe, charges which were calculated so deeply to wound her husband's feelings and to degrade him in the eyes of the world, was cruelty—I should even say gross cruelty, in a wide and popular sense of the
> H words."

All their Lordships were in agreement in regarding the repetition of the charge in the truth of which Lady Russell did not believe as a very serious matter.

In order to revive past cruelty it is not necessary, as a matter of law, that the matter relied on should itself be cruelty. *Moss* v. *Moss* (7) ([1916] P. 155), a decision of the Court of Appeal, is rather complicated by the references to Scottish
I law, which, as to revival, is not on the same footing as English law; but I think that what PHILLIMORE, L.J., said in dealing with cruelty is relevant (ibid., at p. 161):

> "Perhaps it is not necessary to make a sharp and definite exception of cruelty or to say that in complaints of cruelty a matrimonial offence insufficient in itself will displace condonation sufficiently to entitle the sufferer to a decree. For in truth when a course of conduct is to be considered it is impossible altogether to dissociate present conduct from the past, and

> acts not so grievous in themselves may nevertheless operate grievously on the mind of the sufferer either as recalling past acts of violence or as causing fear of their recurrence." A

There is a reference there to the operation on the mind of the sufferer of acts inflicted on him. Revival of cruelty was also discussed in the Court of Appeal in *Richardson* v. *Richardson* (8) ([1949] 2 All E.R. 330). BUCKNILL, L.J., had referred to the difficulty in finding the proper test in determining what would be B sufficient to revive, and he said (ibid., at p. 332) that he thought that

> "... the proper test to apply is ... indicated in the words Sir FRANCIS JEUNE, P., to which I have just referred—that the conduct [of the spouse] must be such as ... will make married life together impossible. That is putting it as broadly as I can."

DENNING, L.J., referring to conduct capable of reviving past cruelty, said this C (ibid., at p. 333):

> " The subsequent conduct may consist of harshness of behaviour short of cruelty, but if it breaks up the marriage that is sufficient to revive the adultery ... In the result, therefore, harshness, or neglect of a real and substantial kind which is such as to be likely to inflict misery on the D innocent party and does indeed lead to a breakdown of the marriage, is sufficient to revive the original offence."

He then went on to apply the test to that case and to say (ibid.):

> " If the judge had found that the husband's conduct was the cause of the breakdown of the marriage, the condoned adultery would, I think, have been revived ... " E

I am of opinion that charges of this nature, when they are false, and knowingly false, are sufficient to revive condoned cruelty. I am not criticising the commissioner when he says:

> " I can imagine nothing more serious or calculated to upset the husband than the malicious and invented charge of sodomy."

I think that to the ordinary man that is perfectly true, and none the less true F because the charge relied on was made in a pleading. This situation was considered in passing, without argument, by this court in *Thompson* v. *Thompson* (9) ([1957] 1 All E.R. 161) by DENNING and MORRIS, L.JJ. There the state of the pleadings was under consideration, and this particular point was not referred to in argument, but the judgment of DENNING, L.J., contains this passage (ibid., G at p. 167):

> " He has in his petition charged his wife with perjury in the prior maintenance proceedings. He has said that she falsely and maliciously swore that he treated her with cruelty and so forth. His charge of perjury is so comprehensive that, in order to investigate it, the court will have to go into her allegations all over again. He has set up this charge of perjury in order to H revive any condoned cruelty."

MORRIS, L.J., touched on the same topic. In respectful agreement with those two members of the court, I see nothing impossible in the contention that reliance can be placed on matters of this kind, even though they only appear in a pleading. In this case the charges were not only contained in the pleading but repeated in a public court when persons were there to hear the evidence given. I It is no answer to say that a pleading is in a class by itself and is specially protected, on the analogy of those cases where it has been held that statements made in a pleading are absolutely privileged, and the question of malice cannot be considered.

That brings me to the last point in this case: Can it be said, these charges having been made and it having been found that they were wilfully wrongly made, that this cruelty had been revived ? The husband never took any steps himself to complain or to express his resentment of those charges. The wife's answer contained them, and was put forward in June. His advisers put forward a plea in an imperfect form, and that not until December; and it was not until the trial itself that the full plea of revival was put forward on his behalf. It would be unreal to say that this allegation of the wife's had any influence at all in preventing the continuance of the re-constitution of the marriage which had been brought about by the condonation. The husband never gave any evidence to that effect; and indeed his evidence tended to the contrary, because it shows that after June, when the answer must have been brought to his attention because he replied to it in August, he was seeing his wife, no doubt primarily for the purpose of seeing his children, but remaining in her company for hours at a time after the children had gone to bed or when they were not present, showing no sort of resentment at her charges nor claiming in any way that by making them she had rendered the continuance of their married life together utterly impossible. After the incident in May, the uncontradicted evidence shows that they were together in November—not that there was sexual intercourse between them, but they were together and seeing one another, the husband being a free agent in this matter. In January of the following year, a few days after the amendment had been made on his behalf and sworn to by him, he was spending time with his wife, first of all at two hotels in Nottingham and later for some hours at the house where he was then living, which he was showing her in order to convince her that his living was not so luxurious as she professed to believe. There is nothing in his conduct as shown by the evidence, and nothing in his direct evidence, to indicate that this allegation of the wife had any effect whatever on him; and if what was said in *Richardson* v. *Richardson* (8) is correct, in my view, that determines against the husband this issue of revival.

I respectfully agree with all that DENNING, L.J., said on this topic. In his opinion it was clearly vital to consider whether the husband's conduct was the reason for the breakdown of the marriage. Reversing the situation, it is vital to consider whether the wife's conduct in making these charges was a cause of any resentment at all in the husband and of a refusal on his part to continue to consider the possibilities of life together. In *Russell* v. *Russell* (6) the evidence was strong and clear that Lord Russell was grieved and distressed by the allegations, which he did his best to stop and to persuade his wife to drop—to persuade her to admit that, even if she had been told gossip about him, she was now satisfied that it was untrue. She refused, and that operated on his mind. There is no such evidence here, and I am unwilling and unable to find anything in this case to take the place of such evidence or to draw any inference in favour of this man that he must have been so shocked by these charges, as Lord Russell was. I think that it is not wholly irrelevant to look at what the husband used to write to his wife. This man, who professes—through his counsel, it is true: he has not been dishonest in evidence himself; he said nothing—that this was a shocking charge to make and that the inference ought to be drawn that it shocked him, was writing erotic letters to his wife in 1949, years previously. In one passage which has been read but which I do not propose to read aloud—I propose to identify it by saying that it immediately precedes the words " Steady the Buffs "—he was making references to a part of his wife's anatomy which make it exceedingly improbable that an allegation of this kind made by her would have any disastrous effect on his feelings. For these reasons, I think that this appeal must be allowed.

MORRIS, L.J.: I agree. The first question which arises is whether there was condonation. The husband left his wife on Jan. 28, 1956, and his petition was filed on the following Apr. 18. It is beyond dispute that on May 27 there was intercourse between him and his wife. It is said that that intercourse took place when he was not in a state fully to appreciate what was happening. *Henderson* v. *Henderson & Crellin* (1) ([1944] 1 All E.R. 44) in the House of Lords, is authority for the proposition that sexual intercourse with knowledge of a wife's adultery amounts to condonation of it, unless she induced the intercourse by a fraudulent misstatement of fact. In the present case, the charge against the wife was a charge of cruelty. If there was voluntary sexual intercourse, it seems very difficult to understand why, on ordinary processes of reasoning, that sexual intercourse should not amount to condonation of cruelty, just as it would have amounted to condonation had there been adultery. The only difference that counsel for the husband sought to submit in reference to cruelty cases was that there might be a case where there would be acts of cruelty on the part of a wife not immediately followed by any injury to the health of the husband, where intercourse then took place and where later the cruelty resulted in some injury to the husband's health. He said that it might be argued that intercourse would not amount to condonation in such a case. If that is capable of argument, it will have to be argued in a case in which the facts give rise to the possibility of so submitting, if anyone so wishes. That is not this case. In the present case, the petition alleging cruelty was on the file on Apr. 18, and then intercourse took place on May 27. Counsel for the husband, therefore, did very fairly and frankly agree, in the course of the submissions, that the only issue on this part of the case was whether the husband's act was a voluntary act on his part. We have, therefore, been invited to read carefully the whole of the relevant evidence in regard to this part of the case. We have had the transcript of the evidence of some medical witnesses. We have had the transcript of the husband's evidence, and of the wife's evidence. The learned commissioner formed the view that the husband, on the day in question, " was not in a state fully to appreciate what was happening ", and that " he was not in his full mental condition and did not realise ". He referred to what the husband had said in his evidence that he did not know whether he " was coming or going ".

It is not necessary and indeed undesirable to refer in detail to the evidence, which had to be very precise. The husband's evidence showed that he had a full recollection of what happened. It is said that that is not in itself enough to show that he still may not have been master of his own actions. But there is further detailed evidence given by the husband showing the way in which he conducted himself at the time in question. I can only say that, having had the careful assistance of both sides in reviewing this evidence, I find it impossible to share the view reached by the learned commissioner, and I have formed the conclusion that this evidence does not support the view that this was not a voluntary act of the husband but shows that it was the act of a husband who knew exactly what he was doing.

I do not pause to add anything on the question of the amendment of the pleadings. I fully concur in what my Lord has said. In regard to revival, we were referred to many authorities, including that of *Beard* v. *Beard* (10) ([1945] 2 All E.R. 306). Scott, L.J., said this (ibid., at p. 314):

> " The trend of judicial decision from 1730 onwards till the present year has been to uphold the rule that the bar of condonation continues only so long as the matrimonial conduct of the repentant spouse continues to be such as the Divorce Court can accept as consistent with matrimonial duty; and that when a fresh matrimonial wrong is done the condonation ceases to confer protection and the right of the other spouse to proceed in the Divorce Court revives. In my opinion any other rule of law would not only be socially intolerable, but inconsistent with the real principle, underlying the long line of cases and expressly mentioned in several of them, though in slightly varying language, namely, that there must be no substantial digression from the path, to which their marriage vows have bound the parties, of what is sometimes called in old but telling words ' conjugal kindness '. A ' matrimonial ' or ' marital offence within the cognizance of the Divorce Court ' in my opinion simply means conduct which in the eye of that court is wrong, whether it does or does not reach the duration, or gravity, or com-

> pleteness which is necessary to permit of a decree; provided always that it be sufficiently serious for the court to regard it as a substantial breach of duty."

My Lord has referred to the judgments in *Richardson* v. *Richardson* (8) ([1949] 2 All E.R. 330). Dealing with the case of a guilty husband, DENNING, L.J., said (ibid., at p. 333):

> "If the guilty husband after being taken back does not behave properly, and the marriage breaks down afresh by reason of his conduct without any fault of the innocent wife, she is entitled to rely on his original guilty act as a ground for divorce. Any other view would greatly hamper attempts at reconciliation, for no innocent party would be inclined to take a guilty party back if it meant being tied for ever to an unhappy marriage. The subsequent conduct may consist of harshness of behaviour short of cruelty, but if it breaks up the marriage that is sufficient to revive the adultery."

It seems to me that the making of gross charges might be calculated so to wound and so to degrade that they might be most serious and might constitute a grievous breach of matrimonial duty so as (in the language of BUCKNILL, L.J.) "to make decent married life together impossible".

I think that the matter has to be decided in this case according to the particular facts. Those facts are almost unique. On May 27, 1956, if the view that we have formed is correct, there was condonation. On that view, the husband ought to have gone to his solicitors and said that the matter was at an end. Nothing of that sort happened, and it became necessary for the wife to put in her answer. That she did in the early part of June, 1956. It is said that, by putting in that answer, there was this serious matrimonial conduct which constitutes revival. If that was the right view of the answer of June 8, there seems to have been an entirely delayed-action effect, for it was very nearly seven months before any dependence was placed on this matter. The reply had been put in in August, but it was not till the very end of the year that leave to amend was obtained, and the reply was amended on Jan. 3, 1957, to plead revival. And even then, the complaint in the pleading was of a false accusation of shameful deeds attempted but no complaint of a false accusation of shameful deeds done. In the course of his evidence the husband said nothing at all about the matter. He had visited his wife in November. He had visited her on Jan. 22, 1957, which was after the date of the amended answer. He never said anything to the effect that he regarded himself as being an aggrieved person who had been bitterly wounded. He was recalled at the end of the hearing on the sixth day, and he still preserved his entire detachment from having any concern with this point.

On the facts of this case, therefore, it seems to me that there is an air of complete artificiality about this point. On this plea, on the facts of this case and dealing with this petitioner—who had written the letters to which we have unfortunately had to be referred—it seems to me quite artificial to say that there was revival. I cannot but think that the case is withdrawn from the realm of reality and is made to seem like some kind of crude contest in which success or failure is made to depend on the astuteness or the defects of rival pleas in a bitter battle of wits. I think that this plea is quite unreal and artificial and, on the facts of this case, ought not to succeed.

SELLERS, L.J.: I agree, and I am content to adopt rather than repeat the reasons, on all the points, which have commended themselves to both my Lords.

Appeal allowed. Decree nisi set aside and petition dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *J. D. Langton & Passmore*, agents for *Walker, Templer & Thomson*, Tonbridge (for the wife); *Culross & Co.* (for the husband).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

A

GRECH *v.* ODHAMS PRESS LTD. AND ANOTHER.
ADDIS *v.* ODHAMS PRESS LTD. AND ANOTHER.

[QUEEN'S BENCH DIVISION (Donovan, J.), November 4, 5, 6, 7, 1957.]

Libel—Fair comment—Findings that words complained of untrue but fair comment—Comment founded on inaccurate statement of witness in judicial proceedings—Whether findings inconsistent or comment unfair. B

In libel actions brought by G. and A. in respect of a passage in a newspaper which included the words, "with the help of A. . . . G. drew up a petition to the Home Secretary. Into it he put all the dirt he knew ", the evidence showed that at a trial held at the Central Criminal Court, which ended the day before the words complained of were published, a witness had said that G. had told him that A. assisted in drawing up the petition; in fact A. had not assisted G. Also, at that trial the contents of the petition were described, by a witness, as vice in the West End. In the present trial the jury found that the words complained of were defamatory, that they were untrue as regarded G., but that in the cases of G. and A. they were fair comment on a matter of public interest. C

D

Held: (i) the findings of the jury that the words were untrue yet were fair comment were not inconsistent nor was the finding of fair comment perverse; and

(ii) comment founded on an inaccurate statement of a witness in judicial proceedings might nevertheless be fair comment.

Dictum of PHILLIMORE, J., in *Mangena* v. *Wright* ([1909] 2 K.B. at p. 977) applied. E

[As to the defence of fair comment being available only where the matter is comment and not fact, see 20 HALSBURY'S LAWS (2nd Edn.) 488, para. 596; as to the requirement that comment must be fair, see ibid., p. 492, para. 599; and as to the distinction between the defence of fair comment and that of justification, see ibid., 497, 498, para. 610; for cases on the subject, see 32 DIGEST 142, 143, *1738-1742*, 144, *1745-1748* and 149, 150, *1805-1811*.] F

Case referred to:

(1) *Mangena* v. *Wright*, [1909] 2 K.B. 958; 78 L.J.K.B. 879; 100 L.T. 960; 32 Digest 140, *1722*.

Action.

These were consolidated actions by Joseph Grech and Jasper Addis, the plaintiffs, for damages for libel, against Odhams Press Ltd. and the Daily Herald (1929) Ltd., the first defendants being the printers and the second defendants being the publishers of the " Daily Herald ", in respect of words contained in the issue of the " Daily Herald " for Nov. 30, 1955. The words complained of included the following: G

> " All the Dirt . . . with the help of Jasper Addis, an ex-solicitor, one-time man of affairs to George Dawson—and jailed for defrauding him—Grech drew up a petition to the Home Secretary. Into it he put all the dirt he knew, and as a Maltese running West End flats as brothels he thought he knew a great deal." H

By their defences the defendants admitted publication but relied on the full terms of the article. They pleaded to the claim by the plaintiff Grech that the words were a fair and accurate contemporaneous report of proceedings publicly heard before a court exercising judicial authority (viz., a report of a trial held at the Central Criminal Court during the period Nov. 16-Nov. 29, 1955, of three men named Ben Canter, Detective-Sergeant Robertson and Morris Page on a charge of conspiring together and with the plaintiff to pervert the course of public justice) and were privileged, alternatively that in so far as the words consisted of expressions of opinion they were fair and impartial comments on a I

A matter of public interest and were published in good faith and without malice, and, in a further alternative, that the words in their natural and ordinary meaning were true in substance and in fact. To the claim by the plaintiff Addis the defendants similarly pleaded privilege and fair comment and, among other pleas, that so much of the words as alleged that with the help of the plaintiff Addis the plaintiff Grech had drawn up a petition to the Home Secretary into which B he had put all the dirt he knew and that as a Maltese running West End flats as brothels he thought he knew a good deal, was in its natural and ordinary meaning true in substance and in fact.

In the course of the trial at the Central Criminal Court in November, 1955, a witness, the defendant Page at that trial, had said that Grech had told him that the plaintiff Addis had assisted in drawing up the petition. In the course of the C present trial HIS LORDSHIP ruled that the repetition of a statement made by a witness at the trial (i.e., the trial at the Central Criminal Court) did not destroy the plea of fair comment on the ground that the statement turned out to be false. The questions put to the jury at the trial of the consolidated actions and the jury's findings, so far as relevant, were—

(A) In the case of Grech. (1) Are the words complained of defamatory? D Answer—Yes. (2) Are they true? Answer—No. (3) If not true, are they nevertheless a fair and accurate report of some of the proceedings at the trial of Robertson, Canter and Page? Answer—No. (4) Alternatively, are they fair comment on a matter of public interest? Answer—Yes.

(B) In the case of Addis. (1) Are the words complained of defamatory? Answer—Yes. (2) Are they a fair and accurate report of some of the proceedings E at the trial of Robertson, Canter and Page? Answer—No. (3) Alternatively are they fair comment on a matter of public interest? Answer—Yes.

C. G. Allen for the plaintiff, Grech.

S. Crowther for the plaintiff, Addis.

F. H. Lawton, Q.C., and *H. M. Davidson* for the defendants.

F **DONOVAN, J.:** The jury in this case have found that the words complained of were defamatory and untrue: yet nevertheless that they were fair comment on a matter of public interest.

It is argued that those two findings are inconsistent. In my view they are not necessarily so at all. Otherwise, it seems to me that the defence of fair comment would be almost valueless; for, if the jury found that the words were G not defamatory, or being defamatory were true, then the defence of fair comment would not be needed.

The answers to questions (1) and (2)—more particularly question (2)*— proceed, I think, on the hypothesis that the words complained of were, or might be, statements of fact; and the jury are saying, " Well, on that hypothesis they were defamatory and untrue ". Then, in question (4), they come to consider an H alternative hypothesis—namely, that the words were fair comment—and they come to the conclusion, " Yes, they were comment and they were fair ". Therefore, since one has to canvass every possibility in these cases and get answers from the jury to all questions which might conceivably arise, it does not surprise me that one receives answers such as I have received, and which, I repeat, I do not think were inconsistent, as is now claimed.

I It is said also that there is no evidence to support the finding of fair comment. I have made fairly clear my own view whether the words were comment at all, but it is the jury's view which matters and I cannot say that no reasonable person could construe the words as comment. Suppose that the " Daily Herald " had written " Grech drew up a petition to the Home Secretary. Our comment on the petition is that into it Grech put all the dirt he knew ". If the jury read the words actually used in the present case as really coming to the same thing as the words that I have supposed, I could not say that it was unreasonable to do so. Comment, I suppose, is often to be recognised and distinguished from allegations of fact by the use of metaphor; and here, for what it is worth, resort was had to the language of metaphor.

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* Questions (1) and (2), put to the jury in the case of the plaintiff Grech, are set out at letter D, above.

Again, I do not think that I can say that there was no evidence of fairness. Some of the contents of the petition were referred to in court. It is clear from what was said in court that they were comprehensive. I may refer, in this connexion, to two or three questions and answers. The questions were addressed to Superintendent Hannam, and were these:

> "Q.—Have you been the officer in charge of this prosecution? A.—I have been in charge of the investigations. Q.—In charge of the investigations into the matters alleged by Mr. Grech in his two petitions and the accompanying documents? A.—Yes. Q.—Would it be right to say that the matters alleged by Mr. Grech in those documents could be compendiously described as vice in the West End? A.—Yes, I think so, Yes, in the broad sense."

It would be going too far on my part, I think, to say that it is unfair comment, when the petitions are so described, to say that into them somebody put all the dirt he knew, although, as a fact, that was not true. As a comment it might be the same thing as saying that in a defence the pleader raised every possible point of which he could think, or raised every defence that imagination could suggest. That would not be strictly true, but, as a comment, one would not say that it was unfair. I cannot say that the jury were perverse in finding that it was fair comment.

In the case of the plaintiff Addis, I have already ruled, in the course of the case, that the repetition of a statement made by a witness at the trial at the Old Bailey* did not destroy the plea of fair comment on the ground that the statement turned out to be false. It is to be noted that what was actually said in court by the witness Page (who was one of the defendants in the case) was that Grech had told him, Page, that Addis had assisted in the drawing up of the petition. In cross-examination, Grech, who was a witness, said that someone assisted him, but gave no name. Grech said that the only assistance given was to correct his grammar and punctuation. The defendants' rendering of all this in the newspaper was that Addis had helped, which no one had actually said at the trial. This was simply the inference that the paper drew from the evidence. No point has been raised, however, on this interpretation of the evidence. The argument in the present case was that, since the plaintiff Addis had not in fact helped, the plea of fair comment could not be sustained and that the decision in *Mangena* v. *Wright* (1) ([1909] 2 K.B. 958) on this point is inapplicable. The reason suggested is that in that case the instances given by PHILLIMORE, J. (ibid., at p. 977), of statements which were privileged although inaccurate, were errors in a Parliamentary debate, or in the judgment of a judge. A witness's statements in the witness-box are entitled, however, to the self-same privilege: and if comment may be fair although founded on the inaccurate statement of a judge in judicial proceedings, I cannot see in principle why comment may not also be fair although founded on an inaccurate statement, similarly privileged, namely, that of a witness in judicial proceedings.

It was for that reason that I ruled as I did, and now, for the benefit of anybody else who may have to consider this, I have repeated, at slightly greater length, the ruling which I gave.

Judgment for the defendants.

Solicitors: *Granville Jones & Co.* (for the plaintiffs); *Simmons & Simmons* (for the defendants).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

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* I.e., the trial in November, 1955, referred to at p. 557, letter B, ante.

NANA OFORI ATTA II, OMANHENE OF AKYEM ABUAKWA AND ANOTHER *v.* NANA ABU BONSRA II AS ADANSEHENE, AND AS REPRESENTING THE STOOL OF ADANSE, AND ANOTHER.

[PRIVY COUNCIL (Lord Tucker, Lord Denning and Mr. L. M. D. de Silva), July 2, 3, 4, 10, November 6, 1957.]

Privy Council—West Africa—Estoppel—Estoppel by conduct—Dispute as to title to lands—Previous proceedings in respect of same lands—Whether party who knew of, but took no part in, previous proceedings bound by decision in those proceedings.

In 1940 the Odikro of Muronam (hereinafter called "Muronam") sued the Stool of Banka (hereinafter called "Banka") for, inter alia, a declaration of title to certain lands in Ghana. The claim was dismissed. The Stool of Akyem Abuakwa (hereinafter called "Akim Abuakwa"), to whom Muronam was subject, and the Stool of Adanse (hereinafter called "Adansi"), who claimed the land through Banka, were not parties to these proceedings but knew of them. In 1954 Akim Abuakwa and Muronam claimed title to the lands as against Adansi and Banka. Adansi contended that Akim Abuakwa was precluded on the ground, inter alia, of estoppel by conduct, since Akim Abuakwa knowingly stood by whilst the title was fought out by its subordinate in the previous proceedings. It was the recognised thing in this part of West Africa for all persons with the same interest in a land dispute to range themselves on one side or the other, either by applying to be joined as parties or by giving evidence in support of the named party.

Held: Akim Abuakwa was estopped from raising the question of the title to the lands in the present proceedings by having taken no part in the previous proceedings where the matter to be determined was the same.

Dictum of LORD PENZANCE in *Wytcherley* v. *Andrews* ((1871), L.R. 2 P. & D. at p. 328) applied.

Per CURIAM: there was nothing in the principle stated by LORD PENZANCE in *Wytcherley* v. *Andrews* ((1871), L.R. 2 P. & D. at p. 328), which compelled it to be limited to wills and representative actions.

Appeal dismissed.

[As to what conduct will create estoppel, see 15 HALSBURY'S LAWS (3rd Edn.) 235, para. 440; and for cases on the subject, see 21 DIGEST 328, *1221-1230*.]

Cases referred to:

(1) *Re Lart, Wilkinson* v. *Blades*, [1896] 2 Ch. 788; 65 L.J.Ch. 846; 75 L.T. 175; 21 Digest 190, *375*.

(2) *Wytcherley* v. *Andrews*, (1871), L.R. 2 P. & D. 327; 40 L.J.P. & M. 57; 25 L.T. 134; 35 J.P. 552; 21 Digest 148, *116*.

(3) *Farquharson* v. *Seton*, (1828), 5 Russ. 45; 38 E.R. 944; 21 Digest 166, *247*.

(4) *Yode Kwao* v. *Kwasi Coker*, (1931), 1 W.A.C.A. 162.

(5) *Appoh Ababio* v. *Doku Kanga*, (1932), 1 W.A.C.A. 253.

(6) *Akwei* v. *Cofie*, (1952), 14 W.A.C.A. 143.

Appeal.

Appeal by the Stool of Akyem Abuakwa, represented by Nana Ofori Atta II, Omanhene of Akyem Abuakwa (hereinafter called "Akim Abuakwa"), and Bafuor Owusu Amo, Odikro of Muronam (hereinafter called "Muronam"), from a judgment of the West African Court of Appeal (FOSTER SUTTON, P., COUSSEY, J. A., and MANYO-PLANGE, J.), dated July 9, 1952, affirming a judgment of the Supreme Court of the Gold Coast (JACKSON, J.), dated Nov. 12, 1949, dismissing the appellants' claim for a declaration of title to land and an injunction.

The following facts are taken from the judgment of the Board. The appeal was a dispute about the title to certain lands in Ghana, called the Nsuakwate or

Anungya lands (hereinafter called "the lands in dispute"). The respondents A were the Stool of Adanse, represented by Nana Abu Bonsra II as Adansehene (hereinafter called "Adansi"), and the Banka Stool, represented by Braho Ababio II (hereinafter called "Banka"). The Stool of Akim Abuakwa was a paramount stool and claimed that the lands in dispute were under its paramountcy and, in particular, that they were part of the Muronam lands which were subject to it. The respondent Adansi was a neighbouring stool B which claimed that the lands in dispute formed part of the Adansi stool but were under the immediate custody of the Stool of Banka. Adansi claimed that Banka was caretaker for it of the lands in dispute. The question was whether it was open to Akim Abuakwa and Muronam to litigate in this action the title to the lands in dispute. Adansi said that the title to the lands in dispute was fought out sixteen years ago in proceedings between Muronam and Banka, and that C Muronam then failed to establish its title to the lands in dispute. The question was whether that finding precluded the paramount Stool of Akim Abuakwa from now claiming title against Adansi. Adansi claimed that Akim Abuakwa was so precluded on one or other of two grounds: (i) estoppel by res judicata on the ground that Muronam was a party to the previous proceedings and Akim Abuakwa was a privy to them; or, alternatively, (ii) estoppel by D conduct on the ground that Akim Abuakwa knowingly stood by whilst the title was fought out by his subordinate in the previous proceedings and it would be inequitable to allow him to bring up the question again. JACKSON, J., upheld the contention of Adansi on the second ground. The Court of Appeal of West Africa upheld the contention on both grounds. Everything depended on what took place in the previous proceedings which were heard in E the Chief Commissioner's Court of Ashanti in 1940. There were no pleadings but, looking at the opening statements by counsel and at the evidence as well as the judgment, it became clear that, on May 9, 1940, Muronam sued Banka claiming a declaration of title to the self-same lands as were now in dispute, £100 damages for trespass and an injunction to restrain Banka from entering the lands. In the course of the evidence both sides claimed to be the first settlers and both F claimed to have exercised acts of ownership over the lands in dispute. A good deal was said about a decision of Captain Soden in 1907, when he, at talks with some of the chiefs, laid down the boundaries of the Banka lands. That was an executive decision only, not a judicial decision but, after it was given, Banka acknowledged that the lands in dispute belonged to Adansi and said that Banka was caretaker of them for Adansi. On Nov. 19, 1940, the court gave its decision. G The acting assistant chief commissioner dismissed Muronam's claim to the land, but he relied much on the executive decision of Captain Soden. He said:

> "I find there is no evidence on [Muronam's] side to justify the grant of the declaration of title which he seeks, but on the other hand that the question of the ownership of the land has already been decided by validated executive decisions." H

Muronam appealed to the West African Court of Appeal, who, on May 29, 1940, dismissed the appeal, seeing no reason to differ from the decision in the court below that "there is no evidence on [Muronam's] side to justify the grant of the title which he seeks". But they thought it necessary to add that they did not subscribe to the other finding that the matter had been decided by the exécutive I decision. Muronam failed, therefore, on the ground that he had not made out his title to the lands in dispute. Akim Abuakwa and Adansi were not parties to these proceedings, but they undoubtedly knew of them and of the disputes that had been going on for years before. There was ample material to show that whenever Muronam or Banka complained of a trespass, each reported it to his superior, Akim Abuakwa or Adansi, as the case might be, who then took the matter up on behalf of his subordinate.

Under the rules of the court, it would have been open to Akim Abuakwa or Adansi to apply to be joined as parties in those proceedings, but neither of them did so.

Phineas Quass, Q.C., and *G. W. F. Dold* for the appellants.
R. Millner for the first respondent.
The second respondent did not appear and was not represented.

LORD DENNING stated the facts and continued: There is, as between the second appellant ("Muronam") and the second respondent ("Banka"), a clear estoppel by res judicata because they were *parties*; but their Lordships have to say whether there is an estoppel between the first appellant ("Akim Abuakwa") and the first respondent ("Adansi") who were not parties.

The general rule of law undoubtedly is that no person is to be adversely affected by a judgment in an action to which he was not a party, because of the injustice of deciding an issue against him in his absence; but this general rule admits of two exceptions. One exception is that a person who is in privity with the parties, a "privy" as he is called, is bound equally with the parties, in which case he is estopped by res judicata; the other is that a person may have so acted as to preclude himself from challenging the judgment, in which case he is estopped by his conduct. Their Lordships propose in this case to consider first estoppel by conduct.

English law recognises that the conduct of a person may be such that he is estopped from litigating the issue all over again. This conduct sometimes consists of active participation in the previous proceedings as, for instance, when a tenant is sued for trespassing on his neighbour's land and he defends it on the strength of the landlord's title and does so by the direction and authority of the landlord. If the tenant loses the action, the landlord would not be allowed to litigate the title all over again by bringing an action in his own name. On other occasions the conduct consists of taking an actual benefit from the judgment in the previous proceedings, such as happened in *Re Lart, Wilkinson* v. *Blades* (1) ([1896] 2 Ch. 788). Those instances do not, however, cover this case which is not one of active participation in the previous proceedings or actual benefit from them, but of standing by and watching them fought out or at most giving evidence in support of one side or the other. In order to determine this question, the West African Court of Appeal quoted from a principle stated by Lord Penzance in *Wytcherley* v. *Andrews* (2) ((1871), L.R. 2 P. & D. 327 at p. 328). The full passage is in these words:

> "... there is a practice in this court, by which any person having an interest may make himself a party to the suit by intervening; and it was because of the existence of that practice that the judges of the Prerogative Court held, that if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to re-open the case. That principle is founded on justice and common sense, and is acted upon in courts of equity, where, if the persons interested are too numerous to be all made parties to the suit, one or two of the class are allowed to represent them; and if it appears to the court that everything has been done bona fide in the interests of the parties seeking to disturb the arrangement, it will not allow the matter to be re-opened."

Counsel for Akim Abuakwa and Muronam argued before their Lordships that the principle stated by Lord Penzance was confined to wills and representative actions and has never been extended further. No decision, however, was cited to their Lordships which confines the principle to wills and representative actions. Their attention was, indeed, drawn to one case where a like principle was applied to mortgages in somewhat special circumstances: see *Farquharson* v. *Seton* (3) ((1828), 5 Russ. 45). But, assuming without deciding that the English decisions have hitherto been so confined, their Lordships would point out that there is nothing in the principle itself which compels it to be limited to wills and representative actions. The principle, as LORD PENZANCE said, is founded on justice and common sense. It may have been found appropriate in England only in special conditions. There is no reason, however, why in Africa it should not be applied to conditions which are found appropriate for it there, but which have no parallel in England. It seems to be the recognised thing in this part of West Africa for all persons with the same interest in a land dispute to range themselves on one side or the other. Sometimes they apply to be joined as parties. On other occasions they regard the named party as their champion and support him by giving evidence. If he wins, they reap the fruits of victory. If he fails, they fall with him and must take the consequences. It is now twenty-five years ago that the Chief Justice (DEANE, C.J.) drew attention to this way of looking at litigation: see *Yode Kwao* v. *Kwasi Coker* (4) ((1931), 1 W.A.C.A. 162 at p. 167), *Appoh Ababio* v. *Doku Kanga* (5) ((1932), 1 W.A.C.A. 253 at p. 255). It has led the Court of Appeal in West Africa to look for a principle to meet the situation, and they have found it in the principle stated by LORD PENZANCE: see *Akwei* v. *Cofie* (6) ((1952), 14 W.A.C.A. 143).

In the present case, the judges have applied the principle and given reasons which show that it is salutary. In the Supreme Court, JACKSON, J., said:

> " The principle is clear and well-established and to hold otherwise would only tend to encourage perjury and to seek to bolster up a case by adducing evidence which, had it been in existence, would or should have been adduced at the first trial."

In the Court of Appeal, MANYO-PLANGE, J., said:

> " . . . what should the [Akim Abuakwa] have done in the circumstances ? In my view he should have applied to be joined as co-plaintiff. He took no such course. Being cognisant of the proceedings, he was ' content to stand by and see his battle fought by somebody else in the same interest ': the interest is the same, because the matter to be determined in the present action was the same as was determined in the former action namely, Muronam's title to the land in dispute, without which Akim Abuakwa cannot establish an interest in the land. Having stood by and seen the battle fought to a finish to the disadvantage of Muronam, he goes to sleep for nearly five years, then suddenly wakes up and tries to re-open the question of Muronam's title to the land in dispute which had been determined in the former action."

Their Lordships are of opinion that the principle stated by LORD PENZANCE should be applied in this case unless technical legal reasons exist which prevent its application. Their Lordships are unable to find any such reasons and are, therefore, of opinion that the principle was correctly applied. This conclusion renders it unnecessary to decide whether Akim Abuakwa was a "privy" of Muronam so as to be estopped on that ground also as was held by the West African Court of Appeal.

Their Lordships ought to notice one further argument. It was said that both Muronam and Banka were subordinate stools under the one paramount Stool of Akim Abuakwa and that, therefore, there was no call on Akim Abuakwa to intervene, because its title would not be affected. The answer is, however, that, whilst originally they may both have been subject to Akim Abuakwa, since 1907 Banka has never admitted that it was subordinate to Akim Abuakwa. In the proceedings in 1940, Banka said that the land belonged to Adansi and that Banka was only caretaker for Adansi. When Adansi's title was thus asserted, it was, as the Court of Appeal said, " clearly the duty of Akim Abuakwa to intervene " if it had an interest in the land. Akim Abuakwa did not do so and cannot now be allowed to fight the battle all over again.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs.

Appeal dismissed.

Solicitors: *A. L. Bryden & Williams* (for the appellants); *T. L. Wilson & Co.* (for the first respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

ADDISCOMBE GARDEN ESTATES, LTD. AND ANOTHER *v.* CRABBE AND OTHERS.

[COURT OF APPEAL (Jenkins, Parker and Pearce, L.JJ.), November 14, 15, 1957.]

Landlord and Tenant—Recovery of possession—Business premises—Defence of absence of notice under Landlord and Tenant Act, 1954*—Tennis courts and premises let to a tennis club—Club a registered society under Industrial and Provident Societies Act,* 1893*—Whether club carried on business—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2 *c.* 56), *s.* 23 (1), (2).

Licence—Licence to occupy premises—Description of document not conclusive—Terms showing an intention to give exclusive possession and create a tenancy—Whether tenancy created.

A lawn tennis club, which was previously a members' club, was registered as a society under the Industrial and Provident Societies Act, 1893, on Mar. 31, 1950. The objects of the club, as stated in its rules, were " to carry on the business of a lawn tennis club "*. By an agreement dated Apr. 12, 1954, and purporting to be a licence, the owners of certain property, comprising a club house and tennis courts, authorised the club to occupy and enjoy the property for a period of two years from May 1, 1954. The club continued to occupy the premises after the period had expired. In an action by the owners, claiming (as well as other relief) possession of the premises, the club contended that the agreement was not a licence but a tenancy agreement; that the Landlord and Tenant Act, 1954, Part 2, which provides security of tenure for business tenants, applied to the tenancy because the premises comprised in the tenancy were occupied by the club for the purposes of a business carried on by the club, within s. 23 (1)† of the Act: and that, as no notice terminating the tenancy had been served by either party under the Act, the tenancy continued.

Held: (i) the relationship between the parties to the agreement was to be determined by law and not by the description given to the agreement by the parties, and this agreement, on a consideration of all its relevant provisions, and having regard to its showing an intention to confer a right to exclusive possession, created the relationship of landlord and tenant between the parties to it.

Dictum of DENNING, L.J., in *Errington* v. *Errington & Woods* ([1952] 1 All E.R. at p. 154) criticised.

(ii) Part 2 of the Landlord and Tenant Act, 1954, applied to the tenancy because a body of persons, viz., the club or its members, it mattered not which, were carrying on on the premises an " activity " in the shape of a lawn tennis club (see p. 571, letter F, p. 572, letter B, post).

Decision of HILBERY, J. ([1957] 2 All E.R. 205) affirmed.

[**Editorial Note.** In *Cobb* v. *Lane* ([1952] 1 All E.R. 1199) it was held that the fact that exclusive occupation was given by an agreement was no longer enough of itself to negative the relationship of licensor and licensee, and thus to establish that of landlord and tenant. The present case shows that the conferring of a right to exclusive occupation is still a consideration of principal importance (see p. 571, letter B, post), and also provides an example of a detailed analysis of an agreement for occupation, called a licence, with a view to deciding whether in law a tenancy was created thereby. A

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* See [1957] 2 All E.R. at p. 206, letter I.

† The terms of s. 23 (1) and (2) are printed at p. 565, letter D, post.

As to the distinction between a lease and a licence, see 20 HALSBURY'S LAWS (2nd Edn.) 8, 9, para. 5; and for cases on the subject, see 30 DIGEST (Repl.) 527-529, *1649-1670*.

For the Landlord and Tenant Act, 1954, s. 23, see 34 HALSBURY'S STATUTES (2nd Edn.) 408.] B

Cases referred to:

(1) *Facchini* v. *Bryson*, [1952] 1 T.L.R. 1386; 3rd Digest Supp.
(2) *Three D's Co., Ltd.* v. *Barrow*, (Apr. 12, 1949), see 99 L.Jo. 239, 240.
(3) *Errington* v. *Errington & Woods*, [1952] 1 All E.R. 149; [1952] 1 K.B. 290; 3rd Digest Supp. C
(4) *Gorham* (*Contractors*), *Ltd.* v. *Field*, unreported.
(5) *Forman* v. *Rudd*, unreported.
(6) *Cobb* v. *Lane*, [1952] 1 All E.R. 1199; 3rd Digest Supp.
(7) *Customs & Excise Comrs.* v. *Pools Finance* (*1937*), *Ltd.*, [1952] 1 All E.R. 775; 3rd Digest Supp.

Appeal. D

This was an appeal by the plaintiffs, the owners of Shirley Park Hotel, Croydon (hereinafter called " the owners "), from the decision of HILBERY, J., dated Apr. 11, 1957, and reported [1957] 2 All E.R. 205, that their claim for possession of certain premises failed because the defendants, the trustees of the Shirley Park Lawn Tennis Club, Ltd., were tenants of the premises, which were part of the hotel, and as such were entitled to the protection given to " business . . . E tenants " by the Landlord and Tenant Act, 1954, Part 2. The club trustees originally occupied the premises, and used them as a tennis club, by virtue of an agreement dated Apr. 12, 1954, which purported to be a licence for two years from May 1, 1954, but remained in possession of the premises and continued to use them as a tennis club after the end of this term. On May 9, 1956, the owners, who had not served the notice under the Act which was necessary to terminate F the agreement if it constituted a tenancy to which Part 2 applied, issued a writ claiming, inter alia, if necessary and as appropriate, orders for delivery up of possession of the premises.

L. A. Blundell for the owners, the appellants.

C. F. Fletcher-Cooke for the club trustees, the respondents, was not called on.

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JENKINS, L.J.: Down to, I think, the year 1950, the Shirley Park Lawn Tennis Club was carried on as a proprietary club by the plaintiffs (" the owners "). In the year 1950 a new arrangement was made under which the club was to be carried on as a members' club; and it appears that on Mar. 31, 1950, a society was incorporated under the Industrial and Provident Societies Act, 1893, with the name of Shirley Park Lawn Tennis Club, Ltd.; and from that time onwards, H as I understand, the club was in fact carried on as a members' club through the medium of the incorporated body, the organisation being, I gather, of the not unusual character under which there is a corporate body bearing the name of the club, and membership of the club is attained through membership of the corporate body. As part of the re-arrangement made in 1950, a document was entered into dated Mar. 30, 1950, between Addiscombe Garden Estates, Ltd. of I the one part and the trustees of the Shirley Park Lawn Tennis Club of the other part. That document was expressed to be a licence, and it gave the trustees of the club extensive rights of use and enjoyment of the club premises in the grounds of the hotel. The interest (whatever it was) granted by that document came to an end, I gather, in 1953. Counsel for the owners referred us to some of its provisions as casting light on the effect of the document to which I am now about to refer, but for my part I can find really nothing in it which is of any assistance in construing that later document. The document in question was described

A as a licence, and was made on Apr. 12, 1954, between Addiscombe Garden Estates, Ltd. of the one part and the trustees of the club of the other part.

It is vital to the owners' claim for possession of the premises that they should be able to establish that this document described as a licence is in truth a licence, as opposed to a tenancy agreement. If it is a mere licence, then the owners' claim to possession must follow, for the rights granted by it have some time since B expired. If, on the other hand, although described as a licence, it has the effect of a tenancy agreement, then prima facie the owners must be faced, before they can get possession, with the task of compliance with the provisions of the Landlord and Tenant Act, 1954. Counsel for the owners has an alternative basis of claim, which is that even though the document in question created a tenancy as distinct from a mere licence, nevertheless the protection of the Landlord and C Tenant Act, 1954, can avail the club trustees nothing inasmuch as s. 23 of the Act, which describes the premises to which the Act applies, applies only to premises used for business purposes. Section 23 of the Act provides:

> "(1) Subject to the provisions of this Act, this Part of this Act applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the D purposes of a business carried on by him or for those and other purposes.
>
> "(2) In this Part of this Act the expression 'business' includes a trade, profession or employment and includes any activity carried on by a body of persons, whether corporate or unincorporate."

Counsel for the owners says that, even if this was a tenancy, it was not a tenancy E of premises "occupied for the purposes of a business" within the meaning of those provisions.

The first question is whether the so-called licence of Apr. 12, 1954, in fact amounted to a tenancy agreement under which the premises were let to the club trustees. The principles applicable in resolving a question of this sort are, I apprehend, these. It does not necessarily follow that a document described as F a licence is, merely on that account, to be regarded as amounting only to a licence in law. The whole of the document must be looked at; and if, after it has been examined, the right conclusion appears to be that, whatever label may have been attached to it, it in fact conferred and imposed on the grantee in substance the rights and obligations of a tenant, and on the grantor in substance the rights and obligations of a landlord, then it must be given the appropriate G effect, that is to say, it must be treated as a tenancy agreement as distinct from a mere licence.

I should next read the document. It is, as I have said, described as a licence made on Apr. 12, 1954, between Addiscombe Park Estates, Ltd. of the one part, and the club trustees of the other part, and it reads:

> "Whereas the grantors inter alia carry on business as hotel proprietors H and are the owners of the Shirley Park Hotel (hereinafter called 'the hotel') and the gardens and pleasure grounds appurtenant thereto including the premises situate and known as the Shirley Park Lawn Tennis Club whereby it is agreed as follows:
>
> "(1) The grantors hereby license and authorise the grantees to enter upon use and enjoy the following: (a) the club house with the dressing I rooms and other appurtenances (including the groundsman's sheds) enjoyed therewith in Shirley Park Addiscombe Road Croydon aforesaid (b) the tennis courts (ten hard courts three grass courts and the practice court) as now laid down in Shirley Park Croydon aforesaid (c) the use of all articles of household use and ornament at present in and upon the said club house and also the use of all nets machines tools and equipment in and about the said premises and now used for the equipment and maintenance of the said club house and tennis courts all of which are hereinafter referred to as the said chattels and are set forth in Stewart Klitz's inventory of Apr. 20, 1950.

" (2) This licence shall extend for the fixed period of two years from May 1, 1954.

" (3) The grantees shall have the use and enjoyment of the said premises in consideration of their paying to the hotel court fees amounting to £37 10s. per month in advance on the first day of each and every month the first payment to become due and payable on May 1, 1954.

" (4) The grantees jointly and severally agree with the grantors as follows: (i) to make the said monthly payment of court fees to the hotel at the times and in the manner aforesaid (ii) to pay for all gas and electricity supplied to and/or consumed in or upon the said premises including all standing charges (iii) to repair and maintain the said club house with the dressing rooms the said hard and grass tennis courts and the practice court in good tenantable repair and condition (fair wear and tear excepted) and to render the same up upon the expiration or sooner determination of the licence in such good tenantable repair and condition and to repair and maintain the said chattels (fair wear and tear excepted) and to replace or renew at the end of the licence any of the same as may have become destroyed or rendered defective otherwise than by fair wear and tear (iv) to manage and manure the said hard and grass courts in a good and husbandlike manner so as to keep the same constantly in good service and playable condition (v) not without the grantors' previously written consent to cut down or injure any plants trees bushes or hedges or remove from the said property any soil clay sand or other materials and not to make any excavations thereon except for the purpose of maintaining the said hard and grass tennis courts and the practice court in accordance with the agreement and conditions hereinbefore contained (vi) not to erect any building or other structures upon the said property except such as shall be approved by the grantors (vii) to use the said premises as a private lawn tennis club and club house for the convenience of members of the club their guests and their staff only but this clause shall not prevent the club from holding tournaments exhibition matches and social functions on the said premises (viii) not to allow any persons except members guests and servants of the club to use the said premises for any purpose but this clause shall not prevent the club inviting or allowing a reasonable number of members of the general public to enter thereon for the purpose of attending functions specially organised for those interested in the game of lawn tennis (ix) that the grantees will cause the chairman for the time being of the grantors or his nominee to be an ex-officio member of the general committee of the club and that as such he or his nominee shall be entitled to receive notice of and attend all meetings of the general committee (x) that the grantees will cause residents of the Shirley Park Hotel aforesaid who shall make application to be elected honorary members of the club save nevertheless that the club may charge them court fees or house fees for the use and enjoyment of the said premises (xi) to permit the grantors and their agents at all reasonable times to enter the said premises to inspect the condition thereof and for all other reasonable purposes (xii) to deliver up the said premises at the termination of this licence in a condition consistent with the foregoing provisions (xiii) during the continuance of this licence to insure against loss or damage by fire in the joint names of the grantors and the grantees the said club house the said chattels and any other items of an insurable nature in or about the said premises to their full insurable value in some insurance office to be approved of by the grantors and forthwith to rebuild or reinstate any of the said buildings or said chattels if and so far as the same may be destroyed or damaged by fire.

" (5) The grantors agree with the grantees as follows: (i) to pay all general rates and taxes including water rates and charges for water arising

> in respect of the said premises Provided however that if the water rates and charges for water exceed the sum of £24 per annum the grantees shall be liable for the excess of water rates and charges for water over that figure (ii) that the grantees making the said payment of court fees and observing the stipulations on their part herein contained shall during the licence quietly enjoy the said premises without interruption by the grantors or any person claiming under or in trust for them.
>
> " (6) It is mutually agreed as follows: (i) that the grantors may re-enter and determine the licence in the event of non-payment of any of the said payments of court fees for fourteen days (whether formally demanded or not) or on breach of any of the grantees' stipulations (ii) in the event of the said premises becoming separately assessed for rating purposes then the grantors shall have the right forthwith to determine this licence."

That is the whole of the document. First, one must observe that it is described by the parties as a licence. Secondly, one must observe that the draftsman has studiously and successfully avoided the use either of the word " landlord " or the word " tenant " throughout the document. The nearest to the use of the word "tenant" is the reference to " tenantable repair " in cl. 4, sub-cl. (iii); so that if the question depended on the label attached to the document, one would be constrained to say that this, in accordance with its label, was a licence. If, however, it is right (as I have no doubt it is) to look at the substance of the matter, I think that a different conclusion inevitably ensues.

I might mention, as regards the character of the premises, that we have been supplied with an agreed plan which shows that, although the whole of the premises are not completely enclosed, as it were, in a ring fence, the greater part of them appear to occupy a particular enclave in the extensive grounds of the Shirley Park Hotel, though there are two outlying rectangular portions, one, I think, consisting of tennis courts, and the other containing some other appurtenances. There is nothing in the character of the premises as shown on the plan to make them an unfit subject of a tenancy agreement as distinct from a licence.

Now looking at the substance of the matter, what do the grantees get? By cl. 1 they are licensed and authorised " to enter upon use and enjoy " the items mentioned; and it seems to me that those words, taken together, are apt to give to the tenant something in the nature of an interest in the land. In cl. 2 provision is made for the licence, as it is called, extending for the fixed period of two years from May 1, 1954. There is thus a term certain which would be appropriate to the grant of a tenancy. Then in cl. 3 it is provided that " the grantees shall have the use and enjoyment of the said premises in consideration " of a payment. The payment is described as a payment of " court fees "; it is fixed at the sum of £37 10s. per month, and it has to be paid in advance on the first day of each month. In all but name, that appears to me to be a rent or reddendum in consideration of the right to " enter upon use and enjoy " the premises which is granted by cl. 1. So far, it seems to me that the rights expressed to be conferred on the grantees are, in substance, the rights of a tenant as distinct from the rights of a mere licensee; and there is the correlative obligation of making monthly payments which, although not so called, are in fact, as it seems to me, in the nature of rent. Then there are the various agreements by the grantees with the grantors in cl. 4, beginning with the agreement to make the monthly payment of the court fees very much like the agreement to pay the rent which is always to be found in a tenancy agreement. There is a significant provision in cl. 4 (iii) under which the grantees agree "to repair and maintain the said club house ". It seems inappropriate that a mere licensee should be saddled with an obligation to repair. Then one finds as to repairs that the items mentioned are to be maintained " in good tenantable repair ", an expression to which I have already called attention. That, one cannot help thinking, to some extent supports the view that the grantees are tenants, although I do not attach very much weight to it, as I am impressed by the argument of counsel for the owners that "good tenantable repair" is a phrase which might have been adopted as giving a standard of repair to serve as the measure of the grantees' repairing obligation, but, for what it is worth, that is, I think, if anything, an indication in favour of tenancy rather than licence. Then under cl. 4 (iv) there is the obligation to maintain the tennis courts. In cl. 4 (v) there is a provision which, I think, is not without significance. That is the provision under which the grantees shall not

> "without the grantors' previously written consent to cut down or injure any plants trees bushes or hedges or remove from the said property any soil clay sand or other materials and not make any excavations thereon except for the purpose of maintaining the [tennis courts] in accordance with the agreement and conditions hereinbefore contained."

The significance of that is that it should have been thought necessary expressly to prohibit the grantees from doing certain things which quite plainly, if they were mere licensees, they would have no right or power to do. What business could a licensee have to cut down or injure plants, trees, bushes or hedges, or to do any other of these things, including the removal of "soil clay sand or other materials"? In a similar sense one may note the provision in cl. 4 (vi)—"not to erect any building or other structures upon the said property except such as shall be approved by the grantors". Then there is the provision which counsel for the owners called in aid which is the restrictive provision in cl. 4 (vii):

> "to use the said premises as a private lawn tennis club and club house for the convenience of members of the club their guests and their staff only . . ."

There is cl. 4 (viii):

> "not to allow any persons except members guests and servants of the club to use the said premises for any purpose but this clause shall not prevent the club inviting or allowing a reasonable number of members of the general public to enter thereon for the purpose of attending functions specially organised for those interested in the game of lawn tennis."

In my view, those provisions afford no real assistance to counsel for the owners, for they are just what one would expect to find in a tenancy agreement of premises intended for use as a lawn tennis club. I do not think that anything turns on cl. 4 (ix) which is the one by which the grantees were to "cause the chairman for the time being of the grantors or his nominee to be an ex-officio member of the general committee". That does not seem to me to carry the matter further one way or the other, though it appears to be a provision to which it was difficult to give effect having regard to the rules of the incorporated body, Shirley Park Lawn Tennis Club, Ltd. Clause 4 (x), under which residents of the hotel who should make application were to be elected honorary members of the club, in my view, is simply a privilege reserved to the grantors, and I do not think that it really throws any light on the character of the grantees' interest.

The next provision of importance is the agreement to permit

> "the grantors and their agents at all reasonable times to enter the said premises to inspect the condition thereof and for all other reasonable purposes."

The importance of that is that it shows that the right to occupy the premises conferred on the grantees was intended as an exclusive right of occupation, in that it was thought necessary to give a special and express power to the grantors to enter. The exclusive character of the occupation granted by a document such as this has always been regarded, if not as a decisive indication, at all events as a very important indication to the effect that a tenancy, as distinct from a licence, is the real subject-matter of the document.

In cl. 4 (xii) there is provision

> "to deliver up the said premises at the termination of this licence in a condition consistent with the foregoing provisions."

"To deliver up" seems to me to be an expression more appropriate to a tenant with an interest in the land than to a person who has a mere contractual right to be on the land; it is an expression universally used, I think, in all tenancy agreements and leases. The provision as to insurance points in the same direction; it would, I think, be curious if a mere licensee, with no interest in the premises, was made liable for insurance. Then in cl. 5 (ii) there is what is practically a common form covenant for quiet enjoyment such as is found in every tenancy agreement or lease; and it seems to me that this clause points strongly in the direction of a tenancy agreement. In cl. 6 (i) there is the provision:

> "that the grantors may re-enter and determine the licence in the event of non-payment of any of the said payments of court fees for fourteen days (whether formally demanded or not) or on breach of any of the grantees' stipulations."

Those references to re-entry and "non-payment of any of the said payments of court fees for fourteen days (whether formally demanded or not)" are provisions wholly appropriate to a tenancy agreement; and I should have thought that a reference to re-entry was really inappropriate to the case of a licence: the conception of re-entry is the resumption of possession by the landlord, and the determination of the interest of the tenant.

Taking all those considerations together, I am of opinion that the learned judge was perfectly right in holding, as he did, that this was a tenancy. He was particularly impressed by the express provision entitling the grantors to enter the premises "to inspect the condition thereof and for all other reasonable purposes"; and he held that to be an indication that the right to occupy the premises granted to the grantees was intended to be an exclusive right of occupation, that circumstance, as I have said, being at lowest a strong circumstance in favour of the view that there is a tenancy as opposed to a licence. That is by no means the only ground for the judge's decision. It is amply justified also by the other matters to which I have referred. The learned judge cited a useful authority in the shape of the decision of this court in *Facchini* v. *Bryson* (1) ([1952] 1 T.L.R. 1386). The headnote reads:

> "Where an employer let his employee into occupation of a house, in consequence of his employment, at a weekly sum payable by him and the occupation had all the features of a service tenancy, the agreement was so construed, notwithstanding a clause that 'nothing in this agreement shall be construed to create a tenancy'; the agreement must be construed as a whole, and their relationship was determined by the law and not by the label which they chose to put on it. The agreement accordingly operated as a tenancy agreement, not a mere licence to occupy, and the employer was not entitled to an order for possession except in accordance with the provisions of the Rent Restriction Acts."

At the beginning of his judgment SOMERVELL, L.J., said (ibid., at p. 1387):

> "This appeal turns on the construction of an agreement, and it involves one of those problems which parties sometimes set the court when they use words in some of the paragraphs of an agreement indicating one relationship, and use words in other paragraphs of the agreement which would indicate another. The court has to construe the agreement as a whole. The question is whether the document here is a lease or a licence to occupy the premises."

The learned lord justice then referred to the decision in *Three D's Co., Ltd.* v. *Barrow* (2) (Apr. 12, 1949, see 99 L.Jo. 239) and said ([1952] 1 T.L.R. at p. 1388):

> "I agree with Mr. Megarry that that agreement was not this agreement,

> A and that there are material differences between the two, but what I said about the similar clause in that agreement is, I think, applicable here. I said: ' That provision is one which is only appropriate and relevant if the document is giving to the party who is going to live in the house exclusive possession. I should have thought that it was quite unnecessary if a servant was merely occupying the house that the landlord should stipulate that he should be allowed to go in and see the condition of it '." B

The reference there was to a provision comparable to the provision in the present case in cl. 4 (xi) as to permitting the grantors to enter for certain purposes. Then, continuing his reference to *Three D's Co., Ltd.* v. *Barrow* (2), SOMERVELL, L.J., went on ([1952] 1 T.L.R. at p. 1389):

> C "I think that that is equally applicable in the present dispute whether this was a lease or a licence. Mr. Megarry asked us to treat it like a declaratory section in an Act of Parliament, that is to say, merely declaring a right and not giving one. I do not think that the words are apt to be considered in that way, but are apt in the sense in which I thought that they were apt in the other case, namely, they assume a right to keep the landlord out, if I may so put it, and state the circumstances and conditions on which he may enter." D

Then, after referring to a prohibition of under-letting, which has no counterpart here, SOMERVELL, L.J., proceeded (ibid.):

> "Those seem to me to be the main and operative clauses in which one would seek to find what the rights as between the two parties are. It is true that the clause with reference to the payment does not use the word ' rent ', and that the earlier part of cl. 2 refers to occupation and use. But, E taking the agreement as a whole for the moment, apart from the last two lines of cl. 2, I would have come to the conclusion that this was a lease."

DENNING, L.J., agreed, and said (ibid., at p. 1389):

> F "We have had many cases lately where an occupier has been held to be a licensee and not a tenant. In addition to those which I mentioned in *Errington* v. *Errington & Woods* (3) ([1952] 1 All E.R. 149) we have recently had three more, *Gorham (Contractors), Ltd.* v. *Field* (4) (unreported), *Forman* v. *Rudd* (5) (unreported), and *Cobb* v. *Lane* (6) ([1952] 1 All E.R. 1199). In all the cases where an occupier has been held to be a licensee there has been G something in the circumstances, such as a family arrangement, an act of friendship or generosity, or such like, to negative any intention to create a tenancy. In such circumstances it would be obviously unjust to saddle the owner with a tenancy, with all the momentous consequences that that entails nowadays, when there was no intention to create a tenancy at all. In the present case, however, there are no special circumstances. It is a H simple case where the employer let a man into occupation of a house in consequence of his employment at a weekly sum payable by him. The occupation has all the features of a service tenancy, and the parties cannot by the mere words of their contract turn it into something else. Their relationship is determined by the law and not by the label which they choose to put on it [and he cites *Customs & Excise Comrs.* v. *Pools Finance (1937), Ltd.* (7) ([1952] 1 All E.R. 775).] It is not necessary to go so far as to find the I document a sham. It is simply a matter of finding the true relationship of the parties. It is most important that we should adhere to this principle, or else we might find all landlords granting licences and not tenancies, and we should make a hole in the Rent Acts through which could be driven—I will not in these days say a coach and four—but an articulated vehicle."

The present case, of course, has nothing to do with the Rent Acts, but the important statement of principle is that the relationship is determined by the law, and not by the label which parties choose to put on it, and that it is not

A necessary to go so far as to find the document a sham. It is simply a matter of ascertaining the true relationship of the parties.

We were also referred by counsel for the owners to *Errington* v. *Errington & Woods* (3) ([1952] 1 All E.R. 149) mentioned by DENNING, L.J., in his judgment. In that case it was held that in very unusual circumstances a lady was a licensee, and entitled to remain in occupation of premises so long as she paid the instal- B ments on a certain mortgage; and in the course of his judgment, DENNING, L.J., said (ibid., at p. 154): "The test of exclusive possession is by no means decisive". I think that wide statement must be treated as qualified by his observations in *Facchini* v. *Bryson* (1) ([1952] 1 T.L.R. at p. 1389); and it seems to me that, save in exceptional cases of the kind mentioned by DENNING, L.J., in that case, the law remains that the fact of exclusive possession, if not decisive against the C view that there is a mere licence, as distinct from a tenancy, is at all events a consideration of the first importance. In the present case there is not only the indication afforded by the provision which shows that exclusive occupation was intended, but there are all the various other matters which I have mentioned, which appear to me to show that the actual interest taken by the grantees under the document was the interest of tenants, and not that of mere licensees.

D For these reasons, I hold that the learned judge came to a perfectly right conclusion when he decided that this must be treated as a tenancy agreement.

There remains the second branch of counsel for the owners' argument, which is that, although this may be a tenancy agreement, the tenancy is not one to which the Landlord and Tenant Act, 1954, applies, because the premises were not "occupied for the purposes of a business". Mr. Blundell (counsel for the E owners) has said all that possibly could be said in favour of the view that the premises here in question were not occupied for the purposes of a business carried on by the tenants. In my view, however, the plain language of the Act is too strong for him. [HIS LORDSHIP read again s. 23 (2) of the Landlord and Tenant Act, 1954*.] Here the premises were used for the activities of a body of persons called the Shirley Park Lawn Tennis Club, and activities were there carried on, F whether one should look at the individual members, or at the incorporated body. "A body of persons, whether corporate or unincorporate"—it matters not which—was carrying on on the premises an activity in the shape of a lawn tennis club. The premises were, therefore, in my judgment, the subject of a tenancy to which the Landlord and Tenant Act, 1954, applies.

Accordingly, for the reasons that I have endeavoured to express, I think that G this appeal fails, and should be dismissed.

PARKER, L.J.: I agree, and there is very little that I can usefully add. The position, as I see it, is that though the agreement in question is labelled a licence, almost all, if not all the clauses in it are appropriate, and more appropriate, to a tenancy agreement. Not only that, but three†, in my view, are completely inconsistent with the document being a licence, those being cl. 4 sub-cl. (xi), H permitting the grantors to enter the premises and inspect, cl. 5 sub-cl. (ii), the ordinary covenant for quiet enjoyment, viz., enjoyment of the premises, and not of any rights granted, and cl. 6 sub-cl. (i), the right to enter and determine on non-payment of fees, whether formally demanded or not.

Counsel for the owners, who has said everything that can be said on behalf of the owners, draws our attention to the plan of the premises in question; and he I stresses that the subject-matter here is not the ordinary private dwelling-house, which has been considered so often in connexion with the Rent Acts, but parcels of land not in a ring fence, some of them separated from each other, and all in and close to the hotel. It seems to me, however (and indeed counsel admits this), that all the parcels referred to in the agreement, and set out on the plan are precise enough to constitute parcels to a tenancy agreement; and accordingly

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* Section 23 is printed at p. 565, letter D, ante.

† See pp. 566, 567, ante.

I do not think that the nature of the subject-matter affects the plain intention as expressed in the agreement itself. Nor do I think, for the reasons given by my Lord, that counsel can derive any comfort from *Errington* v. *Errington & Woods* (3) ([1952] 1 All E.R. 149). A

As regards the second part of the case, it appears to me that it is quite impossible to argue that there is any real limitation on the words " any activity " in s. 23 (2) of the Landlord and Tenant Act, 1954. Those words must be read as enlarging the scope of what goes before, otherwise the sub-section would have read: " the expression ' business ' includes a trade, profession or employment carried on by any person ", thus covering " individuals " in the singular and plural, and " persons whether corporate or unincorporate ". " Any activity " means what it says, and this registered society, through their trustees, were carrying on an " activity ". B C

For those reasons, I would dismiss the appeal.

PEARCE, L.J.: I agree.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Summer & Co.* (for the owners, the appellants); *Currey & Co.* (for the club trustees, the respondents). D

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

CANADIAN PACIFIC STEAMSHIPS, LTD. *v.* BRYERS.

[HOUSE OF LORDS (Viscount Kilmuir, L.C., Viscount Simonds, Lord Morton of Henryton, Lord Tucker and Lord Keith of Avonholm), October 2, 3, 7, 8, November 25, 1957.] E

Dock—Dry dock—Ship under repair—Employee of shipowners injured—Several repairers engaged on work on ship at same time—Liability of shipowners—Notional occupier—Civil right of action where injury to person employed—Shipbuilding Regulations, 1931 (*S.R. & O.* 1931 *No.* 133), *preamble, reg.* 10—*Factories Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 67), *s.* 60, *as amended by Factories Act,* 1948 (11 *&* 12 *Geo.* 6 *c.* 55), *s.* 12 (1), *Sch.* 1. F

Statutory Instrument—Subsequent legislation replacing enactment under which instrument made—Subsequent legislation amended—Statutory instrument not modified in terms—Whether class of persons intended to be protected by instrument ascertained by reference to terms of repealed or subsisting legislation—Shipbuilding Regulations, 1931 (*S.R. & O.* 1931 *No.* 133), *preamble, reg.* 10—*Factories Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 67), *s.* 60, *as amended by Factories Act,* 1948 (11 *&* 12 *Geo.* 6 *c.* 55), *s.* 12 (1), *Sch.* 1. G

The respondent, a yeoman carpenter, was employed by the appellants as a member of the crew of a ship which they owned. The ship was in public dry dock undergoing general repairs by a firm of ship repairers and specialist repairs by some seventeen other contractors under direct contract with the shipowners. Apart from the work of repair, the shipowners retained the general control of the ship. On Dec. 8, 1954, the respondent was doing normal maintenance work on the ship. He was instructed by the shipowners to clear the scuppers on " F " deck, a part of the ship where no repairs were being carried out. Near the foot of the ladder leading down to " F " deck was a well from which a ladder led down to the bilges. The well was unprotected. While the respondent was near the edge of the well, he slipped and fell into it and sustained injuries. In an action against the shipowners for damages for breach of statutory duty under reg. 10* of the Shipbuilding Regulations, 1931, by not securely protecting the well, the respondent contended that the duty of providing this protection was imposed on the shipowners by para. (b) following the proviso to the head " Duties "† H I

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* The relevant terms of reg. 10 are set out at p. 575, letter C, post.

† The terms of the proviso to the head " Duties " are set out at p. 575, letters F to I, post.

A in the regulations, and that he was within the category of persons on whom the regulations conferred a civil right of action, although he was not employed on the repair of the ship.

Held: the shipowners were liable for breach of statutory duty under the Shipbuilding Regulations, 1931, reg. 10, for the following reasons—

(i) paragraph (b) following the proviso to the head " Duties " in the regulations B imposed on the shipowners the duty of complying with reg. 10, since the only condition precedent to para. (b) applying was that the ship was being repaired in public dry dock, which was the fact, and the further fact that there was no notional occupier for the purposes of the initial words of the proviso did not render para. (b) inapplicable (see p. 576, letter I, p. 581, letter C, and p. 583, letter B, post).

C (ii) the persons entitled to the benefit of reg. 10 (construing the regulations in accordance with (iii) below), when a ship was being repaired in public dry dock, included a member of the crew, such as the respondent, who was regularly employed on the ship and thus was in effect a member of the maintenance staff of the notional factory constituted by the ship.

Dicta of Lord Goddard, C.J., and of Streatfeild, J., in *Massey-Harris-* D *Ferguson (Manufacturing), Ltd.* v. *Piper* ([1956] 2 All E.R. at pp. 725, 727) approved.

(iii) the class of persons benefited by the Shipbuilding Regulations, 1931, was to be determined on their true construction in the light of the statutory power under which they had been made (viz., Factory and Workshop Act, 1901, s. 79, subsequently repealed), and was not extended (in the absence of E any modification of the regulations) merely by reason of the vires conferred by s. 60 of the Factories Act, 1937 (for the purposes of which the regulations continued by virtue of ibid., s. 159 (1)) being wider than that of s. 79 of the Act of 1901 (see p. 578, letters F and G, and p. 581, letter F, post).

Decision of the Court of Appeal (sub nom. *Bryers* v. *Canadian Pacific Steamships, Ltd.*, [1956] 3 All E.R. 560) affirmed.

F [As to special regulations for safety and health in shipbuilding, see 17 Halsbury's Laws (3rd Edn.) 131-133, para. 209; and for cases on the subject, see 24 Digest 919, *135-138*.

As to the continuance of subordinate legislation by virtue of the Factories Act, 1937, see 17 Halsbury's Laws (3rd Edn.) 4, 5, para. 1.

For the Factories Act, 1937, s. 60, as amended, see 9 Halsbury's Statutes G (2nd Edn.) 1046.

For the Shipbuilding Regulations, 1931, preamble " Duties ", reg. 10, see 8 Halsbury's Statutory Instruments 142, 144.]

Cases referred to:

(1) *Wilkinson* v. *Rea, Ltd.*, [1941] 2 All E.R. 50; [1941] 1 K.B. 688; 110 H L.J.K.B. 389; 165 L.T. 156; 2nd Digest Supp.

(2) *Donovan* v. *Cammell Laird & Co., Ltd.*, [1949] 2 All E.R. 82; 2nd Digest Supp.

(3) *Mackey* v. *Monks (Preston)*, [1918] A.C. 59; 87 L.J.P.C. 28; 118 L.T. 65; 82 J.P. 105; 24 Digest 919, *135*.

(4) *Darroch (or O'Brien)* v. *Enrico Arbib & Co.*, 1907 S.C. 975; 15 S.L.T. I 78; 36 Digest (Repl.) 65, *336*.

(5) *Manchester Ship Canal Co.* v. *Director of Public Prosecutions*, [1930] 1 K.B. 547; 99 L.J.K.B. 230; 143 L.T. 113; Digest Supp.

(6) *Hawkins* v. *Thames Stevedore Co., Ltd., & Union Cold Storage Co., Ltd.*, [1936] 2 All E.R. 472; Digest Supp.

(7) *Harvey* v. *Royal Mail Lines, Ltd.*, (1941), 65 T.L.R. 286n.; 2nd Digest Supp.

(8) *Kininmonth* v. *William France Fenwick & Co., Ltd.*, (1949), 65 T.L.R. 285; 2nd Digest Supp.

(9) *Hartley* v. *Mayoh & Co.*, [1954] 1 All E.R. 375; [1954] 1 Q.B. 383; 118 J.P. 178; 3rd Digest Supp.
(10) *Wingrove* v. *Prestige & Co., Ltd.*, [1954] 1 All E.R. 576; 3rd Digest Supp.
(11) *Stanton Ironworks Co., Ltd.* v. *Skipper*, [1955] 3 All E.R. 544; [1956] 1 Q.B. 255; 3rd Digest Supp.
(12) *Massey-Harris-Ferguson (Manufacturing), Ltd.* v. *Piper*, [1956] 2 All E.R. 722; [1956] 2 Q.B. 396; 3rd Digest Supp.

Appeal.

Appeal by shipowners, Canadian Pacific Steamships, Ltd., from an order of the Court of Appeal (Singleton, Jenkins and Parker, L.JJ.), dated Oct. 12, 1956, and reported sub nom. *Bryers* v. *Canadian Pacific Steamships, Ltd.*, [1956] 3 All E.R. 560, affirming an order of Diplock, J., dated June 27, 1956, and reported [1956] 3 All E.R. 242, that the appellants were liable in damages for breach of the Shipbuilding Regulations, 1931, to the respondent, James Bryers, a member of the crew, who fell through an uncovered hatchway in the appellants' ship while it was under repair by several repairers in public dry dock. The facts appear in the opinion of Viscount Kilmuir, L.C.

J. S. Watson, Q.C., and *Melville Kennan* for the appellants.
Rose Heilbron, Q.C., and *H. L. Lachs* for the respondent.

The House took time for consideration.

Nov. 25. The following opinions were read.

VISCOUNT KILMUIR, L.C.: My Lords, in this case, the facts as found by Diplock, J., are as follows: The respondent at all material times was employed as a yeoman carpenter by the present appellants (who were the original defendants) on board their ship the Empress of Scotland. The scuppers and bilge openings of the ship had been covered while a cargo of grain was carried on the voyage prior to the accident and it was the respondent's task, in the ordinary course of his employment as a carpenter, to remove the covering cement from the scuppers and bilge openings. He had performed this work in most of the holds of the ship while she was lying for the purpose of discharge in a wet dock in the port of Liverpool but at the time the respondent met with his accident the ship had been moved into a public dry dock (owned by the Mersey Docks and Harbour Board) under a contract with the board for her annual survey and overhaul. The appellants had instructed Harland & Wolff, Ltd., ship repairers, to carry out general repairs and, in addition, had instructed some seventeen other contractors to execute specialist repairs on the ship under direct contract with the appellants. On the morning of Dec. 8, 1954, after the ship had gone into the public dry dock, the respondent's task took him to No. 5 hatchway on "F" deck, a part of the ship at which no repairs were being carried on. A ship's ladder led down from "E" deck to "F" deck and there was a well a few feet from the foot of the ladder. Another vertical ladder led from the top of the well down to the bilges. In order to get down to the bilges it was necessary to approach to the edge of the well and climb on to the ladder. The respondent had done this many times in the course of his thirteen years' service at sea. As the hatch covers of "E" deck were on at the time, it was necessary for the respondent, on his way to "F" deck, to have a cover lifted so that he could climb down the ladder to "F" deck. There was no permanent lighting on "F" deck, and the respondent was expecting to find a light cluster there. With the assistance of an engineer working on "E" deck, the respondent lifted the cover in the vicinity of the ladder and, after borrowing the engineer's torch, went below. He walked to the edge of the well and shone the torch down to find out whether there was a light cluster on the ceiling of the well. He had no difficulty in seeing round about him on "F" deck and he did not complain of lack of light. Nevertheless, while he was near the edge of the well, he slipped and fell into the well and sustained injuries. His complaint was that the well should have had stanchions and life-lines round it, which he could have gripped after slipping and so saved himself.

On these facts the learned judge found that, at the material time, the ship was undergoing work of repair in a public dry dock; that the control of the ship, apart from the work of repair, remained with the appellants as the shipowners and that, although it was impossible to find any person who had contracted with the appellants to execute the work of repair so as to be deemed to be the occupier for the purpose of Parts 1 to 8 of the Shipbuilding Regulations, 1931, it was the duty of the appellants to provide the protection specified in reg. 10 in so far as the well in " F " deck was concerned; that the appellants had failed securely to cover the well and were in breach of the said reg. 10, the relevant part of which reads as follows:

> " All openings in decks and tank tops shall be securely protected. Such protection shall be maintained in position and when necessarily removed in the course of work shall be replaced as soon as practicable."

The judge also found that the respondent fell into the category of persons on whom the regulation conferred a civil right of action in respect of a breach; that the appellants, their servants or agents, had not been guilty of negligence at common law; that the respondent had been guilty of negligence contributing to his injuries to the extent of one half; that the respondent would have been entitled to the sum of £393 6s. 6d. if he had not been guilty of contributory negligence. On these findings the learned judge gave judgment for the respondent for £196 13s. 3d. and costs.

The relevant parts of the Shipbuilding Regulations in my opinion are:—

A. The heading:

> " In pursuance of s. 79 of the Factory and Workshop Act, 1901, I hereby make the following regulations and direct that they shall apply to the construction and repair of ships in shipbuilding yards."

B. The part headed " Duties ":

> " Duties "
>
> " It shall be the duty of the occupier to comply with Parts 1 to 8 of these regulations.
>
> " Provided that, when a ship is being repaired in public dry dock, the person who contracts with the owner of the ship or with his agent to execute the work of repair, shall be deemed to be the occupier for the purposes of Parts 1 to 8 and it shall be his duty to comply with the said parts, except as follows:—
>
> " (a) It shall be the duty of the person having the general management or control of the public dry dock to comply with regs. 2 (b) and (c) and 11 (c) so far as they concern those gangways, uprights, thwarts and planks provided at the dock by such person; with reg. 42 (b) so far as it concerns the lighting of the quay round the dock; and with reg. 46.
>
> " (b) Where the control of the ship apart from the work of repair remains with the shipowner, it shall be the duty of the shipowner, master, or officer in charge, to provide the protection specified in reg. 10 in so far as concerns those hatches or openings which are not required to be used for the purposes of the repairs, but if such protection be removed by any person or persons in the employment of the occupier or at his or their request, the occupier shall be responsible for its replacement as soon as practicable.
>
> " (c) Where the shipowner provides the lighting on board the ship it shall be the duty of the shipowner, master, or officer in charge, to comply with reg. 42 (b) so far as regards the lighting on the ship which he has undertaken to provide.
>
> " It shall be the duty of all persons employed to comply with Part 9 of these regulations."

The appellants appealed and in the Court of Appeal made two submissions A which are relevant to the problem now before the House namely:—A. That, on the true construction of the part of the regulations headed " Duties ", considered in relation to the circumstances of the present case, the appellants were not at the material time under any duty to observe reg. 10. B. That the respondent was not a person who was entitled to sue for injury sustained by him by reason of a breach of these regulations. B

On the first point, SINGLETON, L.J., and JENKINS, L.J., held that the only condition to be satisfied in order to bring into operation the proviso and the exceptions contained in the part of the Shipbuilding Regulations, 1931, headed " Duties " was that the ship should be undergoing repair in a public dry dock; that the exceptions (a), (b) and (c) were in terms substantive provisions, each enjoining compliance with some specified regulation or regulations; and that, C as the ship was undergoing repair in a public dry dock, exception (b) applied and the appellants were under a duty to provide the protection specified in reg. 10. The whole court held that they were bound on this point by the decision of the Court of Appeal in *Wilkinson* v. *Rea, Ltd.* (1) ([1941] 2 All E.R. 50), in which this point was not argued. PARKER, L.J., indicated ([1956] 3 All E.R. at p. 574) that, apart from this authority, he would have accepted the argument D now advanced by the appellants. He thought that, read literally, the exceptions are, and could only be, exceptions from the duty imposed by the preceding words on someone who is not, but who is deemed to be, the occupier of the premises, and that if, as in the present case, there was no such person, there was nothing to except.

On the second submission, the court unanimously held that the Shipbuilding E Regulations, 1931, were intended to protect the people working within the factory; that the public dry dock constituted the factory at the material time and that the respondent, being employed within the factory in his normal and regular work, came within the category of persons for whose protection the regulations were intended.

As a result the appellants' appeal was dismissed (as was a cross-appeal on F which I need say nothing further). The Court of Appeal refused to grant leave to appeal to this House but the appellants petitioned the House for such leave which was granted.

At your Lordships' Bar, counsel for the appellants made the same two submissions as in the Court of Appeal. I have endeavoured to summarize these above and I now proceed to deal with them in order. With regard to the first G submission, I have tried to give full weight to the reasons on account of which it found favour with PARKER, L.J., in the present case and DEVLIN, J., in *Donovan* v. *Cammell Laird & Co., Ltd.* (2) ([1949] 2 All E.R. 82). I have also had in mind that, although these regulations are made with the purpose of ensuring the safety of workpeople in dangerous employments, they carry a penal sanction and that a criminal offence requires clear words for its establishment. Never- H theless, I am left in no doubt as to my view.

In the first place, I think that it has been sought to read too much into the words " except as follows ". I take the view which was raised during the argument that they are really equivalent to " but ". Secondly, I find nothing in the context of para. (a), para. (b), and para. (c) which makes the substitution of a notional occupier essential to their being in force. They show a thoroughly I practical and sound allocation of duties between those in control of the dock and those in control of various parts of the ship, whoever be the occupier. Thirdly, I am of opinion that the only condition precedent for their coming into force is that contained in the words " when a ship is being repaired in public dry dock ". I note that in his judgment in *Donovan's* case (2), DEVLIN, J., undoubtedly reasoned from this starting point. Thereafter, however, if I may say so with the greatest respect, he proceeded to construe on the basis of the state

A of affairs which he thought the draftsman must have contemplated. Thence he proceeds to create further conditions precedent, and finally, though with some doubt, comes to the view that the regulations do not apply to the shipowner where there is no notional occupier. In my opinion, such reasoning is, to use words often canvassed in argument before us, "supplying a gap", while the reasoning of DIPLOCK, J., and the majority of the Court of Appeal does not B involve so doing. Moreover, it does not seem to me a compelling factor that para. (b) provides for a division of duties between the shipowner and the repairer who is a notional occupier. It seems obviously reasonable to make the latter, should he exist, provide for the safety of the openings used in the course of the repairs.

In support of their second submission, the appellants argued that the Ship- C building Regulations, 1931, were made in respect of the construction and repair of ships in shipbuilding yards, and were designed and intended to protect persons employed in such construction and repair in such premises, and were not designed or intended to protect persons who happened to have employment wholly unconnected with the construction or repair of ships and who are not even employed by any repairing contractors. In other words, they raise the question D whether the duty is owed only to persons employed in the processes or also (at least) to persons ordinarily employed in the notional factory which the regulations envisage.

Before I consider certain statutory provisions, I note that the powers and duties of the Secretary of State have been transferred since 1941* to the Minister of Labour. As the heading states, these regulations were made in pursuance of E s. 79 of the Factory and Workshop Act, 1901, which reads:

> "Where the Secretary of State is satisfied that any manufacture, machinery, plant, process or description of manual labour, used in factories or workshops, is dangerous or injurious to health or dangerous to life or limb, either generally or in the case of women, children or any other class of persons, he may certify that manufacture, machinery, plant, process or F description of manual labour to be dangerous; and thereupon the Secretary of State may, subject to the provisions of this Act, make such regulations as appear to him to be reasonably practicable and to meet the necessity of the case."

That Act was repealed by the Factories Act, 1937, which, however, contained the following saving proviso to s. 159 (1):

> G "Provided that any . . . regulation . . . made or certificate . . . given under any enactment repealed by this Act which is in force at the commencement of this Act shall continue in force and shall have effect as though it had been made or given under this Act, and, in so far as it could have been made or given under a particular provision of this Act, shall be deemed to have been made or given under that provision, and any such order or H regulation made by the Secretary of State under a power which is exercisable under a corresponding provision of this Act by a different class of instrument, shall be deemed to be an instrument of that class, so, however, that any order or regulation of the Secretary of State which continues in force by virtue of this proviso may, in so far as may be necessary to bring it into conformity with this Act, be varied or revoked by an order made by him I under this Act."

The regulations before us are, therefore, by the foregoing proviso, deemed to have been made under s. 60 (1) of the Act of 1937, which originally read:

> "Where the Secretary of State is satisfied that any manufacture, machinery, plant, process, or description of manual labour, used in factories

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* By reg. 2 of the Defence (Functions of Ministers) Regulations, 1941 (S.R. & O. 1941 No. 2057), revoked and replaced by the Transfer of Functions (Factories, etc., Acts) Order, 1946 (S.R. & O. 1946 No. 376); 5 HALSBURY'S STATUTORY INSTRUMENTS 48.

> is of such a nature as to cause risk of bodily injury to persons employed in connection therewith, or any class of those persons, he may, subject to the provisions of this Act, make such special regulations as appear to him to be reasonably practicable and to meet the necessity of the case." A

By s. 12 of the Factories Act, 1948, the words " the persons employed " were substituted for " persons employed in connection therewith ", while s. 15 (2) provided: B

> " (2) Any reference in the principal Act [i.e., the Act of 1937] or this Act to a provision of that Act which is amended by this Act shall be construed as a reference to that provision as so amended."

It is, therefore, clear that the Shipbuilding Regulations, 1931, are now deemed to have been made under s. 60 of the Factories Act, 1937, as amended by s. 12 of the Act of 1948, and have not been varied to bring them into conformity with the Act of 1937 by a subsequent order made under s. 159. C

I accept and adopt the two basic principles formulated by the editors of REDGRAVE'S FACTORIES, TRUCK & SHOPS ACTS (19th Edn.), at p. 562, namely:

> " (i) Regulations cannot lawfully be made in favour of persons outside the class of persons for whose benefit Parliament authorised the making of the regulations; D
>
> " (ii) If the regulations themselves define the class of persons benefited, then the regulations cannot benefit persons outside that class even though they may fall within a wider class in favour of whom the Secretary of State had the authority of Parliament to make the regulations."

It is an arguable view (in regard to which the trend of decisions in the courts is not without interest) that regulations protecting eo nomine persons employed in the factory but not in the processes might be intra vires s. 79 of the Act of 1901 but ultra vires s. 60 of the Act of 1937 in its original form. In my view, they would clearly be intra vires that section as amended in 1948. If one were in doubt as to the construction of a regulation, it might be legitimate to lean to an interpretation which made the regulation intra vires ut magis valeat quam pereat. That is a very different thing from saying that the construction of a regulation can change automatically by reason of an extension in the vires of the enabling Act—especially when the extended enabling section contains a power to make the change by further subsidiary legislation. In other words, if it were ultra vires s. 79 to make regulations for persons employed in the factory but not in the processes, that might have some relevance to the construction of regulations made under that section. On the other hand, if, after taking into account all legitimate factors, one comes to the conclusion that, on their true construction, the regulations are confined to those employed in the processes, s. 60, as amended in 1948, cannot automatically change their interpretation into something wider. E F G

I, therefore, look first at the powers of the Secretary of State under s. 79 of the Act of 1901 and then at the construction of the regulations. In my opinion, it was not beyond the powers given to the Secretary of State by s. 79 of the Factory and Workshop Act, 1901, to make regulations which enured for the benefit of persons employed in the factory even if they were not employed in the process which caused the danger or injury to health or the danger to life and limb and thus brought about the certificate. It is obvious, without quoting examples, that such a process unless regulated (and the same applies to manufacture, machinery and plant) might be dangerous to others whose ordinary work in the factory brings them into regular proximity to the danger. H I

We were referred to *Mackey* v. *Monks* (*Preston*) (3) ([1918] A.C. 59). In that case the question for decision was, in the words of LORD WRENBURY (who dissented) (ibid., at p. 99),

> " Does the Act give the Secretary of State jurisdiction to make a regulation binding upon a person who is neither owner of the factory nor occupier

A of the factory, nor employed in the factory, a person who, in fact, has nothing to do with the factory and is not carrying on the manufacturing process? "

The majority of this House said that he had jurisdiction. They were considering on whom the duty could be laid. Nevertheless, it is interesting to note that B the majority emphasized that what " meets the necessity of the case " in s. 79 was a matter for the Minister (see ibid., at p. 81, per LORD ATKINSON and at p. 85, per LORD PARKER OF WADDINGTON), that the powers conferred on the Secretary of State were in terms of the widest possible description (ibid., at pp. 81, 82 and at p. 84) and that the power to make regulations was given because the Act did not deal with each dangerous trade (ibid., at p. 73, per LORD FINLAY, C L.C.). LORD FINLAY mentioned s. 82 which stated that the regulations might apply to all or any specified class of the factories in which the process, etc., was used.

Moreover I refer to, without quoting, the variety of words used to describe the persons for whose benefit the various regulations purport to be made. These are set out in the judgment of JENKINS, L.J. ([1956] 3 All E.R. at p. 573), and D some extend to persons other than those employed in the processes. It will be noted that the Aerated Water Regulations made in 1921 under s. 79 apply to persons " employed in the works ".

In my opinion, it would require express words to prevent the Minister from making regulations in favour of all persons employed in the factory. I see the difficulty of defining where you are to stop. If one goes outside those employed E in the processes, why should one not include the casual visitor whose own work brings him there ? To this the answer is that we are now considering a man who is ordinarily and regularly employed in the ship which was part of the factory, and in such a case there is, in my opinion, no doubt of the vires of s. 79.

This is not, of course, sufficient in itself to answer the question. One must now look at the construction of the regulations and the circumstances of the F case. Regulation 10 itself is perfectly general. In the context of these regulations a ship being repaired in a public dry dock is part of the notional factory. The very paragraph discussed in the first part of this case shows that the incidence of the duty shifts between repairer and shipowner according to who is controlling and using part of the ship. Therefore, the presence of some part of the crew is envisaged. I can find nothing in Part 9—the Duties of Persons employed— G inconsistent with the view that " persons employed " may include the crew. One circumstance of the case that appeals to me is that both the workmen employed by the repairers and the crew will be working together in a ship exposed to all the changes and dangers which the repairing process entails. Apart from authority, I would be of opinion that the regulations enure for the benefit of a member of the crew. I have tried to give full weight to the practical disadvantages of this view so forcibly urged by junior counsel for the appellants H but I do not think these sufficient to displace my opinion.

I now come to consider the authorities. The question has been considered in relation to different sets of regulations and the result appears to be this: Before 1937, in *Darroch (or O'Brien)* v. *Enrico Arbib & Co.* (4) (1907 S.C. 975), the Court of Session had taken the view that the Docks Regulations* did not

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I * I.e., the Docks Regulations, 1904 (S.R. & O. 1904 No. 1617). These were revoked and replaced by the Docks Regulations, 1925 (S.R. & O. 1925 No. 23), in which some words that in the Regulations of 1904 had limited the benefit of the regulations to persons employed in the processes were omitted, these words being " for the protection of persons employed in the processes " which were in the description of the purpose for which the Regulations of 1904 were made (see per LORD HEWART, C.J., [1930] 1 K.B. at p. 557). The Docks Regulations, 1934 (S.R. & O. 1934 No. 279), revoked the Docks Regulations, 1925, subject to savings, and the Regulations of 1934 follow in this respect the wording of the Regulations of 1925. The definition of " person employed " was the same in the Regulations of 1934 and of 1925, and in those of 1904 the description was defined as meaning " a person employed in the above processes or any of them ".

protect a workman who was not employed in the processes. After an amendment of the regulations, LORD HEWART, C.J. (obiter), in *Manchester Ship Canal Co.* v. *Director of Public Prosecutions* (5) ([1930] 1 K.B. 547) and ATKINSON, J., in *Hawkins* v. *Thames Stevedore Co., Ltd., & Union Cold Storage Co., Ltd.* (6) ([1936] 2 All E.R. 472) took the contrary view. Then, after 1937, in *Harvey* v. *Royal Mail Lines, Ltd.* (7) ((1941), 65 T.L.R. 286n.), HALLETT, J., and in *Kininmonth* v. *William France Fenwick & Co., Ltd.* (8) ((1949), 65 T.L.R. 285), HILBERY, J., took the same view as that taken by the Court of Session. I do not say any more about these cases in view of the wording of the Docks Regulations where " person employed " is defined as a " person employed in the processes ". The question then rose in relation to the Electricity Regulations of 1908 in *Hartley* v. *Mayoh & Co.* (9) ([1954] 1 All E.R. 375), where a fireman coming on premises which were on fire did not come within the class of persons employed for whose benefit the regulations were enacted. In *Wingrove* v. *Prestige & Co., Ltd.* (10) ([1954] 1 All E.R. 576), it was held that a clerk of the works employed on a building site by the owners of the site was not entitled to a cause of action as a result of a breach of reg. 5 of the Building (Safety, Health and Welfare) Regulations, 1948. I think, however, that DIPLOCK. J., is right in saying ([1956] 3 All E.R. at p. 248) that the ratio decidendi was that the clerk of the works would have fallen within the protection of the regulations but for the construction of the particular regulation relied on which, it was held, plainly applied only to the persons employed by the building contractors. It is true that in *Stanton Ironworks Co., Ltd.* v. *Skipper* (11) ([1955] 3 All E.R. 544 at p. 547), there are some dicta of ORMEROD, J., which imply that *Hartley's* case (9) is of very wide application. The *Stanton* case (11) was considered in *Massey-Harris-Ferguson* (*Manufacturing*), *Ltd.* v. *Piper* (12) ([1956] 2 All E.R. 722). It is true that both of those cases were criminal prosecutions, but I agree with the way in which both *Hartley's* case (9) and the *Stanton* case (11) are there dealt with and I also respectfully agree with LORD GODDARD, C.J., when he said ([1956] 2 All E.R. at p. 725):

> " In that case [*Hartley* v. *Mayoh & Co.* (9)] a fireman, who was employed by the local authority who maintained the fire brigade, was called in, in an emergency, to a fire at a factory, and it was held that he was not a person within the ambit of the Factories Act, 1937. One can understand that; he was a man who always had to be exposed to special dangers, and he was called in to deal with a particular emergency. He was not employed in the factory. He had gone there to quell a fire. He was no more employed in the factory than a police constable is who might be called in to quell a disturbance . . . or arrest a thief . . ."

and later (ibid., at p. 726)

> " I do not think that the decision in *Hartley* v. *Mayoh & Co.* (9) can have anything like so wide an effect as has been contended for and as I think ORMEROD, J., thought it had."

I am similarly in agreement with STREATFEILD, J., when he says (ibid., at p. 727):

> " I have come to the conclusion that they [the regulations] clearly do apply to any person who is employed in the factory, whether the direct servant of the occupier or a servant of an independent contractor, so long as he is employed on work in that factory, as the deceased was in this case."

In the words of PARKER, L.J., in the present case ([1956] 3 All E.R. at p. 576):

> ". . . I see no reason for inserting the further limitation that it must be a person employed in the processes."

I think that the considerations of general safety which are, if I may say so, powerfully stated in the last paragraph of the judgment of STREATFEILD, J., from which I have already quoted, are most relevant to the problem under our consideration.

I would dismiss the appeal.

My noble and learned friend, **LORD MORTON OF HENRYTON**, who is unable to be present this morning, has intimated to me that he agrees with the motion which I propose.

VISCOUNT SIMONDS: My Lords, I have had the privilege of reading the opinion which my noble and learned friend on the Woolsack has just delivered and also that of my noble and learned friend, Lord Tucker, which is about to be delivered, and I so fully agree with them that I propose to do no more than say that I concur in the motion that this appeal should be dismissed.

LORD TUCKER: My Lords, I understand that all your Lordships are of opinion that Diplock, J., and the Court of Appeal came to a correct decision on the first question at issue in the present appeal, viz., that the appellants were under a duty to comply with reg. 10 in Part 1 of the Shipbuilding Regulations, 1931, made under s. 79 of the Factory and Workshop Act, 1901, and that, on the facts found by the trial judge, they were in breach thereof. I am of the same opinion and do not feel I can usefully add anything on this part of the case.

The second question is whether the respondent, who suffered injuries by reason of the breach, is within the class of persons for whose benefit the regulation was made and, as such, entitled to damages. He was a yeoman carpenter and member of the crew of a vessel undergoing repairs in a dry dock and in the employ of the appellants, the owners of the vessel. He was injured in consequence of the failure of the appellants to protect an opening on one of the decks down which he fell on his way to perform one of his ordinary duties as a member of the crew unconnected with the work of repair which was being carried out by a number of contractors on the ship. All the members of the courts below have held him entitled to recover damages for the injuries he suffered as a result of the appellants' breach of their statutory obligation under reg. 10, but it is contended on behalf of the appellants that only persons actually engaged in the work of repair are entitled to the benefit of this regulation.

All three members of the Court of Appeal (Singleton, Jenkins and Parker, L.JJ.) were of opinion that the relevant enabling section was s. 79 of the Factory and Workshop Act, 1901, and that this section and the regulations themselves alone fell to be construed in order to decide for whose benefit this regulation was made. I agree, and accordingly ignore for this purpose the Acts of 1937 and 1948 which cannot, I think, be relied on for the purpose of giving a wider meaning to the regulation than that which it bore when it was made in 1931. Section 79 reads as follows:

> "Where the Secretary of State is satisfied that any manufacture, machinery, plant, process or description of manual labour, used in factories or workshops, is dangerous or injurious to health or dangerous to life or limb, either generally or in the case of women, children or any other class of persons, he may certify that manufacture, machinery, plant, process or description of manual labour to be dangerous; and thereupon the Secretary of State may, subject to the provisions of this Act, make such regulations as appear to him to be reasonably practicable and to meet the necessity of the case."

In February, 1931, the Secretary of State made the Shipbuilding Regulations, 1931 (S.R. & O. 1931 No. 133), under this section and directed that they should apply to the construction and repair of ships in shipbuilding yards, which are defined in the Act of 1901* as "any premises in which any ships, boats or vessels used in navigation are made, finished or repaired". In the regulations,

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* In Sch. 6, Part 2, para. (25).

"Public dry dock" is defined as "any dry dock which is available for hire". The ship in question was being repaired in a public dry dock and, accordingly, the provisions of para. (b) of the regulations under the heading "Duties" became applicable. So far as relevant it reads:

> "Where the control of the ship apart from the work of repair remains with the shipowner, it shall be the duty of the shipowner, master, or officer in charge, to provide the protection specified in reg. 10 in so far as concerns those hatches or openings which are not required to be used for the purposes of the repairs . . ."

Regulation 10 provides "All openings in decks and tank tops shall be securely protected . . ."

Dealing with this part of the case Singleton, L.J., said ([1956] 3 All E.R. at p. 570):

> "Under that power the Regulations of 1931 were made. They are general in their terms. Counsel for the [appellants] submits that they should not apply to a man on a ship employed by the shipowners. I fail to see why they should not be applied in such a case. It may be that in some cases the shipowner (as I have said in this case) is liable, and I cannot see why he should not be as responsible for the protection of his own men working on the ship as for anyone else's men; nor do I see why, if there is a breach of one of these regulations which breach leads to injury to a man, the man on the ship should not have an action in respect of it for breach of that regulation —which, I think, was intended for the protection of people working within the 'factory'."

Jenkins, L.J., considered (ibid., at p. 573) that the question had to be determined on the construction of the particular regulation and that it would be idle to attempt to lay down any general rule. He referred to several sets of regulations, in some of which there is a definition of "person employed" limiting the meaning to persons employed in the particular process or manufacture in contrast to other cases where the expression used is "person employed in the works". He proceeded (ibid.):

> "In the present instance . . . the relevant enabling section is s. 79 of the Factory and Workshop Act, 1901. That section enabled protective regulations to be made in the widest possible terms without any reference to 'persons employed' or other express indication of the limits of the class or category of people entitled to sue for any breach of the regulations whereby they sustain injury; and reg. 10 of the Shipbuilding Regulations is itself in perfectly general terms which do not state or define the class of persons to be protected."

Parker, L.J., considered (ibid., at p. 575) that, under s. 79, the matter was at large, but that there must clearly be some limit. Reading the Act of 1901, however, as a whole he thought it clear that the Act was dealing with, and the Secretary of State could make regulations in respect of and affecting, persons employed in the factory or premises. He rejected the further suggested limitation either to persons employed in the factory by the occupier or to persons employed in the factory by whomsoever, but in connexion with the processes or manufacture. Turning to the regulations made under that power, he pointed out (ibid., at p. 576) that it was of course open to the Secretary of State to cut down, though not enlarge, that class of person, and that further limitation may be introduced either expressly or implicitly. Looking at reg. 10, he could see no ground for implying any limitation.

My Lords, I find myself in complete agreement with the conclusion reached by the members of the Court of Appeal, and, for myself, I would respectfully adopt the reasoning of Parker, L.J. I think that there must be some limit to the enabling power, but the whole scheme of this safety legislation seems to me to indicate that persons employed in the factory are not altogether outside its scope. The fact that they are sometimes expressly included in the provisions of the Act does not, to my mind, point to the conclusion that they are outside the scope of an enabling section unless expressly included. When, therefore, I find, as here, an enabling section in general terms I would construe it as at any rate enabling regulations to be made for the benefit of any of the classes of persons who are afforded protection in certain parts of the Act. If this is correct, the remaining question is whether this particular reg. 10, read in conjunction with para. (b) of the " Duties " provisions, impliedly imports some limitation beyond that which is contained in the enabling section. I can find no justification for any such limitation. A ship undergoing repairs in dry dock is regarded as a factory in which dangerous work is being done; an obligation is expressly imposed on the owner of the ship with regard to protection of certain parts of the ship which are not required to be used for the purposes of the repairs. This is presumably for the protection of persons whose employment necessitates their presence in the dangerous area on their way to or from their work or near to their work. A member of the crew is one of the factory maintenance staff and, if his work requires him to be in the danger area, I can see no reason why he should not be entitled to the benefit of this particular safety regulation. It does not, in my view, by any means necessarily follow that he is entitled to the benefit of all the regulations; some of them may, by their very nature, be applicable only to persons engaged in a particular operation. The decision of this case does not require any attempt to give a definition of the words " persons employed ". There may be cases where this will be necessary, but, in the context of reg. 10, it must, I think, include a person employed by a shipowner whose regular full-time employment is as a member of the maintenance crew on a ship in dry dock undergoing repair.

For these reasons, I would uphold the decision of the four judges who have dealt with this case below and dismiss this appeal.

LORD KEITH OF AVONHOLM: My Lords, I had some doubt whether, in the circumstances of this case, the appellants owed any duty to the respondent under reg. 10 of the Shipbuilding Regulations, 1931. The regulations are capable, however, of two constructions and my doubts are not strong enough to make me prefer a construction different from that reached by your Lordships.

I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Hill, Dickinson & Co.* (for the appellants); *Mawby, Barrie & Letts*, agents for *Silverman & Livermore*, Liverpool (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

Re HODGE'S POLICY. HODGE v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Ormerod, L.JJ.), November 12, 13, 1957.]

Estate Duty—Passing—Property deemed to pass—Money received under policy of assurance—Policy kept up for donee—" Kept up "—Premiums paid by deceased—Policy settled on son of deceased after payment of first premium—Policy fully paid up since 1916*—Mortgage to insurance company—" Money received "—Deduction for mortgage debt by insurance company—Customs and Inland Revenue Act,* 1889 (52 *&* 53 *Vict. c.* 7), *s.* 11 (1)*—Finance Act,* 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2 (1) (*c*).

In 1912 the father of the plaintiff took out a policy of insurance on his own life for £10,000 with profits. After paying the first of the five annual premiums which were payable, the father in 1913 assigned the policy to trustees on trust for his son on attaining the age of twenty-five years. After the date of the settlement, the father paid the remaining four premiums as they fell due in 1913, 1914, 1915 and in 1916, whereupon the policy became fully paid up. In 1935 the plaintiff, then being twenty-two years old, agreed to assign the policy to the insurance company by way of mortgage to secure a loan of £5,000. The policy was deposited with the insurance company. In 1938 the plaintiff reached the age of twenty-five years, and in 1950 the father died. The gross amount then payable under the policy was £16,675 and the debt to the insurance company amounted, with interest, to £5,431. The net amount receivable by the plaintiff from the insurance company was £11,244, being the proceeds of the policy after deducting the debt. On the question whether estate duty was exigible on the proceeds of the policy and, if so, whether on the gross amount (£16,675) or the net sum (£11,244),

Held: estate duty was chargeable under the Finance Act, 1894, s. 2 (1) (c), on the gross proceeds (£16,675) for the following reasons:

(a) the policy was wholly " kept up " for the benefit of a donee, viz., the plaintiff, within the meaning of the Customs and Inland Revenue Act, 1889, s. 11 (1), for the words " is wholly kept up " in that sub-section meant " has been wholly kept up from the date of the assignment of the policy ", and it was, therefore, irrelevant that payment of premiums had, at the date of the settlor's death, long since ceased.

Lord Advocate v. *Inzievar Estates* ([1938] 2 All E.R. 424) and dictum of LORD WRIGHT in *Barclays Bank, Ltd.* v. *A.-G.* ([1944] 2 All E.R. at p. 211) applied.

Re Oakes' Settlement ([1950] 2 All E.R. 851) considered.

(b) although the insurance company paid only the net sum of £11,244 to the plaintiff, the money " received " by him under the policy within s. 11 (1) of the Act of 1889 was the gross proceeds, viz., £16,675.

Decision of HARMAN, J. ([1957] 2 All E.R. 219) affirmed.

[As to estate duty in respect of policies kept up for a donee, see 15 HALSBURY'S LAWS (3rd Edn.) 24, 25, paras. 45, 46.

For the Customs and Inland Revenue Act, 1889, s. 11 (1), see 9 HALSBURY'S STATUTES (2nd Edn.) 344.]

Cases referred to:

(1) *Lord Advocate* v. *Inzievar Estates*, [1938] 2 All E.R. 424; [1938] A.C. 402; 1938 S.C. (H.L.) 1; 107 L.J.P.C. 65; 159 L.T. 97; Digest Supp.

(2) *Barclays Bank, Ltd.* v. *A.-G.*, [1944] 2 All E.R. 208; [1944] A.C. 372; 113 L.J.K.B. 465; 171 L.T. 366; 2nd Digest Supp.

(3) *Lord Advocate* v. *Fleming*, [1897] A.C. 145; 66 L.J.P.C. 41; 61 J.P. 692; sub nom. *Lord Advocate* v. *Robertson*, 76 L.T. 125; 42 Digest 735, *1578*.

(4) *Re Oakes' Settlement, Public Trustee* v. *Inland Revenue Comrs.*, [1950] 2 All E.R. 851; [1951] Ch. 156; 2nd Digest Supp.

Appeal.

This was an appeal by the plaintiff, Sir John Rowland Hodge, Bart., from an order of HARMAN, J., dated Mar. 14, 1957, and reported [1957] 2 All E.R. 219. HARMAN, J., held that estate duty was chargeable under the Finance Act, 1894, s. 2 (1) (c), on the death of Sir Rowland Frederic William Hodge in respect of the gross proceeds of a policy of insurance taken out by him in 1912 on his own life and assigned in 1913 by the proposer to trustees on trust for the plaintiff on his attaining the age of twenty-five years. The policy became fully paid up in 1916, and the amount received by the plaintiff on the proposer's death in 1950 was reduced by £5,431, representing a loan (secured by a mortgage on the policy) and interest thereon due to the insurance company.

R. E. Borneman, Q.C., and *Jackson Wolfe* for the plaintiff, the taxpayer.
Geoffrey Cross, Q.C., and *E. Blanshard Stamp* for the Crown.

LORD EVERSHED, M.R.: The claim of the Crown for estate duty is founded on the Finance Act, 1894, s. 2 (1) (c), and more particularly on the language of the Customs and Inland Revenue Act, 1889, s. 11, which, by reference, is incorporated into para. (c) of s. 2 (1) of the Act of 1894. The question turns on the language of s. 11 (1) of the Act of 1889 and, in the end of all, on four words in it, namely, the four words "is wholly kept up". Section 11 (1) provides:

> "The charge under the said section [s. 38 of the Customs and Inland Revenue Act, 1881] shall extend to money received under a policy of assurance effected by any person dying on or after June 1, 1889, on his life, where the policy is wholly kept up by him for the benefit of a donee . . . or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit."

The relevant facts may be shortly stated. In September, 1912, the late Sir Rowland Frederic William Hodge, Bart., took out a policy on his own life with the Royal Insurance Co., Ltd., for £10,000 payable with profits on his death, and by the terms of the contract five premiums, and five only, fell to be paid, one on Sept. 14, 1912, and one of the remaining four on Sept. 14 in each of the four succeeding years, so that the last premium fell to be paid and was paid on Sept. 14, 1916. The amount of each premium was £1,475. After Sept. 14, 1916, there was, therefore, no further obligation on the part of the assured or anyone else to make any further payment to the insurance company. The insurance company, in their turn, were thenceforward bound, on the happening of the event stipulated in the contract, viz., the death of Sir Rowland Frederic William Hodge, to pay the stipulated sum. That event did not occur until 1950, some thirty-four years, no less, after the last premium had been paid. During the whole of that period of thirty-four years this policy was a fully paid policy with no further obligations of any kind on the assured. After the first premium had been paid, viz., on Sept. 12, 1913, the assured settled this policy by assigning it to trustees for the benefit of his son, the plaintiff and present baronet, conditional on his attaining the age of twenty-five years. At that date, Sept. 12, 1913, the plaintiff was aged less than six months. He attained the age of twenty-five on May 1, 1938, twelve years before the death of his father. It follows, therefore, that on attainment of the age of twenty-five the plaintiff became by the terms of the settlement absolutely entitled, without any qualification and without any obligation on his part, to the benefit of this policy, which for twenty-two years then had been fully paid up; and so he continued during the remaining twelve years of his father's life.

It would be difficult to imagine any species of property which had become more indubitably the plaintiff's without any limitation on his right of any kind, sort or description; but it is nevertheless the claim of the Crown that on the death of the assured, the plaintiff's father, estate duty is leviable on the whole of the moneys payable under the policy on the footing that that sum must be treated as part of the property passing on the father's death.

The sum which by the terms of the policy was payable to the assured at the date of his death was £16,675, but there had been in 1935 and before the plaintiff's title became absolute a bargain between the father, the son and the Royal Insurance Company by virtue of which a sum total of £5,000 had been advanced to the plaintiff. There was therefore on the death of the father that figure, plus interest which amounted to £431, or £5,431 in all, owing to the insurers by the plaintiff. What in fact happened was that the insurers deducted the debt of £5,431 due to them and paid to the plaintiff the balance of £11,244. It is a subsidiary question in the case whether the Crown, if entitled to tax at all under s. 2 (1) (c) of the Act of 1894, is entitled to tax on the full figure which by the terms of the policy became payable, viz., £16,675, or only on the balance which remained in fact receivable by the plaintiff, viz., £11,244.

The first and vital question is whether it can be said of this policy that it was one which " is wholly kept up " by the assured (the plaintiff's father) within the terms of the paragraph. In his judgment the learned judge, HARMAN, J., said ([1957] 2 All E.R. at p. 221):

> " There is no doubt that the plaintiff here is a donee. There is no doubt that nobody paid any premium on this policy except the assured himself. Equally there is no doubt that no premium has been paid or payable since 1916. It comes as a shock that a policy which has been fully paid for over forty years [that was perhaps a slight over-statement though it had been fully paid since a date more than forty years ago] and has, therefore, not needed any keeping up during the whole of that time, and in respect of which there has been nothing to do, but wait for the death of the assured, should now attract duty although no beneficial interest in it passes from anybody to anybody else on the death. It has belonged absolutely to the plaintiff since 1938, twelve years before his father died: it is striking that duty should be exigible in such circumstances. If on the other hand this had been what is called an ordinary whole life policy and the premiums had been payable periodically at dates continuing up to the death of the assured it would come as no surprise that the last paragraph of s. 11 (1) of the Act of 1889 caught it."

I associate myself entirely with all that I have read from that judgment, and it is to me no less shocking than it was to him that in such a case duty should be exigible, as on a passing on the death of the assured, of the sums payable under this policy. However, if the language of the section imposes the duty, then it is Parliament which has done the shocking thing, and it will likewise be for Parliament and the legislators of today, if they suffer a similar shock, to alter the law.

I have said that the vital question is: was this policy one of which, within the terms of s. 11 (1) of the Act of 1889, it could be said at the relevant date, whatever it be, " It is a policy which is wholly kept up by the assured "? The use of the present tense in that context is obviously somewhat inelegant on any view of it; and indeed LORD MACMILLAN in *Lord Advocate* v. *Inzievar Estates* (1) ([1938] 2 All E.R. 424), drew attention to the inelegance of the section.

If the date which is being contemplated is the date of or immediately before the death of the person dying, then one is at once placed in somewhat of a difficulty if one asks at that point of time: " Is the policy kept up? " If by that is meant " Is it effective? ", that would be answered without any necessary reference to the question whether any premiums had been payable for years. If it means " Is the policy one under which all the premiums have not been paid ", then it is a curious way of expressing that idea to use the words " is kept up "; though, as will presently appear, it is the foundation of the argument of counsel for the plaintiff that the test presented by the section is the test whether at that date (i.e., immediately before the assured's death) the policy is one which still requires premiums periodically to be paid, is what he calls " a running policy ".

In my judgment, as counsel for the Crown pointed out, the initial difficulty which I have adumbrated is much increased by the use of the adverbs, " is *wholly* kept up ", and again at the end of the paragraph, " is *partially* kept up ". Let me try to apply the kind of test which counsel for the plaintiff sought to impose and ask of a policy immediately before a death: is it at that date *wholly* kept up? Does it mean that at that particular date the assured, the donor, is going to pay the next premium or has paid the last one? Or does it refer to other premiums which previously fell due and had been paid? And if you pose the same sort of question in regard to the formula " is partially kept up ", does it mean that the next premium will be paid or that the last premium has been paid partly by the donor and partly by the donee? Or does it bring into account, so to speak, past premiums, some of which have been paid exclusively by one party and some exclusively by the other? This last question has, as I think, been conclusively answered for this court by the House of Lords in *Lord Advocate* v. *Inzievar Estates* (1); and, having regard to that answer and to the reasoning on which it was founded, I think, as did the learned judge in the court below, that it would be impossible for this court to say in the present case that, because here we are dealing with a policy which required four or five premiums only to be paid after the date of its coming into existence and because all those premiums have long since been paid, therefore it is on its facts sufficiently distinct from *Lord Advocate* v. *Inzievar Estates* (1) to permit us to decide this case in the appellant's favour. So to do would in my judgment be to decide the case in a sense and, so far as I can see, on the basis of reasoning, which would not be consistent with the reasoning of the House of Lords in that case. At best it would create an extremely fine distinction; and, in my judgment, if distinctions of that kind are going to be made they should be made by the House of Lords and not in this court.

Counsel for the plaintiff in founding his argument on the view that any policy within the contemplation of this paragraph must be what he called " a running policy " (a phrase which I have tried previously to define), invoked certain language of LORD WRIGHT in *Barclays Bank, Ltd.* v. *A.-G.* (2) ([1944] 2 All E.R. 208). That case arose under s. 11 (1) of the Act of 1889, though the point was quite a different one from that with which we are concerned. There the settlor, the assured, had assigned policies of assurance which he had effected on his own life to trustees for the benefit of his son, but he had also endowed the trustees with the means of keeping up the policies, because he had transferred investments to the trustees and under the terms of the trust the trustees were bound to apply the funds in their hands in paying the premiums. The question was whether in those circumstances the donor, the settlor, was himself paying the premiums, was himself " keeping up " the policy, or whether it was not the donor but the trustees who were so doing. Let me say at once that it was a case in which the premiums continued to fall due for payment right up to the date of the death of the assured, so that there is again this distinction between the facts in *Barclays Bank, Ltd.* v. *A.-G.* (2) and the facts in this case. The House of Lords took the view which LUXMOORE, L.J., in a dissenting judgment in this court had taken, that in truth, the settlor was not paying the premiums and, therefore, was not keeping up the policy, because it was the trustees who were doing both those things. In the course of his reasoning, however, LORD WRIGHT used this language (ibid., at p. 211):

> " I do not need here to recapitulate in detail the terms of the material settlements and the appointment. They are fully analysed by LUXMOORE,

> L.J., in his judgment. On these dispositions the first Lord Devonport, the settlor, did not himself in the ordinary sense of the word pay the premiums necessary to keep the policies alive. The trustees paid them. I think that 'keeping up' a policy according to the ordinary use of language connotes payment of the premiums which is the normal method of keeping up a policy. This involves generally periodical payments, and, though a single premium policy is not unknown, that would have the effect not so much of keeping up a policy as establishing its operation once and for all. The Act did not apparently contemplate this contingency, but, however that may be, the insertion of the words 'in proportion to the premiums paid by him' is necessary to deal with the case where the deceased did not himself wholly keep up the policy but only did so partially. In that case the death duty is to fall on the deceased's estate in proportion to the premiums paid by him."

It was the foundation of the argument of counsel for the plaintiff, based on that language, that s. 11 (1) ceased to be applicable at all to a policy of which it could be said that "its operation had been established", which, being interpreted, meant (according to counsel for the plaintiff) that all the premiums having been paid there only remains the obligation of the insurers on the happening of the stipulated event to pay the sum insured. So, counsel said, in this case once the four premiums after the first had been paid this policy was one of which its "operation had been established". It no longer fell within the description of a policy which required any keeping up or which could be kept up, and so is outside the section altogether.

I appreciate the argument and its attraction and, if it were sustained, the justice of the result in this particular case; but my first difficulty is that I cannot get so much out of the language of Lord Wright. When he was illustrating the meaning of the words "keeping up", he qualified his statement by observing that the case of a single premium policy was really sui generis and never was a policy which had to be kept up at all. In other words, I agree for my part with Harman, J., when he said referring to Lord Wright's language ([1957] 2 All E.R. at p. 222):

> "That is a view (obiter, I think) that a single premium policy would not be caught by the Act because it is never 'kept up' at all. I think it follows that if there are periodical payments by the donor, whether two, three or twenty-five, the policy can be said to be kept up by the donor from the tax point of view."

I agree. I cannot extract any further assistance from *Barclays Bank, Ltd.* v. *A.-G.* (2), and I turn at once to the other case which seems to me to have for us a concluding influence, *Lord Advocate* v. *Inzievar Estates* (1). Again let it be made quite plain that the point in the case was not the same as the point before us. There was not there involved the case of a policy all the premiums under which had been paid at some date before maturity. The question before the House was one under the latter part of the paragraph, a question of the proper apportionment of the premiums that had been paid from the date of the assignment by the settlor to the date of his death. The settlor appears to have paid four of the premiums after that date. The remainder had been paid by the donee. It was suggested on behalf of the respondents that in fixing the apportionment, one should have regard not only to the premiums paid since the assignment, but to all the premiums paid since the policy was first taken out; if one had regard to the whole of the premiums paid since the policy had been taken out, then the proportion of the whole which the donee had paid was of course reduced. It was the view of the House, however, that regard could only be had to premiums which fell to be paid after the assignment.

I agree of course with counsel for the plaintiff that the point was a different one. Nevertheless, as I follow the case, the reasoning in support of the conclusion of the House negatives the view that the phrase " is partially kept up " has to be construed by looking at the point of time immediately before the death of the assured; because if one looks at that date then prima facie, at any rate, it would follow that all the premiums payable under the policy from its inception could and should be taken into account. But the opinions proceeded on the view that the vital point of time to which attention had to be directed was the date of the assignment, and it seems to me inevitably to follow that, if one takes that point of time and then asks " In what proportion are the premiums paid ? ", the answer to be given will not be essentially affected by the circumstance that all the premiums may stop before the date of maturity of the policy. That such was the reasoning is, I think, implicit beyond doubt in the language used particularly by Lord Maugham, L.C., in his leading speech, and by Lord Macmillan. Let me take the speech of Lord Maugham, L.C., first. He referred to s. 11 (1) and then said ([1938] 2 All E.R. at p. 426):

> " I think that the matter might be somewhat clearer if the sub-section were re-written in the following expanded form: The charge under the said section shall extend to moneys received under a policy of assurance effected by a person on his own life who shall die on or after June 1, 1889, notwithstanding that he . . . shall have assigned the policy gratuitously for the benefit of a donee . . . "

Then he set out the remaining provisions in a form which makes, as he said, no assumptions as to its construction. After referring to *Lord Advocate* v. *Fleming* (3) ([1897] A.C. 145), he said ([1938] 2 All E.R. at p. 427):

> " Accordingly, where the donee has paid all the premiums after the date of the assignment, no account duty is payable by the donee under the Act. It follows that the first provision of the section, as above expanded, can be clarified by making it run thus: 'Where the policy after the date of a donation is wholly kept up by the donor for the benefit of a donee, the charge, etc.'. By parity of reasoning, the second provision may be read as follows: 'Where the policy after the date of a donation is partially kept up by the donor for the benefit of the donee, the charge . . . '."

I will not take time by reading further from Lord Maugham's speech, though counsel for the Crown drew attention also (and I do not forget it) to his language in another passage (ibid.), but there is one passage in Lord Macmillan's speech which I would like to add to my citation from Lord Maugham. He, also after a reference to *Lord Advocate* v. *Fleming* (3), continued (ibid., at p. 429):

> " In the second place, all the premiums after the assignation may be paid by the donor. The sub-section applies, for the policy has, after the assignation, been wholly kept up by the donor for the benefit of the donee. In such a case, the whole proceeds of the policy are subject to duty. In the third place, as here, some of the premiums after the assignation may be paid by the donor and some by the donee. Here also the sub-section applies, for the policy has, after the assignation, been partially kept up by the deceased donor for the benefit of the donee."

It was at the end of his speech (ibid., at p. 430) that Lord Macmillan used the language:

> " . . . I appreciate the anomaly, but I fear that there is no reading of this imperfectly drafted sub-section which will avoid all illogicalities."

Counsel for the plaintiff said that those observations were merely obiter and that we could therefore disregard them. I cannot agree. It seems to me that the reasoning of the decision involved essentially the view that the vital date to which one must pay regard in seeking to apply s. 11 (1) is the date of the assignment; and, as I think and as Lord Macmillan expressly said, it follows as a consequence that the words "is wholly kept up" and again the words "is partially kept up" must be translated as meaning "has been wholly kept up" and "has been partially kept up" in each case from the date of the assignment.

Taking that view it seems to me that out of loyalty to the decision of the House (and I am not of course to be taken as doubting its correctness) this court must hold, applying the same reasoning, that this is a case in which the policy "is wholly kept up" by the donor because it has been wholly kept up, from the date of its assignment, by the donor. Put another way, the phrase "is wholly kept up by the donor" (inelegant though it be) means and fairly must mean "is a wholly-kept-up-by-the-donor policy". That is, for the purposes of taxation, its essential quality; and I add that if the result in the present case is harsh, the other view, the view advanced by counsel for the plaintiff, would, as Harman, J. pointed out, produce inevitably anomalies no less startling.

I do not forget that the actual decision in *Lord Advocate* v. *Inzievar Estates* (1) was based on the last part of the last paragraph of s. 11 (1) where the relevant words were "where the policy is partially kept up". It would appear to me, however, to be quite impossible to construe the words "is partially kept up" so far as is relevant in a different sense from the way in which one construes the earlier words in the same paragraph "is wholly kept up". So far as the phrase "is partially kept up" is concerned, the actual case of a policy all the premiums of which had been finally discharged came before Romer, J., sitting as a judge of first instance in *Re Oakes' Settlement, Public Trustee* v. *Inland Revenue Comrs.* (4) ([1950] 2 All E.R. 851). Harman, J., thought that there had been some incorrectness in the report of the judgment in that case (in [1951] Ch. 156), and it is certainly not quite clear how the case was put and what were the points then argued or mainly argued by counsel for the taxpayer, but Romer, J., undoubtedly held that it was irrelevant in considering the application of this part of the paragraph, that all the obligations by way of premium paying had been discharged some time before the death. Whether the report of the judgment is entirely correct or not, that much is clear and, in my view, and for the reasons which I have given, Romer, J., rightly so held. For those reasons, therefore, I can see no escape from the conclusion at which Harman, J., arrived.

The question remains whether the whole sum is chargeable or whether the taxpayer is entitled to deduct from the £16,675 the amount that was owing by the plaintiff in respect of the borrowed money. That turns again on the language of s. 11 (1) and particularly the phrase "money received under a policy of assurance". I agree again with Harman, J., that the money received under this policy of assurance was the sum assured, £10,000 plus profits, a total of £16,675. That sum cannot be reduced by setting off what in fact on another account and by way of mortgage the plaintiff owed the insurers. As the learned judge pointed out, if the transaction had been in the form of a mortgage to a third party it would have been impossible for the plaintiff to have said otherwise than that the money received under the policy, for all of which he had to give a receipt, was the £16,675. I therefore am unable to agree that any legitimate deduction can be made on that account.

One other point was suggested by counsel for the plaintiff to which I should have earlier referred. There was evidence to show that at the date of the passing of the Act of 1889 statistics had been provided by the Board of Trade and had been laid before the House of Commons which showed to what extent policies of assurance were of the kind where premiums periodically were payable during the whole of the life assured and to what extent the policies were in some different form providing for either single premiums or a limited number of premiums. It appears from those figures that the former numerically were very far in excess of the latter. From those facts it was sought by counsel for the plaintiff to suggest that Parliament must have been intending only to deal with the common case and had excluded and deliberately excluded the uncommon case. If the language used by Parliament is ambiguous or doubtful, it is no doubt legitimate to inquire, by reference to the surrounding circumstances, what was the mischief which Parliament was seeking to amend and to get some assistance from the answer to that question in construing the section; but I have been quite unable to see how in this case the presence of those figures can on any view assist in arriving at the conclusion for which counsel for the plaintiff contends. It leaves it all, so far as I can see, a matter of complete speculation. Are we to assume that Parliament or the legislatures—and one would have to include the legislatures in both Houses of Parliament and also, as it seems to me, the Sovereign who gave assent to the bill—intended only to deal with certain types of insurance? I am bound to say that, if the proper view of the facts is that Parliament did so intend, then it seems to me inexplicable that they should use the language they did. I can find nothing which can legitimately be invoked from those matters of fact that would entitle us so to construe this paragraph so as somehow or another to exclude from its operation policies other than those which require periodic premium payments continuing up to the date when the policy matures.

For these reasons I think this appeal fails and must be dismissed.

ROMER, L.J.: I agree. This claim for duty appears to me to be wholly devoid of any merit at all, and it is quite shocking to think that this policy should be liable to estate duty as representing property which was deemed to pass on the death of the plaintiff's father. The father assigned it to trustees for the benefit of his son in 1913 and ever since 1938 that policy has been the sole, absolute and unqualified property of the plaintiff. It really is shocking to think that it should be treated as subject to duty under the Finance Act, 1894. In saying that, I am not in the slightest degree criticising the Commissioners of Inland Revenue. Their function is to claim such duty as the Crown is properly entitled to, and if the property in question is liable to duty, as I think it is, then it is their bounden obligation to recover it for the Sovereign.

Counsel for the plaintiff in his forceful and persuasive argument naturally relied very much on the word " is " in s. 11 of the Customs and Inland Revenue Act, 1889, where it says " where the policy is wholly kept up ". He said that that present tense is indicative of the time when duty becomes normally payable, namely the death of a deceased. He says: why should the court alter that word so as to read " is or has been " or " shall have been " in order to bring into the taxation net such a person as the plaintiff ? I would willingly give effect to that argument for my part if it was open to me to do so, but much to my regret it is not, and I think it is not for two reasons at least.

The first reason is that in *Lord Advocate* v. *Inzievar Estates* (1) ([1938] 2 All E.R. 424), Lord Maugham, L.C. and Lord Macmillan expressed views which Lord Evershed, M.R., has already referred to, which as I think make it quite impossible for this court to accept the argument of counsel for the plaintiff founded on the word " is "; because both the learned Lords' speeches show quite clearly that the use of the present tense merely results in this, that, in ascertaining whether a particular policy has been wholly or partially kept up, the period of time which it is relevant to look to is the period after the date of the donation of the policy. I think nothing can be clearer than the way in which Lord Maugham expressed it when he said ([1938] 2 All E.R. at p. 427) in expanding the relevant language and putting it into inverted commas: " Where the policy after the date of a donation is wholly kept up by the donor for the benefit of a donee . . . " That view, which I may say was concurred in, as appears from the beginning of

LORD MAUGHAM's speech, both by LORD ATKIN and LORD ROMER, is binding on us and was echoed, as my Lord has already indicated, by LORD MACMILLAN in his speech. It is true, as LORD EVERSHED, M.R., has said, that in so far as their Lordships' observations were directed to the first part of the sub-section, namely dealing with the event of a policy being wholly kept up, the observations which they made may be regarded as obiter; but when one has all the members of the House of Lords (because LORD THANKERTON agreed both with the opinion of LORD MAUGHAM and with that of LORD MACMILLAN) expressing a view, if some different interpretation is to be put on this language it must be put on it by the House of Lords and not by this court.

The second reason why I do not think that we can accept the argument of counsel for the plaintiff is that it is abundantly plain that the language which deals with policies which have been partially kept up by the deceased for the benefit of the donee, namely " is partially kept up ", includes " or has been ". That is quite manifest if one merely looks at the language alone, but at all events it has been decided by the House of Lords in *Lord Advocate* v. *Inzievar Estates* (1).

Cases can be conceived, I suppose, where one interpretation may be put on a phrase and another interpretation may be put on the same phrase even though it appears in the same section, but such cases must be rare indeed. I think that, when it is so obvious that the word " is " in relation to partially paid premiums includes the past, then the same conception must be applied to cases where the policy is wholly kept up.

Accordingly I think that for those two reasons and other subsidiary reasons the argument of counsel for the plaintiff, attractive though it was, cannot be accepted, at all events in this court. On all other points I entirely agree with what my Lord has said and I have nothing to add.

ORMEROD, L.J.: I agree. The only thing which I think I need say is that I, too, share the sense of shock which my brothers obviously have felt at the thought that the moneys receivable under this policy should attract estate duty on the death of the assured. I found the argument of counsel for the plaintiff an attractive one and one to which for my part I would have been glad to be able to accede, but for the reasons which have been fully set out in the judgments of LORD EVERSHED, M.R., and ROMER, L.J. I, too, feel that it is quite impossible to distinguish the present case from that of *Lord Advocate* v. *Inzievar Estates* (1) ([1938] 2 All E.R. 424). I agree that the appeal must fail.

Appeal dismissed.

Solicitors: *J. D. Langton & Passmore* (for the plaintiff); *Solicitor of Inland Revenue.*

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

WILLIAMS BROTHERS DIRECT SUPPLY STORES, LTD. *v.* RAFTERY.

[COURT OF APPEAL (Hodson, Morris and Sellers, L.JJ.), November 14, 15, 1957.]

Limitation of Action—Land—Adverse possession—Discontinuance of possession—Dispossession—Vacant land—Owners' intention to develop land in future—Owners' minor acts of use—Defendant's war-time cultivation and subsequent use for greyhound breeding—Limitation Act, 1939 (2 *&* 3 *Geo.* 6 *c.* 21), *s.* 5 (1).

The owners of a vacant piece of land acquired in 1937 intended in due course to develop it. They put a gate in a fence which they erected between it and a roadway, and in 1948 applied for planning permission for development and for that purpose had it measured by their representative. In 1953 they dumped some rubbish on it, but otherwise they made no active use of it. From 1940 to 1943 the land was cultivated by a third party as part of the "dig for victory" campaign and from 1943 to 1948 it was cultivated by the defendant without the owners' permission. The defendant subsequently erected a shed on it for greyhound breeding, but he did nothing to keep the owners off the land. In 1957 the owners brought an action for recovery of possession of the land from the defendant.

Held: the owners were entitled to an order for possession, since their minor acts of user showed that they had never discontinued possession (dictum of BRAMWELL, L.J., in *Leigh* v. *Jack* (1879), 5 Ex.D. at p. 272, applied), and the acts of the defendant did not amount to dispossession of the owners (*Leigh* v. *Jack*, supra, applied; *Marshall* v. *Taylor*, [1895] 1 Ch. 641, distinguished).

Appeal allowed.

[As to discontinuance of possession and dispossession of land in relation to the limitation of actions, see 20 HALSBURY'S LAWS (2nd Edn.) 688-690, paras. 898-900; and for cases on the subject, see 32 DIGEST 431-438, *1055-1088*.

For the Limitation Act, 1939, s. 5 (1), see 13 HALSBURY'S STATUTES (2nd Edn.) 1165.]

Cases referred to:

(1) *Leigh* v. *Jack*, (1879), 5 Ex.D. 264; 49 L.J.Q.B. 220; 42 L.T. 463; 44 J.P. 488; 32 Digest 432, *1057*.

(2) *Marshall* v. *Taylor*, [1895] 1 Ch. 641; 64 L.J.Ch. 416; 72 L.T. 670; 32 Digest 436, *1080*.

Appeal.

The plaintiffs appealed against an order of His Honour Deputy JUDGE DARE, deputy judge of Edmonton County Court, made on June 28, 1957, in favour of the defendant, in an action commenced in 1957, in which it was adjudged and declared that the defendant was the owner in fee simple in possession of a strip of land situate at the rear of 367, Fore Street, Edmonton, in the county of Middlesex. The plaintiffs sought an order for possession of the land, for the removal of fencing and sheds erected thereon by the defendant, and for payment of £10 damages. Their grounds of appeal were, inter alia, that the judge had misdirected himself and was wrong in law in holding that the defendant had ever dispossessed the plaintiffs of the entire strip of land, or dispossessed them effectively and continually for the full period of twelve years of it, and that the defendant was ever in exclusive possession of the entire strip of land or had retained exclusive possession of it for that period.

D. S. Hunter for the plaintiffs.
R. H. Tuck for the defendant.

HODSON, L.J.: The plaintiffs are the owners of freehold land at the rear of premises known as Nos. 367, 369 and 371, Fore Street, Edmonton, and the defendant is the tenant of a maisonette over shop premises at No. 367, Fore A Street, his premises being known as No. 367a and his immediate landlord being the London Co-operative Society, who lease the premises from the plaintiffs. The action was an action for possession of land and for an order directing the removal of some fencing and sheds erected by the defendant on some of the land, and damages for trespass. The land in question was a piece of land at the rear of the place where the defendant lived, a strip running east and west. The county B court judge gives the measurements of the land as 110 feet long and 13 feet wide.

In 1940 a man called Haydon used that land for cultivation. It had previously been occupied, as part of a larger area, by some cottages belonging to the plaintiffs, which had been pulled down. The cultivation by Mr. Haydon was part of the " dig for victory " campaign, and from 1943 to 1948 the defendant did the same. In 1948, or immediately afterwards, he gave up the cultivation of the land and he C put up on a portion of it a shed for breeding greyhounds, and he has been breeding them there ever since.

The plaintiffs' intention all along has been, when they got the chance, to develop the land at the rear from which they had removed the cottages, and they had no intention that the land should be used for any particular purpose in the meantime. They put a gate in the fence which they erected between the land and the back D roadway, and during the war they were unable to do any development. In 1948 they applied for planning permission to develop the land, and with that object in view a representative of the plaintiffs went over the land and measured it. By their representatives, the plaintiffs have been on the land since, but I think that those occasions are not important.

Like the tenants of the adjoining houses, the defendant cultivated the land E at the back. Each house had a strip of a like kind. The defendant continued cultivation after the others had given it up. The others had permission from the plaintiffs to cultivate the land—perhaps oral permission—but he had no such permission. His defence to this action for possession and for damages as against a trespasser is that he has a squatter's title. Therefore, before dealing with the law on the matter, I think that I could usefully read the evidence, or the gist F of the evidence, which the defendant gave.

Having described how he had a discussion with Mr. Haydon and how his neighbours were working on either side of him, the defendant said that he moved into the plot of land and " put in rhubarb and bulbs from other garden before Haydon went ". He goes on: " Got no permission from anyone. Never paid rent ". He said that the other two, Mr. Wood and Mr. Haydon, gave up about G 1947, and he continued to work on and grow potatoes. The place was overrun with weeds. He " went in for " greyhounds in 1949, having first put up the shelter. In cross-examination he refers to the cultivation of the plots by the two tenants on either side of him, and the fact that Mr. Haydon, the man whom he had succeeded, did not live in those premises at all. He wanted the bit behind his maisonette and he thought, being tenant of No. 367a, that he was entitled H to the bit behind it. He then went on to say:

> " I knew other tenants cultivating behind their premises. I thought entitled to same. Not trying to take over land, not really. Exercising rights I thought I had as tenant of these premises. All three cultivated bits. One by one, when war ended, these gave up. By 1948 whole place overgrown barring my strip . . . Done no more than grow vegetables on I site. Two-thirds of the strip down towards concrete. Did nothing to keep plaintiffs off."

He gave evidence about some bricks which he had put down to mark the boundary of the plot of land to which he claims a statutory title. The bricks are there, crushed into the ground, and they appear to have been bricks which were lying about after the demolition of the cottages. They were used merely to make a line and a boundary round the piece of ground which was being worked, without in any way forming any sort of fence. The land had been marked off by the laying of bricks by Mr. Haydon, not by the defendant, and Mr. Haydon's phrase is "down from old cottages", as if the bricks were bricks which had formed part of the old cottages.

That was the defendant's evidence, on which he claims to have a title which is conveniently described as a squatter's title. To understand what the law on the matter is I must refer to the Limitation Act, 1939. Section 4 (3) of that Act provides:

> "No action shall be brought by any other person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

The defendant claims that more than twelve years have elapsed since the right of action accrued to the plaintiffs, i.e., since 1940, when Mr. Haydon first occupied the land. Section 5 (1) provides:

> "Where the person bringing an action to recover land, or some person through whom he claims, has been in possession thereof, and has while entitled thereto been dispossessed or discontinued his possession, the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance."

Section 10 (1) provides:

> "No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as 'adverse possession') and where under the foregoing provisions of this Act any such right of action is deemed to accrue on a certain date and no person is in adverse possession on that date, the right of action shall not be deemed to accrue unless and until adverse possession is taken of the land."

I refer to s. 10 (1) because the word "'adverse' possession" is there used. That word had not appeared in the Limitation Acts considered in earlier authorities.

The first question which arises is whether the plaintiffs had, in the language of the statute, "discontinued their possession", and that question was answered by the learned county court judge in favour of the plaintiffs. He said:

> "I am satisfied that they never intended to discontinue their ownership or to allow anyone else to acquire ownership."

In my view the evidence justified that finding that there was never any intention on the part of the plaintiffs to discontinue their ownership. Indeed, they were doing all that they could do in the circumstances, being landlords who intended to use the land for no other purpose than to develop it, and who have been prevented by circumstances hitherto from so doing.

However, the second question, on which the defendant succeeded in the court below, depends on whether they had been dispossessed by the action of the defendant, and that question was answered in favour of the defendant in these words:

> "In my view what was done by Haydon and the defendant was quite sufficient to amount to actual ousting of the plaintiffs."

The question on this appeal is whether there was evidence on which the learned county court judge could so find. In my view the evidence of the defendant which I have read, and which was substantially the evidence in this case on which the learned county court judge acted, was not, with all respect to him, sufficient; and, indeed, there was no evidence on which he could properly find that the defendant had dispossessed the plaintiffs.

As I indicated, the authorities on this matter go back to a period long before the present Limitation Act, 1939, and the first is a decision of the Court of Appeal, *Leigh* v. *Jack* (1) ((1879), 5 Ex.D. 264). The words which were considered there were the words of s. 3 of the Act of 3 & 4 Wm. 4. The headnote says: A

> "Acts of user committed upon land, which do not interfere and are consistent with the purpose to which the owner intends to devote it, do not amount to a 'dispossession' of him, and are not evidence of 'discontinuance of possession' by him within the meaning of 3 & 4 Wm. 4, c. 27, s. 3." B

The plaintiff was the owner of the land in dispute, Grundy Street and Napier Place, waste land which belonged to J. S. Leigh, his predecessor. At the material time the defendant had occupied and become the owner of the land on each side of this piece of ground, had enclosed the piece of ground and placed on it a quantity of old graving dock materials, screw propellers and boilers, and refuse C from his foundry. He had spread this over the surface of Grundy Street so as to make the place impassable for carts and horses, although people did occasionally pass on foot until the place was fully enclosed. The only intention which the owner had referable to that piece of ground was that it should be used as a road. It was never dedicated to the public as a highway. So far as it is material to this part of the case, the argument was stated in this way by counsel for the D plaintiff (5 Ex.D. at p. 269):

> "The second question depends upon the facts stated in the special case, and from these it is clear that the plaintiff and her predecessors in title have not been out of possession for the period of twenty years. The acts of the defendant were consistent with the intention of J. S. Leigh, namely, that the soil of Grundy Street should be at some time dedicated to the public as a E highway; the defendant only used the land until that intention could be carried out."

According to the report he was then stopped, and that argument was accepted by the court, consisting of COCKBURN, C.J., and BRAMWELL and COTTON, L.JJ. COCKBURN, C.J. said (ibid., at p. 271): F

> "I do not think that any of the defendant's acts were done with the view of defeating the purpose of the parties to the conveyances; his acts were those of a man who did not intend to be a trespasser, or to infringe upon another's right. The defendant simply used the land until the time should come for carrying out the object originally contemplated. If a man does not use his land, either by himself or by some person claiming through him, he G does not necessarily discontinue possession of it. I think that the title of the plaintiff is not barred by the Statute of Limitations."

BRAMWELL, L.J., said that two things appeared to be contemplated by the statute in question: dispossession and discontinuance of possession. He said (ibid., at p. 273): H

> "I think that . . . the circumstance that J. S. Leigh within twenty years before suit repaired the fence separating Grundy Street from Regent Road is strong to show that there was no discontinuance."

He then came to the question of dispossession and said (ibid.):

> "I do not think that there was any dispossession of the plaintiff by I the acts of the defendant: acts of user are not enough to take the soil out of the plaintiff and her predecessors in title and to vest it in the defendant; in order to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it; that is not the case here, where the intention of the plaintiff and her predecessors in title was not either to build upon or to cultivate the land, but to devote it at some future time to public purposes."

Cotton, L.J., dealt with the matter as follows (ibid., at p. 274):

> " In deciding whether there has been a discontinuance of possession the nature of the property must be looked at. I am of opinion that there can be no discontinuance by absence of use and enjoyment where the land is not capable of use and enjoyment. In the present case the property sought to be recovered is a piece of land intended to be dedicated to the public as a road. At one end of it was a fence consisting of a post and rails; within twenty years before action this fence was repaired by J. S. Leigh; this was a user of it sufficient to defeat the operation of the Statute of Limitations. Even if the acts of the defendant could be held to amount to an ouster of the plaintiff and her predecessors in title, there has been a possession by them of the soil of Grundy Street and Napier Place within twenty years."

So Cotton, L.J., laid emphasis on the nature of the property to be looked at in the particular case. I think that all their Lordships were in agreement in the way in which they dealt with the matter, and that there really is no substance in the argument, put forward by counsel for the defendant here, that Bramwell, L.J., was striking out on his own unsupported by the other members of the court, when he spoke of acts having to be done inconsistent with the enjoyment of the soil for the purposes for which the plaintiff intended to use it.

Applying that test to this case, I cannot see that any act which the defendant did is capable of being treated as sufficient to dispossess the plaintiffs. The defendant never even thought he was dispossessing the plaintiffs; he never claimed to do more than work the soil, as he thought he was permitted to do. He had some vague idea in his head, derived from a source which is not clear on the evidence, that it was quite all right for him to work it, but, so far as I know, he never had nor claimed any intention of asserting any right to the possession of this piece of ground.

I would have left the matter there had not the learned county court judge founded himself on another case which he thought supported the view which he came to, *Marshall* v. *Taylor* (2) ([1895] 1 Ch. 641). There the plaintiff and the defendant were owners of adjacent houses and adjacent gardens, which were formerly separated by an open ditch, and on the plaintiff's side of the ditch was a hedge. *Leigh* v. *Jack* (1) was distinguished on the facts of that particular case, but it seems to me that these facts were so different from this case that there was no reason why the learned county court judge should have been deflected from the prima facie view which he might have adopted if he had referred only to *Leigh* v. *Jack* (1). The headnote, which has to do with matters that have very little to do with this case, reads:

> " . . . more than twelve years before the action was brought the defendant paved part of the surface with cobble-stones and laid cinders on part, and also planted a rose-garden and made a fowl-house on other parts. But the plaintiff continued to cut his hedge from the defendant's side, and on two occasions opened the ditch to clean out the drains:—Held . . . that, assuming that the plaintiff was the original owner of the ditch, he had lost the ownership of the surface by lapse of time, the acts of ownership of the defendant having been sufficient to dispossess him within the meaning of s. 3 of 3 & 4 Will. 4, c. 27."

To distinguish this case, I think that it is sufficient to point out that in that case the defendant had completely enclosed the property in question by a hedge and made it entirely part of his garden, which was a property of the same kind and of the same nature as the garden of the plaintiff alongside. The plaintiff was excluded from access to the defendant's garden unless he had chosen, as Lord Halsbury pointed out, to creep through the hedge; whereas in this case there was nothing of that kind. No attempt was made by the defendant here to fence off his piece of ground so as to exclude anyone from it; all he did was work the ground in the period before the sheds were built, and in 1949, within the twelve year period, he put up these sheds which in the end have been the reason why this action has been brought.

I think that, if the plaintiffs desire an order for possession in accordance with the precedent of *Leigh* v. *Jack* (1), they are entitled to it, although it would seem to be unnecessary. What they really require is an order for the pulling down of the sheds and damages for the trespass, which in my judgment should be nominal. Those damages will be 40s.

To that extent I think the appeal should be allowed.

MORRIS, L.J.: I am of the same opinion. When the plaintiffs brought their action, they were met by the defence that the claim had not been brought until after the expiration of twelve years from the date on which the right of action accrued to them. It is necessary to have the provisions of s. 5 (1) of the Limitation Act, 1939, in mind. The plaintiffs had been in possession of the property and under that sub-section a right of action is deemed to have accrued on the date of any dispossession or discontinuance. The two questions therefore arose: first, had there been discontinuance of possession by the plaintiffs, and, secondly, had there been dispossession of the plaintiffs by the defendant ? The first of those questions has presented no difficulty. It was pointed out by Bramwell, L.J., in his judgment in *Leigh* v. *Jack* (1) ((1879), 5 Ex.D. 264 at p. 272) that the smallest act is sufficient to show that there is no discontinuance. He said that, in dealing with a house, it would perhaps be difficult to suppose a case where it could be doubtful whether there had been a discontinuance of possession, but that it was possible to conceive of a case of discontinuance of possession as to a piece of land; he went on to point out that, in such a case, the smallest act would be sufficient to show that there was no discontinuance.

In the present case the plaintiffs had wished to develop the land. In 1948 their representative, Mr. Howey, had twice gone on the land and had measured it, and application was presented for permission to build on the land. Later, in 1953, the plaintiffs actually dumped some material, some rubbish, on the land, which, they were saying, was their land. It seems to me that those acts would be sufficient to indicate that there was no discontinuance of possession by the plaintiffs.

The real question is whether, on the facts as they are found and known, there was dispossession of the plaintiffs by the defendant. The plaintiffs had bought the property in 1937. They had taken down some old cottages and built the premises which are now numbered 365 to 375. But the land at the back was left vacant. It was found by the learned judge that they intended to develop that land when an opportunity arose, and until that opportunity arose they did not intend to use it. The war came and there were the great difficulties of building on the land. So the land at the back of these premises was used for purposes of growing garden produce. Mr. Haydon in fact used the land at the back of the property No. 367. He began to use it in 1940. It is perhaps not uninteresting to see how he himself put it. He said that he did not think that he was trying to take possession but he was merely using the land while the emergency was on. He called it a " part of the war effort." Some bricks were put down which he described as being simply a dividing mark. I think that all that shows the nature of what was happening. Similar evidence was given by a lady, Mrs. Wolcha, the mother-in-law of the defendant. She was in flat No. 365, and she said: " I did not regard it as my own land." She was speaking with reference to a corresponding user. She said her husband worked part and Mr. Haydon worked part; " we just took it and used it ". I think that those facts are all material, because, in considering this question of whether there was dispossession, it is of importance to have in mind what Cotton, L.J., said in *Leigh* v. *Jack* (1) (5 Ex.D. at p. 274):

> " In deciding whether there has been a discontinuance of possession the nature of the property must be looked at."

Here, therefore, was property which, after 1937, was waiting to be developed. The plaintiffs wanted to build on it when they could, but did not intend to use it meanwhile. Then by reason of the coming of the war and the desire of people to use any land, the land was used by the tenants of various properties in order to grow things thereon. Mr. Howey said that, if he had been asked by the tenant of No. 367 for permission, he would have given it, but he would have called for some record. It seems to me that the evidence shows that there was mere user of this land, but not user amounting to dispossession of the owners of it. The defendant himself said that he had done nothing to keep the plaintiffs off the land, and there was practically no fence there now. The defendant cultivated until 1948 or the beginning of 1949, and then, in 1949, put the wire round the part where he was keeping greyhounds and some sort of shelter or shed. When Mr. Howey went on the land in 1948 there was no let or hindrance at all. He was able to go on the land. He went on the land with an official. He was seen by someone to go on the land. No fence of any kind stopped him. He took measurements, he prepared a plan of the proposed development, and we have seen a document showing that he applied to build on the land. I have mentioned the occasion in 1953 when there was some dumping of rubbish by the plaintiffs on the land. There was then a conversation between Mr. Howey and the defendant. There is no doubt that the gist of the conversation was that, on a protest from the defendant, Mr. Howey said that the defendant really had some "cheek" in suggesting what the plaintiffs were to do with their own land. When Mr. Howey went on the land in 1953, he saw a shed but he did not think that it was on the plaintiffs' land: he formed the impression that it was not: and he did not see the greyhounds. No attempt was ever made to stop Mr. Howey going on to the land.

In all the circumstances, it seems to me that the cumulative effect of the evidence is to make it quite impossible to say that there was actual possession in the defendant of a nature that ousted the plaintiffs from possession, or excluded them from possession: there was no intention on the plaintiffs' part to do other than keep the land until they could use it, and in those circumstances, in my judgment, such measure of user as took place was not of a nature or quality which could amount to an ouster by the defendant of the plaintiffs from their possession. I therefore think that the appeal should be allowed.

SELLERS, L.J.: I agree. The land in question was idle. Its owners were waiting an opportunity to build on it. Unhappily, there are in our country many vacant plots of land due to enemy bombing which, for economic and planning reasons, have not yet been and cannot yet be built on. In the circumstances, the true owners can make no immediate use of the land, and as the years go by I cannot accept that they would lose their rights as owners merely by reason of trivial acts of trespass or user which in no way would interfere with a contemplated subsequent user. I am glad to think that this appeal must be allowed.

Judgment for the plaintiffs. Order for removal of fencing and sheds. Damages 40s.

Solicitors: *H. B. Wedlake, Saint & Co.* (for the plaintiffs); *Alfred Slater & Co.* (for the defendant).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

PARKES *v.* KNOWLES AND ANOTHER.

[BIRMINGHAM ASSIZES (Lynskey, J.), July 30, 1957.]

Costs—Tort—High Court action—Two defendants—Payment into court of £100 *by first defendant—Acceptance by plaintiff in satisfaction of claim—Whether money "recovered" in the action—Scales of costs applicable to plaintiff's costs and second defendants' costs—County Courts Act,* 1934 (24 *&* 25 *Geo.* 5 *c.* 53), *s.* 47 (1), *as substituted by the County Courts Act,* 1955 (4 *&* 5 *Eliz.* 2 *c.* 8), *s.* 1 (2)—*R.S.C., Ord.* 22, *r.* 4 (3).

While the plaintiff was travelling as a passenger in a motor car driven by the first defendant, the car came into collision with a motor omnibus owned by the second defendants and the plaintiff was injured. He commenced an action in the High Court against both defendants, each of whom blamed the other for the accident. The first defendant paid into court £100 under R.S.C., Ord. 22, r. 1, and the plaintiff gave notice of acceptance of the sum in satisfaction of his claim. On application under R.S.C., Ord. 22, r. 4 (3)*, the question of costs arose for determination having regard to s. 47 (1)† of the County Courts Act, 1934, as substituted by s. 1 (2) of the County Courts Act, 1955.

Held: the £100 was money "recovered" by the plaintiff within s. 47 (1) of the County Courts Act, 1934, and (i), as the action was one which on the facts should have been begun in the county court, the plaintiff would be awarded his costs of the action against the first defendant on county court scale 3, and (ii), the costs of the second defendants should be on the High Court scale and, they having been reasonably joined, would be ordered, in order to avoid the double taxation involved by a Bullock order, to be paid by the first defendant.

[**Editorial Note.** As regards the decision that money paid into court was money "recovered" in the action, cf. the similar decisions on the construction of an earlier statute (the County Courts Act, 1850, s. 11), *Parr* v. *Lillicrap* ((1862), 1 H. & C. 615) and *Boulding* v. *Tyler* ((1863), 3 B. & S. 472).

For the County Courts Act, 1934, s. 47 (1), as substituted by the County Courts Act, 1955, s. 1 (2), see 35 HALSBURY'S STATUTES (2nd Edn.) 26.

For the Rules of the Supreme Court, Ord. 22, see the ANNUAL PRACTICE, 1957, p. 385.]

Application under R.S.C., Ord. 22, r. 4 (3).

In an action commenced in the High Court, the plaintiff, Clive Parkes, claimed damages against the first defendant, Albert John Knowles, and the second defendants, Birmingham & Midland Red Motor Omnibus Co., Ltd., for personal injuries which the plaintiff had received on July 14, 1956, when a motor car in which he was a passenger, and which was owned and driven by the first defendant, collided with a motor omnibus owned by the second defendants. Each of the defendants blamed the other for the accident. On June 28, 1957, the first defendant paid £100 into court under R.S.C., Ord. 22, r. 1; the plaintiff subsequently gave notice of acceptance of the sum paid in in satisfaction of his claim. The plaintiff now applied to the court under R.S.C., Ord. 22, r. 4 (3), to deal with the sum in court and with the costs.

G. Griffiths for the plaintiff.

A. E. James for the first defendant.

A. J. Flint for the second defendants.

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* The provisions of r. 4 (3) are printed at p. 601, letter F, post.

† The terms of s. 47 (1), as substituted, are printed at p. 601, letter I, to p. 602, letter [illegible]

A **LYNSKEY, J.:** In this case the plaintiff, Clive Parkes, claimed damages for personal injuries which he sustained on July 14, 1956, when he was travelling as a passenger in an Austin motor car belonging to and driven by the first defendant, Albert John Knowles. While he was being driven in that car there was a collision between it and an omnibus belonging to the second defendants, Birmingham & Midland Red Motor Omnibus Co., Ltd. According to the case B made for the first defendant, as the Austin car was just about to overtake the motor omnibus, the motor omnibus suddenly started off and an impact took place between the two vehicles with the result that the plaintiff sustained certain personal injuries, the injuries which gave rise to this case. They do not appear to have been extremely serious, but the plaintiff commenced the action in the High Court against both defendants, claiming damages against both defendants. C From the very start the first defendant blamed the second defendants, and then, when the pleadings came to be completed for both defendants, each blamed the other, but neither, of course, could blame the plaintiff for the cause of the accident, or for the injuries sustained by him. The action proceeded, and on June 28, 1957, the first defendant paid into court the sum of £100 under the provisions of R.S.C., Ord. 22, r. 1. The plaintiff gave notice of acceptance of the amount paid in D in satisfaction of his claim and he now applies to me under R.S.C., Ord. 22, r. 4, to deal with the amount in court.

R.S.C., Ord. 22, r. 4 (1), provides:

> " Money may be paid into court under r. 1 by one or more of several defendants sued jointly or in the alternative, upon notice to the other defendant or E defendants."

Rule 4 (2) reads:

> " If the plaintiff elects within fourteen days after receipt of notice of payment into court to accept the sum or sums paid into court, he shall give notice as in Form 4 in Part 2 of Appendix B to each defendant."

F That was done in this case. Rule 4 (3) reads:

> " Thereupon all further proceedings in the action or in respect of the specified cause or causes of action (as the case may be) shall be stayed, and the money shall not be paid out except in pursuance of an order of the court or a judge dealing with the whole costs of the action or cause or causes of G action (as the case may be)."

The application now comes before me under R.S.C., Ord. 22, r. 4 (3), on the question what order as to costs shall be made. It is quite clear in the first instance that the first defendant having paid into court became liable to the plaintiff for his costs of the action to the appropriate time*. That is a little com- H plicated in this case, because, having regard to the County Courts Act, 1955, an action in respect of personal injuries of this sort could have been brought against both defendants in the county court.

Section 47 (1) of the County Courts Act, 1934, as substituted by s. 1 (2) of the County Courts Act, 1955, reads:

I " Where an action founded on contract or tort is commenced in the High Court which could have been commenced in the county court and the action is not referred for trial to an official referee, then subject to sub-s. (3) and sub-s. (4) of this section the plaintiff—(a) if he recovers a sum less than £300, shall not be entitled to any more costs of the action than those to which he would have been entitled if the action had been brought in the

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* See p. 603, letter E, post, for the date to which costs were awarded against the first defendant.

> county court; and (b) if he recovers a sum less than £75, shall not be entitled to any costs of the action; so, however, that this section shall not affect any question as to costs if it appears to the High Court or a judge thereof (or where the matter is tried before a referee or officer of the Supreme Court, to that referee or officer) that there was reasonable ground for supposing the amount recoverable in respect of the plaintiff's claim to be in excess of the amount recoverable in an action commenced in the county court*.
>
> "For the purposes of para. (a) and para. (b) of this sub-section, a plaintiff shall be treated as recovering the full amount recoverable in respect of his claim without regard to any deduction made in respect of contributory negligence on his part or otherwise in respect of matters not falling to be taken into account in determining whether the action could have been commenced in the county court."

The first point raised by counsel for the plaintiff is that the £100 paid into court is not money "recovered" in the action. In my view, it is. The action was brought; the money was paid into court in the action; the notice of acceptance of the money has been given under the rules in relation to the action: and the money will be paid to the plaintiff as the result of the action having been brought by him. That being so, it seems to me quite clear that this is money "recovered" in the action.

The next question which arises is one of fact, that is: Was there reasonable ground for supposing the amount recoverable in respect of the plaintiff's claim to be in excess of the amount recoverable in an action commenced in the county court? There may be cases where it is very doubtful what amount the plaintiff would recover in actual fact. Contributory negligence is dealt with in the latter part of the sub-section. In this particular case, however, the plaintiff was a passenger and he was bound to recover against one or the other of the defendants. Therefore, in deciding whether the amount paid into court was sufficient, he was in no way interested in any question of liability as affecting the amount which he would recover. The result is, it seems to me, quite clear. The acceptance by the plaintiff of the amount of £100 paid into court shows that the £100 is a fair amount to be paid to him in respect of his injuries—at any rate, he thinks so. That being so, it is quite clear that this is an action which should have been commenced in the county court, as there is no real reason for thinking that the plaintiff would not have recovered in the county court everything that he would be entitled to in respect of his injuries.

The result is that the costs, which the plaintiff is entitled to recover from the first defendant, who paid into court, must be limited to scale 3 of the county court scales.

The next question which arises is in relation to the costs of the second defendants, who have not paid into court. R.S.C., Ord. 22, r. 4 (3), provides that all proceedings shall be stayed, and the effect of the payment-out to the plaintiff is to put an end to the action so far as he is concerned, because he can no longer allege any damage against the other defendant as he has been recouped in full. The result is that, as far as the second defendants are concerned, there is no further issue to be tried and the second defendants are entitled to judgment with costs. The question is from whom shall they recover the costs. Prima facie, they are entitled to recover them against the plaintiff, but if one makes a "Bullock" order† it means a double taxation. The question is whether the

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* By s. 40 (1) of the County Courts Act, 1934, as amended by s. 1 (1) of the County Courts Act, 1955, the county court has jurisdiction to hear and determine an action founded on tort where the damages claimed do not exceed £400.

† An order such as was made in *Bullock* v. *London General Omnibus Co.*, [1907] 1 K.B. 264.

A plaintiff is entitled to add to the costs which he is to obtain from the first defendant the costs which he would have to pay to the second defendants.

I think that I ought to exercise my discretion in this matter in exactly the same way as I would have exercised my discretion if this action had been fought to conclusion and the conclusion come to was that the first defendant was alone to blame and that the proper amount to be paid was £100. That being so, it B seems to me that, if the plaintiff was reasonable in joining both defendants in the action, he is entitled to recover his costs. Having regard, first, to a letter which was written and, secondly, to the allegations, or lack of allegations, of negligence in the two defendants' pleadings, it seems to me that the plaintiff was not only reasonable in joining both defendants, but would have been extremely foolish if he had not done so. In those circumstances the plaintiff is entitled to recover C from the first defendant the costs which he is to pay to the second defendants. As a Bullock order would involve double taxation, which I do not like, for it only adds to the costs and does not help anybody, I propose to make a direct order. So far as the second defendants are concerned, they are not affected by the plaintiff's choosing the High Court. They have been brought here, and had to fight here. It seems to me that the proper order to make is that the first D defendant pay the plaintiff's costs on scale 3 of the county court scales, and that the first defendant pay the second defendants' costs on the High Court scale.

A. E. James (for the first defendant): In respect of your Lordship's order that the first defendant should pay the plaintiff's costs on county court scale 3, would your Lordship say that his costs be to the date of payment in ?

E **LYNSKEY, J.:** I do not think so, for this reason. Under R.S.C., Ord. 22, r. 4, it is not open now, where there are two defendants, for the plaintiff to take the money out. He must make an application. Therefore, until he comes before the court to make the application he cannot take the money out. My order as to costs will include not merely costs up to date of payment in, but also the costs of this application.

F *Order accordingly.*

Solicitors: *Hewitt & Walters*, Birmingham (for the plaintiff); *Maurice Putsman & Co.*, Birmingham (for the first defendant); *Rutherfords*, Tamworth (for the second defendants).

[*Reported by* GWYNEDD LEWIS, *Barrister-at-Law.*]

GILBERT *v.* GILBERT & ABDON (ADAMS intervening).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), November 13, 14, 15, 18, 19, 1957.]

Divorce—Practice—Trial—Allegation of adultery—Submission by intervener of no case—Election—Matrimonial Causes Act, 1950 (14 *Geo.* 6 *c.* 25), *s.* 5.

In a divorce suit the wife alleged that the husband had committed adultery with the intervener. At the conclusion of the wife's case counsel for the intervener asked the court to dismiss the intervener from the suit under s. 5 of the Matrimonial Causes Act, 1950*, on the ground that there was insufficient evidence against her. On the question whether counsel for the intervener should first be put to his election whether or not to call evidence,

Held: the court had a discretion under s. 5 of the Act of 1950 to dismiss the intervener from the suit at the close of the wife's case; whether the court would exercise that discretion by so dismissing the intervener depended on the circumstances of the case, and in the present case counsel for the intervener would be put to his election whether to call or not to call evidence.

Observations of Mr. Commissioner LATEY, Q.C., in *Beal* v. *Beal, Reade cited* (see footnote, p. 605, post), on the obsolescence of s. 5 not followed.

[**Editorial Note.** If, in a common law case, a submission were made that there was " no case " to answer, the consequence that no evidence could be called subsequently by the party making that submission followed only if the party making the submission had been first put to his election whether to call or not to call evidence (see per LORD GREENE, M.R., in *Yuill* v. *Yuill* ([1945] 1 All E.R. at p. 185, letter B). Thus, if counsel is not put to this election, the mere fact that he submits " no case " does not preclude him from calling evidence subsequently (*Yuill* v. *Yuill*, [1945] 1 All E.R. at p. 185). It was there assumed that the same applied in the Divorce Division where, however, there is the special power conferred by s. 5 of the Matrimonial Causes Act, 1950.

As to a person other than the husband or wife, against whom adultery is alleged being dismissed from the suit at the close of the petitioner's case, see 12 HALSBURY'S LAWS (3rd Edn.) 387, para. 852, text and note (c).

As to putting a party to election whether to call evidence in a divorce suit, see 12 HALSBURY'S LAWS (3rd Edn.) 387, para. 852, text and note (e).

For the Matrimonial Causes Act, 1950, s. 5, see 29 HALSBURY'S STATUTES (2nd Edn.) 395.]

Cases referred to:

(1) *Hopper* v. *Hopper*, (July, 1955, unreported).

(2) *Beal* v. *Beal, Reade cited*, [1953] 2 All E.R. 1228n.; 3rd Digest Supp.

(3) *Yuill* v. *Yuill*, [1945] 1 All E.R. 183; [1945] P. 15; 114 L.J.P. 1; 172 L.T. 114; 27 Digest (Repl.) 544, *4921*.

(4) *Matina* v. *Matina*, [1957] N.Z.L.R. 440.

(5) *Alexander* v. *Rayson*, [1935] All E.R. Rep. 185; [1936] 1 K.B. 169; 105 L.J.K.B. 148; 154 L.T. 205; Digest Supp.

Petition.

The parties were married in 1940 and there were five children. By a petition dated July 13, 1956, the husband prayed for a divorce on the ground of the wife's adultery with the co-respondent. By her answer the wife admitted adultery but contended that the adultery was conduced to by the husband's neglect and misconduct, that she had just cause for leaving the husband and did in fact leave him in July, 1953, that the husband had treated her with cruelty and that the husband had committed adultery with the intervener; and the wife cross-prayed for a divorce in the exercise of the court's discretion. The husband by his reply denied the allegations of conduct conducing, cruelty and adultery. The intervener also by her reply to the wife's answer denied the charge of adultery. At the end of the wife's case counsel for the intervener referred the court to s. 5 of the Matrimonial Causes Act, 1950, and submitted that there was not " sufficient evidence " of adultery against the intervener and that she should be dismissed from the suit. The question then arose whether counsel for the intervener should be put to his election whether to call or not to call evidence, and the case is reported on this point.

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* The terms of s. 5 of the Matrimonial Causes Act, 1950, so far as relevant, are printed at p. 605, letter C, post.

R. J. A. Temple, Q.C., and *C. Sleeman* for the husband.
W. A. L. Raeburn, Q.C., and *M. Share* for the wife.
Joseph Jackson for the intervener.

Nov. 15. **SACHS, J.**: At the conclusion of the evidence adduced on behalf of the wife, counsel for the intervener referred to s. 5 of the Matrimonial Causes Act, 1950, and submitted that this was a case in which the court should exercise its powers whereby

> ". . . the court may, after the close of the evidence on the part of the petitioner, direct the co-respondent or the respondent, as the case may be, to be dismissed from the proceedings if the court is of opinion that there is not sufficient evidence against him or her."

He submitted that the court should not put him to his election whether or not to call evidence before considering the question of dismissing the intervener from the suit.

This is not the first occasion that an application by a co-respondent or intervener has been made to me in similar circumstances. The last such application was in *Hopper* v. *Hopper* (1) at Leeds Assizes in July, 1955. There is, however, apparently no direct decision on the point so far as it concerns co-respondents and interveners, though there are the very helpful observations of Mr. Commissioner LATEY, Q.C., in *Beal* v. *Beal, Reade cited* (2)*. On the one hand counsel for the husband, to whom I put the question as amicus curiae, was unable to bring to mind any case since *Yuill* v. *Yuill* (3) ([1945] 1 All E.R. 183), where a co-respondent or intervener had been dismissed from the suit at the stage now under consideration. On the other hand, in *Matina* v. *Matina* (4) ([1957] N.Z.L.R. 440)* the court, on parallel provisions in their Divorce and Matrimonial Causes Act, 1928, s. 17 (2), dismissed from the suit a woman named in the wife's petition. As the evidence in the case before me, in so far as it concerns the alleged adultery of the intervener, is of a type which merited the court's attention being directed to the provisions of the above s. 5, it accordingly becomes necessary, before examining that evidence, to consider what is the correct approach to the application of counsel for the intervener having regard to *Alexander* v. *Rayson* (5) ([1935] All E.R. Rep. 185), and *Yuill* v. *Yuill* (3), and also, of course, to the above referred to observations of Mr. Commissioner LATEY. Section 5 of the Matrimonial Causes Act, 1950, being part of a recently consolidated statute, clearly remains effective, if I may so put it; and I doubt whether that part of the judgment of Mr. Commissioner LATEY (see p. 605, letter I, ante), which is phrased: " I have now come to the conclusion that the section is really obsolete ", was meant to convey anything more than that under modern practice, the occasions on which the discretion conferred by the section will be exercised in favour of the intervener are likely to be rare.

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*The case is shortly reported in [1953] 2 All E.R. 1228n. In *Beal* v. *Beal, Reade cited*, Mr. Commissioner LATEY, Q.C., stated that in the case before him the point raised under s. 5 of the Matrimonial Causes Act, 1950, was only of academic interest, but that he had made some research into the genesis of s. 5 which was to be found in *Robinson* v. *Robinson & Lane* ((1859), 1 Sw. & Tr. 362) and continued: " At that time [i.e., in 1858] a co-respondent was not a competent or compellable witness, and neither husband nor wife was competent or compellable to give evidence in proceedings instituted in consequence of adultery. The somewhat complicated course of matrimonial and evidence legislation which terminated this state of things is lucidly reviewed in the judgment of DENNING, L.J., in *Tilley* v. *Tilley* ([1948] 2 All E.R. 1113). The full court in *Robinson* v. *Robinson & Lane* (supra) found itself bound to hold that, as the co-respondent, while still a co-respondent, was not a competent witness, he could not be called as a witness in favour of the wife respondent, nor could he be dismissed from the suit before final judgment, as the law then stood. COCKBURN, C.J., announced, however, that a provision was being introduced into the pending Divorce Act (Amendment) Bill to overcome the difficulty which had arisen; thus s. 11 of the Matrimonial Causes Act, 1858, came into existence. That Act became law on Aug. 2, 1858, within a few weeks after the final judgment in *Robinson* v. *Robinson & Lane* (supra). Nevertheless, despite the competence now, and for many years past, of any party to give evidence in proceedings which are instituted on the ground of adultery, and despite the general duty of this court, laid down by s. 4 of the Matrimonial Causes Act, 1950, re-enacting similar provisions in previous Matrimonial Causes Acts, to dismiss a petition if not satisfied that the adultery has been committed, s. 5 of the Matrimonial Causes Act, 1950, still remains on the statute book. Either it means what it says, or it is obsolete. As regards the rule laid down in *Alexander* v. *Rayson* (5) ([1935] All E.R. Rep. 185) and its application to divorce proceedings as explained by LORD GREENE, M.R., in *Yuill* v. *Yuill* ([1945] 1 All E.R. 183), GODDARD, L.J., in *Parry* v. *Aluminium Corpn., Ltd.* ((1940), 162 L.T. 236), in asserting that the rule should be followed in negligence cases, suggested that it might not be the right course in every action, for example, in defamation and slander cases.

" Having investigated the origin of s. 5 of the Matrimonial Causes Act, 1950, I have now come to the conclusion that the section is dead wood which might well be cut away by legislation, but that it would be wrong to hold in principle that it counteracts the authority of *Alexander* v. *Rayson* (supra). Therefore, the course which I took in this case must not be treated as a precedent. No harm was done thereby to any party, because I think, to echo the words of WALLINGTON, J., in *Yuill* v. *Yuill* (supra), that it might have involved grave injustice if I had attempted to dispose of this case without hearing the evidence on both sides."

To my mind, s. 5 gives the court a statutory discretion under which in suitable cases it may in future, as in the past, dismiss a co-respondent or an intervener at the conclusion of the evidence of the party seeking to make a case of adultery against that co-respondent or intervener. Nothing in the way of a rule of practice could prevail against the provisions of that section or take away that discretion from the courts. Whether or not to put a co-respondent or intervener to election as to calling evidence must depend on the circumstances of the case under consideration. The factors which have to be taken into account when applying one's mind to the question of discretion must, of course, include those which the authorities show to be the basis of the decisions in *Alexander* v. *Rayson* (5) and the cases which followed it. High amongst the factors to be taken into account is the danger of causing litigation to be made additionally expensive and additionally protracted where the judge has to make a ruling in a border-line case such as the one now before me. Another factor, and to my mind a cogent factor, is the danger of producing an absurd result in a particular case. For instance, the spouse accused of adultery may yet after the ruling of the court under s. 5, go into the witness-box and there give in testimony facts which tend both against him or her and against the intervener and which, when added to the previous evidence, may result in a finding that that adultery took place. In such a case one could then come on the position that the adultery had been proved against the intervener on the totality of evidence available against him or her, and yet that intervener had been already dismissed from the suit. It was for that reason that I felt it appropriate to ask counsel for the husband whether he was going to call the husband in the present case to testify on the issue whether there had been adultery, or whether he was going to take his stand on s. 32 (3) of the Matrimonial Causes Act, 1950†. Counsel gave an unequivocal answer that he was going to call his client on the point which I have mentioned.

In the circumstances of the present case, I have come to the conclusion—as in the case which fell for decision at Leeds Assizes—that counsel for the intervener should be put to his election. This, accordingly, I propose to do. In the

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* In *Matina* v. *Matina* GRESSON, J., declined to put counsel to his election before ruling on the submission.

† 29 HALSBURY'S STATUTES (2nd Edn.) 417.

A nature of things a similar result may ensue in the great bulk of causes where applications are made by co-respondents and interveners under the provisions of s. 5. That, however, does not alter the position that each such application must be the subject of a discretion to be exercised on the facts of the case as opposed to one which should be exercised according to automatic rule. I therefore put counsel to his election.

B

[Counsel for the intervener elected to call evidence on behalf of the intervener, and the trial continued.]

Nov. 19. **SACHS, J.,** having found that the wife had not established her charge of adultery, referred again to the submission under s. 5 of the Act of 1950, and C said: I may add that when counsel for the intervener made his submission under s. 5 of the Matrimonial Causes Act, 1950, I was somewhat sympathetic towards his application. If, in fact, at that stage I had had to come to a decision whether or not there was, to use the words of the section, " sufficient evidence " against the intervener, and remembering the view I took of the wife's evidence and of that of a witness called on her behalf, I would have come to the conclusion that there D was not sufficient evidence. For the reasons which I gave, however, I still consider that this is not the type of case in which one should accede to a submission such as that made by counsel for the intervener; even in the present case some additional evidence of relevance to the wife's case was put before the court after the submission, in the shape of the statement on oath as to the E husband's having slept during the holiday period of Christmas, 1955, at the wife's flat. In other cases, evidence of this type might well be supplemented under cross-examination by matters which would be adverse to the intervener's case.

[HIS LORDSHIP rejected the wife's cross-prayer and granted the husband a decree on his petition.]

Solicitors: *Braund & Fedrick* (for the husband); *Benson, Mazure & Co.* (for the wife); *Tatton, Gaskell & Tatton* (for the intervener).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

NATIONAL BANK OF GREECE AND ATHENS, S.A. *v.* METLISS.

[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Tucker, Lord Keith of Avonholm and Lord Somervell of Harrow), October 10, 14, 16, 17, 21, 22, November 25, 1957.]

Conflict of Laws—Succession—Universal succession by foreign law of one foreign company to another—Whether recognised by English courts—Creditor's action against successor company protected by moratorium imposed by foreign law.

Company—Foreign company—Amalgamation—Universal succession of new amalgamated company by law of domicil—Whether recognised by English courts—Creditor's action against successor to foreign guarantor company.

In 1927 the M. Bank, a Greek bank, issued sterling mortgage bonds, payment of interest and principal being guaranteed by the N. Bank, another Greek bank incorporated under Greek law. The proper law of these contracts was English. No interest had been paid on the bonds since 1941, when the Germans and Italians occupied Greece. In 1949 a Greek law suspended all obligations on the bonds and imposed a moratorium thereon. The suspension and moratorium were still in force. In 1953, by a Greek law, the N. Bank was amalgamated with another Greek bank, the A. Bank, to form a new amalgamated company, the G. Bank, the appellants. The Greek Act governing the amalgamation of banking companies provided that a new company absorbing another company by amalgamation should become the "universal successor" to the rights and liabilities in general of the amalgamated companies, without any other formality or act. In an action by a bondholder, the respondent, against the G. Bank for arrears of interest,

Held: the respondent was entitled to recover six years' arrears of interest against the G. Bank since—

(i) the court recognised not only the fact that the G. Bank was created by and existed under Greek law but also that it had been invested with the liabilities as well as the assets of the N. Bank and the A. Bank to which banks it was the universal successor, and

(ii) the proper law of the contracts being English, the N. Bank, if sued in the English courts, could not have relied on the moratorium imposed by Greek law and, therefore, neither could the G. Bank.

Decision of the COURT OF APPEAL (sub nom. *Metliss* v. *National Bank of Greece and Athens, S.A.*, [1957] 2 All E.R. 1) affirmed.

[As to the recognition of the dissolution of foreign corporations, see 7 HALSBURY'S LAWS (3rd Edn.) 13, para. 22; and as to the withholding of recognition because of the nature of a foreign law, see ibid., 8, para. 10.]

Cases referred to:

(1) *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux*, (1890), 25 Q.B.D. 399; 59 L.J.Q.B. 510; 63 L.T. 503; 11 Digest (Repl.) 423, *723*.

(2) *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Akt. & Hungarian General Creditbank*, [1939] 3 All E.R. 38; [1939] 2 K.B. 678; 160 L.T. 615; Digest Supp.

(3) *Lazard Bros. & Co.* v. *Midland Bank, Ltd.*, [1933] A.C. 289; 102 L.J.K.B. 191; 148 L.T. 242; 10 Digest (Repl.) 1299, *9161*.

(4) *Beavan* v. *Hastings (Lord)*, (1856), 2 K. & J. 724; 27 L.T.O.S. 282; 69 E.R. 973; 11 Digest (Repl.) 398, *550*.

Appeal.

Appeal by the National Bank of Greece and Athens, S.A., from an order of the Court of Appeal (Denning, Romer and Parker, L.JJ.), dated Mar. 18, 1957, and reported sub nom. *Metliss* v. *National Bank of Greece and Athens, S.A.*, [1957] 2 All E.R. 1, affirming an order of Sellers, J., dated July 12, 1956. The appellants were a new amalgamated Greek company which, by Greek law, was the universal successor both to a Greek company which had no English assets but which had guaranteed the interest (which was in arrear) on Greek bonds payable in England and subjected by Greek law to a moratorium, and to another Greek company which had English assets. Sellers, J., held the appellants liable to pay six years' arrears of interest on the bonds to the respondent, Cyril Metliss, a bondholder. The facts appear in the opinion of Viscount Simonds.

T. G. Roche, Q.C., and *N. H. Lever* for the appellants.

J. G. Foster, Q.C., and *M. Littman* for the respondent.

The House took time for consideration.

Nov. 25. The following opinions were read.

VISCOUNT SIMONDS: My Lords, the respondent is the holder of bonds of the total amount of £21,900, part of an issue of £2,000,000 seven per cent. sterling mortgage bonds issued by the National Mortgage Bank of Greece in the year 1927 and guaranteed by the National Bank of Greece. Both these companies were incorporated under Greek law. In the year 1935 the provisions of the bonds were modified so as to reduce the rate of interest from seven per cent. to four and three quarters per cent. and to provide that bondholders resident in Greece should be paid only in drachmae. These modifications, the latter of which did not affect the respondent, were agreed to by the guarantor, the National Bank of Greece. On Dec. 6, 1955, the respondent, having in vain presented for payment coupons for interest which had accrued since June 1, 1941, brought an action in the Queen's Bench Division, not against the original debtor nor against the guarantor, but against the appellants, the National Bank of Greece and Athens, S.A., claiming unpaid arrears of interest for fourteen and a half years to June 1, 1955, amounting to £15,083 12s. 6d. He recovered judgment for £6,241 5s. 1d., being the interest due for the six years preceding the presentations of coupons. An appeal by the appellants was dismissed by the Court of Appeal.

Your Lordships will see at once how important and novel a question is raised in this appeal. For I am not aware of any case, nor has the industry of learned counsel discovered one, in which, in the courts of this country, a plaintiff has, without a plea of novation or statutory assignment, recovered a sum due under a contract from one who was not a party to that contract. It will be necessary to examine closely the circumstances which, in the opinion of Sellers, J., and the Court of Appeal, support the claim. A further question, not of general importance, is also raised whether, if the appellants are suable in this action, they can claim the benefit of a moratorium decreed by Greek law which would undoubtedly avail them if they were sued in Greece.

The appellants, a company incorporated under Greek law, owe their existence to an Act of the Greek Parliament and a Decree made under it, to which I must briefly refer. By the Act, which was enacted on Feb. 18, 1953, and was numbered Act No. 2292, it was provided (I take the so-called official translation) that

> "When the amalgamation of limited liability banking companies is concerned, the legal provisions in force are amended as follows."

Then follow provisions relating to amalgamation consequent on shareholders' meetings to which I need not refer. Then comes s. 4:

> "No description of the items contributed is required in the relative contract of amalgamation nor in the statutes, in the case of amalgamation

> by formation of a new company, provided that all the assets and liabilities of the banking companies amalgamating are contributed as a whole. A
>
> "The company which absorbs another company by merger, or the new company formed by the amalgamation, becomes the universal successor to the rights and liabilities in general of the amalgamated companies, without any other formality or act whatsoever."

Section 8 provides that: B

> "Wherever in a Law, Decree or Ministerial Decision reference is made to one of the above-mentioned amalgamated limited liability banking companies by shares, it is understood that reference is made to the new limited liability banking company formed pursuant of the amalgamation, and generally all provisions in force of Laws, Decrees or Ministerial Decisions in favour of one of the amalgamated companies are considered as being in favour of the new company as from the formation of the latter." C

Section 10 provides that

> "The amalgamation of limited liability banking companies by shares, by formation of a new limited liability banking company by shares, may also be effected without a resolution of the general meeting of the shareholders, by Decree promulgated on the proposal of the Council of Ministers." D

It was under the authority of this last section that, on Feb. 27, 1953, a decree was promulgated under which the Greek company that I have mentioned, the National Bank of Greece, and another Greek company, the Bank of Athens, were amalgamated and a new limited liability company by shares formed under the style "National Bank of Greece and Athens, Ltd. Co." having its seat in Athens and as objects the carrying on of the business of the amalgamated banks for a period of fifty years. The decree prescribed the terms of amalgamation in respect of shareholders and other matters, and then, by cl. 5, provided that as from the publication of the decree the two companies, the National Bank of Greece and the Bank of Athens, should cease to exist and the entire property of each of them in its whole (assets and liabilities) on the day of publication should be considered as being automatically contributed to the new company constituted by those presents, which was substituted, ipso jure and without any other formality, in all rights and obligations of the amalgamated banks, as their universal successor. (I again use the language of the official translation.) Thus the guarantor bank, which owed its existence to the law of Greece, was by the same law extinguished. On the other hand, the original debtor bank was left untouched by that or, so far as I am aware, any other decree and, on Oct. 27, 1955, asserted its continued existence by making an offer to the holders of its sterling bonds about which it is necessary to say no more than that it was rejected by the respondent. On the contrary, within a few days he presented his interest coupons to Hambros Bank, Ltd. (one of the paying agents named in the bonds) for payment, and, payment being refused, brought this action not against the debtor bank but against the new company created by the Greek decree of Feb. 27, 1953. E F G H

It may be mentioned here that the new company, that is the appellants, duly registered with the Registrar of Companies the prescribed particulars under s. 410 of the Companies Act, 1948, and are now carrying on business in this country. It must also be added that it has not been, and could not be, alleged that there has been a novation of the original contract between the respondent and the appellants. The respondent rests his claim against the appellants on Greek law and specifically on the decree of Feb. 27, 1953, and on nothing else. I

I have so far said nothing about the second point that arises in this case, viz.: how far the appellants can avail themselves of the Greek moratorium laws to which I will refer later, even if they are otherwise liable on the bonds. I propose to defer any discussion of this point until I have dealt with the main question.

A To the respondent's claim, the appellants object in brief that they were not parties to the original bonds and, therefore, are not liable in respect of them, that the proper law of the bonds was English law and no foreign decree can operate to modify the terms thereof or to substitute one company for another as a party thereto and (stating the same proposition in other words) that English law does not recognise a succession imposed by a foreign law to an obligation arising under B a contract governed by English law. Each one of these propositions is challenged by the respondent so far as it relates to the present claim, except that it is now conceded, as was held by the learned trial judge, that the proper law of the contract is English.

My Lords, it must be apparent that, if the appellants are right, a strange situation is revealed. Here is a company whose status is recognised by the C courts of this country because it is incorporated by the law of its domicil. By that law it is invested with duties, powers, assets, liabilities. It admits that, if sued in Greece, it would be liable on the bonds here in question, subject always to the benefit of any moratorium. It comes to this country, carries on its business, and assumes unchallenged possession of the assets of the dissolved company. It is the strange climax of this narrative that it then disclaims a D liability to which that dissolved company was undoubtedly subject. I do not think that an English court of justice should readily give effect to such a pretension, and I will in the first place examine such authority as was cited by learned counsel for the appellants in support of his propositions.

In the forefront was put *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux* (1) ((1890), 25 Q.B.D. 399), a case which will be found to illustrate E well the fallacy of the appellants' contention. In that case, according to the headnote, a party to a contract made and to be performed in England is not discharged from liability under such contract by a discharge in bankruptcy or liquidation under the law of a foreign country in which he is domiciled. The parties having entered into a contract of which the law was indisputably English law, the defendants made default and, in defence of a claim made against them F in an English court, pleaded that they had been placed in judicial liquidation by the Tribunal of Commerce of the Seine, France being the country of their domicil. This plea was vigorously rejected by the court, LORD ESHER, M.R., saying (ibid., at p. 407):

> G "I wish to base my judgment, however, on the assumption that they were so discharged [i.e., by the order of the French court]. I say that, assuming that to be so, the suggestion that the defendants would be discharged in this country by a law of the country of their domicil is altogether outside the general principle that governs such matters, and cannot be supported."

This statement of the law is repeated as r. 102 in DICEY'S CONFLICT OF LAWS (6th Edn.) at p. 447, and, subject to certain immaterial qualifications, can be H accepted by this House. But what bearing has it on the present case? It would, no doubt, be relevant if the original guarantor company were being sued and pleaded that they had been dissolved by the law of their domicil and their liability ended. But that is not what has happened. It is not an issue in this case whether the original guarantor company could still be sued notwithstanding that it has been wound-up and its liabilities transferred to the new company I under Greek law, and it is the fundamental fallacy of the appellants' argument that the two propositions are treated as complementary, that is to say that, if our law would regard the original company as still liable, the new company can disclaim the liability which is imposed on it by Greek law—and, I would say, imposed on it as a condition of its existence, but that is to anticipate what I shall say on another aspect of the case.

Reliance was next placed on some observations of the Court of Appeal in *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Akt. & Hungarian General Creditbank* (2) ([1939] 3 All E.R. 38). They have so little relevance to the present case that I hesitate to occupy time by referring to them. The question A there was whether a contract, of which the proper law was English and which was to be performed in England, was enforceable in the English courts although its performance might involve a breach by the defendants of the law of Hungary. The court did not challenge the principle* that

> " a contract (whether lawful by its proper law or not) is, in general, invalid B in so far as the performance of it is unlawful by the law of the country where the contract is to be performed . . .",

but rejected with lively references to the possible laws of Ruritania the suggested extension of this principle to a case where the contract is lawful in the country where it is to be performed. Your Lordships have recently had occasion to examine this question at some length. C I can only say that it appears to me to be irrelevant to the question whether our courts will recognise the liability of the appellants to an obligation imposed on them by their own law.

No other authority, I think, was cited in support of the appellants' contention. The question is rather one of principle and analogy, though analogies are dangerous and principles difficult to state with precision. The analogy, which has found some favour with the courts below and is not without its use, is in the D conception of universal succession. That is a conception of the Roman law which found its way into many systems of law including, as my noble and learned friend, LORD KEITH OF AVONHOLM, has pointed out, the law of Scotland. It may be assumed that the Greek legislature, using the words " Universal successor " in the relevant Act, was looking to the familiar principle under which the heir was the universal successor of his testator and regarded as eadem persona E cum defuncto, and was asserting the identity of the new company with the old. But I do not care to rest my opinion on a conception which is, at the least, artificial. The fact is that the new company is a new juristic entity which was not a party to any contract with the respondent, and I do not think that, when a competent legislature has created a corporation and vested in it all the powers, assets and liabilities of an old corporation, which is then dissolved, anything is F added by a further reference to universal succession, unless, indeed, it can be said that such a reference makes the path seem more familiar and, therefore, easier. In the same way it is easier to recognise the validity and efficacy of such a transfer if one recalls the many examples of statutory amalgamation of undertakings in this country and, no doubt, in other countries. It might be said that it has become a commonplace feature of commerce and industry in the modern G state that such amalgamations should take place, and that it has become a matter of comity to recognise them except in so far as they are in conflict with the positive law of the country where it is sought to give effect to them.

But, my Lords, in the end and in the absence of authority binding this House, the question is simply: What does justice demand in such a case as this? I H believe that justice will be done if your Lordships think it right not only to recognise the fact that the new company exists by the law of its being but to recognise also what it is by the same law. It is conceded that its status must be recognised. That is a convenient word to use. But what does it include or exclude? If a corporation exists for no other purpose than to assume the assets, liabilities and powers of another company, what sense is there in our recognising I its existence, if we do not also recognise the purposes of its existence and give effect to them accordingly? If, for reasons of comity, we recognise the new company as a juristic entity, neither the Greek government, the creator, nor the new company, its creature, can complain that we, too, clothe it with all the attributes with which it has been invested. Thus and thus alone, as it appears, justice will be done. It may not be inappropriate that, in dealing with this Greek company,

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* DICEY'S CONFLICT OF LAWS (6th Edn.), p. 637, r. 141, Exception.

I have used language which may to some of your Lordships be reminiscent of the words of a Greek philosopher of more than two thousand years ago.

I conclude, therefore, that the appellants fail in their first contention that they are not liable on the bonds which were guaranteed by the old company. If I have to base my opinion on any principle, I would venture to say it was the principle of rational justice. I turn now to the second question, whether, being sued in this country, the appellants can claim the benefit of the moratorium imposed by successive Greek laws.

The effect of these laws is, I think, correctly stated in the appellants' formal Case and I quote from it. In the month of April, 1941, the Germans and Italians occupied Greece and payment of the sums falling due under the bonds ceased and (so far as the bonds in question in this case are concerned) was never resumed. In November, 1949, the suspension of payments was regularised by the Greek Emergency Law 1318 of November, 1949, which suspended the service on Greek bonds payable in foreign currency (including these bonds) until June 30, 1952. The Emergency Law was ratified by the Greek Law 1586. The moratorium was continued by Greek Law 2204 of 1952 until June 30, 1954, then by Greek Law 2948 of 1954 until Dec. 31, 1954, then by Greek Law 3162 of 1955 until June 30, 1955, and by Greek Law 3274 of 1955 until Dec. 31, 1955. Thus the moratorium was still in force at the date of the issue of the writ in this action on Dec. 6, 1955. The only other thing that need be said about these laws is that they expressly operated to suspend not merely all remedies for enforcement of the bonds in question but also the obligation to make payments, and it is conceded by the respondent that, if he sued in Greece, the moratorium would be an effective defence to his action.

My Lords, I think that in the consideration of this question some confusion has arisen out of the evidence of the experts on Greek law who were called on either side. They could, of course, give evidence as to the meaning and effect in Greek law of the statutes to which I have referred and say what, in their opinion, the result would be if the appellants were sued on the bonds in a Greek court. But they could not give evidence on the question which our courts and ultimately your Lordships have to decide: whether, and to what extent, in an action here the moratorium laws will be regarded as capable of affecting the obligations under the bonds which are admittedly governed by English law. I have read and re-read the evidence and the statutes to which they relate and am unable to extract anything from them except what may be said to be obvious, that the new company succeeded to (inter alia) the liabilities of the old company, including the liability on these bonds, but that, if the bondholder sued in a Greek court, he would be met by the moratorium and his action would fail. I can find no firm evidence that, on a true construction of the amalgamation decree, the new company was to be in a better position than the old in regard to foreign contracts. On the contrary, there was repeated affirmation of the proposition that the new company was to be in just the same position as the old, having truly the advantage of any law of which the old company had the benefit but having nothing more. I ask then what would have been the position of the old company if sued here on these bonds and am absolved from any further examination of the question by the concession freely and, I think, rightly made by the appellants that the old company could not have relied on the moratorium. Clearly the obligations in English law (the proper law of the contract) could not be affected by a Greek law which purported to vary its terms. I would for this purpose regard a law imposing a moratorium as in the same category as a law creating a new period of limitation. In this respect it is interesting to note that the appellants, though it did not become necessary for them to rely on it, in fact pleaded the English Statute of Limitations as a partial answer to the claim. But whether the law of the foreign country imposes a moratorium or a period of limitation, it cannot avail a defendant sued in the courts of this country. For these reasons, I think that the contentions of the appellants on the second point also fail.

I ought not to conclude without referring to an argument powerfully presented by junior counsel for the appellants, which made some appeal to me. It was to the effect that it was to the last degree improbable that the Greek government, having as a matter of public policy imposed a moratorium on the payment of these amongst other bonds, should then create a new corporation which, in this country at least, would not be able to take advantage of it. This may be so, though, where questions of policy are concerned, it would be unwise to come to any conclusion without a full knowledge of all the facts. But I have borne this aspect of the case carefully in mind in coming to the conclusion which I have stated. I cannot be satisfied by any extraneous consideration that the obligations of the new company in an English court are in any way different from those of the company of which it is the " universal successor ".

The appeal should, in my opinion, be dismissed with costs.

LORD MORTON OF HENRYTON: My Lords, two questions arise for decision on this appeal. I would state them as follows:—(i) Apart from the effect (if any) of the Greek statutes imposing a moratorium, does the Greek Statute No. 2292 of Feb. 18, 1953, coupled with the decree of Feb. 27, 1953, make the appellants liable in an English court on the guarantee given by the National Bank of Greece in 1927? (ii) If the answer to the first question is " Yes ", does the existence of the moratorium under Greek law preclude the respondent from recovering the sum awarded to him by Sellers, J.?

My Lords, I would answer " Yes " to the first question. On this point I am content to say that I agree with the Court of Appeal.

On the second question, counsel for the appellants puts his argument somewhat as follows. The rights of the respondent against the appellants arise only by reason of the Greek statute and decree, since the appellants were not a party to the contract of guarantee. It is, therefore, necessary to see exactly what obligation was imposed on the appellants by the Greek legislation. That is a question of Greek law and is, therefore, a question of fact to be proved by the evidence of experts on the law of Greece. If the respondent goes to Greek law to establish his right, he must accept the whole of the relevant Greek law, and not only the part of it which suits him best.

So far, my Lords, I think that the argument has considerable force, and I shall assume, without so deciding, that it is right, and pass on to the next stage of the argument. Counsel next points out that the moratorium was in force when the amalgamation took place, since it had been extended till June 30, 1954, by a law of Aug. 15, 1952, and, as a result of subsequent extension, it was in force when the writ was issued, and it is still in force. Counsel then submits that, according to the evidence of the experts on Greek law, the obligation which passed to the appellants was a suspended obligation and it is still a suspended obligation. I agree that this is the effect of the evidence, if one is considering only what would happen if this action were brought in a Greek court, but I do not think this helps the appellants. The evidence of the experts was that the amalgamation had the effect of putting the appellants in exactly the same position in all respects, as regards this obligation, as the old bank was in immediately before the amalgamation. Now the position of the old bank immediately before the amalgamation was as follows. An action against it on the guarantee would have succeeded in an English court, but would have failed in a Greek court, because of the moratorium. As I understand the evidence, and, in particular, the evidence of Mr. Seferiades at p. 294 to p. 296 of Appendix II [to the Printed Record] immediately after the amalgamation the new bank was in exactly that position and is in that position today. If this is so, the respondent was entitled to bring the present action in England and to succeed in it.

A For these reasons, my Lords, I would answer the second question in the negative and dismiss this appeal.

LORD TUCKER: My Lords, the National Bank of Greece, the original guarantors of the bonds issued by the National Mortgage Bank of Greece in December, 1927, was a corporate entity created by Greek law. Its existence as a B legal entity has been destroyed by the Greek decree of Feb. 27, 1953, promulgated under powers conferred by an Act of the Greek Parliament (No. 2292) passed on Feb. 18, 1953. English law will recognise both the creation and destruction of this foreign corporation by the law of the country of its domicil (cf. *Lazard Bros. & Co.* v. *Midland Bank, Ltd.* (3), [1933] A.C. 289). One of the consequences of the dissolution of this entity is that it is no longer possible to sue C it and obtain judgment against it in an English court for a debt payable in this country. Statutory remedies to mitigate to some extent these consequences have been created by the provisions of the Companies Acts for winding-up non-existent foreign companies with assets here. These statutory remedies, in my view, are not really relevant to the questions which your Lordships are called on to decide in the present appeal.

D The same decree which destroyed the National Bank of Greece created a new legal entity, namely, the present appellants, the National Bank of Greece and Athens, S.A., which was "substituted ipso jure and without any other formality, in all rights and obligations of the said amalgamated banks" for the National Bank of Greece and the National Bank of Athens, which latter corporation had also been extinguished by this same decree. The decree provided that the two E former banks should

> "cease to exist and the entire property of each of them in its whole (assets and liabilities) on the day of publication is considered as being automatically contributed to the new limited liability banking company [the National Bank of Greece and Athens Company] by shares, constituted by virtue of these presents . . ."

F English law will look at the Greek decree to determine the status of this new entity. It is contended, however, that the transfer of liabilities from the old bank to the new is no part of its status. It is said that "status" is confined to the existence, powers and dissolution of the new corporation.

My Lords, I think the result of this appeal really turns on this short point. It is devoid of authority. I do not regard *Beavan* v. *Lord Hastings* (4) ((1856), G 2 K. & J. 724) as really affording any guidance. The identity of the old bank has become merged in the amalgam by a process which is by no means alien to English legal conceptions. It is of the very essence of the transaction that the liabilities and assets of the former should attach to the latter, and to recognise the existence of the new entity but to ignore an essential incident of its creation would appear to me illogical. Why an English court should be compelled to H recognise that part of the decree which has extinguished the old bank but to refuse to give effect to matters which are of the essence of the process of amalgamation I find it difficult to understand. In my view, the fact that this liability was attached to it at birth by its creator can properly be regarded as a matter pertaining to the status of the appellants and, accordingly, governed by the law of its domicil.

I On the second point, namely, the effect of the Greek moratorium, I am of opinion that Greek law is irrelevant. This was an English debt and the obligation to pay it, its quantum and the date of payment are all governed by English law which will not give effect to the Greek moratorium. DENNING, L.J., said in the Court of Appeal ([1957] 2 All E.R. at p. 8):

> "We recognise that Greek law has power of life and death over the company which it created, and we must accept the substitute whom it has provided; but when the substitute stands in our courts to answer for an

> English debt, it must answer according to English law, which says that A
> the debt must be paid according to its terms."

It is argued that the liability which attached to the new bank at birth was only a suspended obligation, but the nature of the obligation under an English contract must be determined by English law and the Greek moratorium would not have availed the original guarantor in an English court. It follows, in my opinion, that it cannot avail the appellants, and I would respectfully accept the B language quoted above as a concise statement of the grounds on which this appeal should be dismissed.

LORD KEITH OF AVONHOLM: My Lords, I agree with the line of reasoning by which your Lordships have arrived at the conclusion that the liability of the appellants to the respondent involves a question of status. I C find it easier, however, to approach the matter from the point of view of succession. The appellants were expressly declared by the relevant Greek statute and subsequent royal decree to be the "universal successor" of the banks which were absorbed and extinguished by the amalgamation decree. This conception, as expounded in the evidence in this case, is common to other legal systems which have borrowed from the Roman law. Used generally with reference to an heir D who takes up a succession on death, it carries with it a liability on the heir to the deceased's creditors for the deceased's debts. From this aspect he represents the deceased. The persona of the deceased is regarded as continued in the heir, or, as it is otherwise expressed, he is eadem persona cum defuncto. He is no more to be regarded as a new party introduced into a contract than is an executor or administrator of a dead man's estate in English law. The term "universal E successor" may be foreign to English law but it cannot be regarded as strange in this House for the doctrine is part of the common law of Scotland, though now affected by statute, and, till within the last hundred years, had important consequences to the heir in a succession. As such the doctrine would not appear to have differed in its fundamental principles from the common law of Greece. I would quote only one short passage from STAIR'S INSTITUTES OF THE LAWS OF F SCOTLAND, Vol. I, Book III, Title IV, p. 505, s. XXIII:

> "Heirs in law are called universal successors, quia succedunt in universum jus quod defunctus habuit, they do wholly represent the defunct, and are as one person with him, and so they do both succeed to him active, in all the rights belonging to him, and passive, in all the obligations and debts due G
> by him . . ."

There are material differences between a succession and a novation. In succession no question of contract arises. In both cases, it is true, the creditor will have lost the personal credit of the debtor on which he may be assumed to have relied. On the other hand he will not have lost, in a universal succession, the security of the debtor's assets which will have passed to the successor and H be available for the creditor, whereas in a novation no transfer of assets need take place at all. The extinction of a corporation under statute or decree and the passing of all its rights and liabilities to a successor exhibits, in my view, all the features of a universal succession. It may not generally be so regarded, but the consequences appear to me to be in many respects indistinguishable. But be that as it may, in the present case the new bank has been declared the universal I successor of the old banks. The result is to fix on it the status and the liabilities of a universal successor. That, in short, is the effect of the evidence given of the Greek law, and in this matter, which is essentially a question of status, it is to Greek law that recourse must be had. I accordingly reject the contention that the appellants are not liable to be sued on the contract of guarantee, as not being party to the contract. They are just as liable as would be the executor in England of a deceased debtor.

The answer to the first point in the case really determines the second point taken for the appellants. If the appellants represent the old debtor they must be subject to all the pleas that affected that debtor. They stand in his shoes. The proper law of the contract is English law and it is conceded that, if the original guarantor had been sued here, the Greek moratoria could not be pleaded in defence. The same must apply, in my opinion, to the new bank which has succeeded to the liabilities of the old.

I would dismiss the appeal.

LORD SOMERVELL OF HARROW: My Lords, I agree with the opinion that has been delivered by my noble and learned friend on the Woolsack.

Appeal dismissed.

Solicitors: *Stibbard, Gibson & Co.* (for the appellants); *Hardman, Phillips & Mann* (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

Re A SOLICITOR'S CLERK.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Barry and Havers, JJ.), November 8, 22, 1957.]

Solicitor's Clerk—Disciplinary jurisdiction over unadmitted clerk—Exclusion from employment without consent—Order made after extension of jurisdiction in respect of conduct before it—Whether disciplinary committee had jurisdiction to make order—Solicitors Act, 1941 (4 *&* 5 *Geo.* 6 *c.* 46), *s.* 16 (1), *as substituted by Solicitors* (*Amendment*) *Act,* 1956 (4 *&* 5 *Eliz.* 2 *c.* 41), *s.* 11.

Statute—Retrospective operation—Amendment extending disciplinary jurisdiction—Amendment not expressly stated to be retroactive—Whether jurisdiction conferred in relation to conduct before date of amendment.

In 1953 the appellant, an unadmitted solicitor's clerk, was convicted of larceny. The property stolen was not property of the solicitor by whom the appellant was employed or of any client of the solicitor. On Apr. 23, 1957, application was made, under s. 16* of the Solicitors Act, 1941, by virtue of an amendment thereto effected by s. 11† of the Solicitors (Amendment) Act, 1956, to the disciplinary committee appointed from the members of the Council of the Law Society for an order directing that no solicitor should employ the appellant without the written permission of the Law Society. By order dated Sept. 20, 1957, the disciplinary committee made such a direction as from that date. Before the amendment made by the Act of 1956, which was not expressed to be retroactive, there had been no jurisdiction under s. 16 of the Act of 1941 to make such an order where the property stolen was not that of the solicitor-employer or his clients'; the amendment extended the jurisdiction to such circumstances. The appellant appealed against the order on the ground that the amendment effected by the Act of 1956 was not retroactive and that the committee had no jurisdiction.

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* Section 16 (1) of the Solicitors Act, 1941 read as follows:

"(a) Where a person who is or was a clerk to a solicitor but is not himself a solicitor has been convicted of larceny, embezzlement, fraudulent conversion or any other criminal offence in respect of any money or property belonging to or held or controlled by the solicitor by whom he is or was employed or any client of such solicitor . . . an application may be made by or on behalf of the society to the disciplinary committee that an order be made directing that as from a date to be specified in such order, no solicitor shall in connexion with his practice as a solicitor take or retain the said person into or in his employment or remunerate the said person without the written permission of the society."

† Section 11 (1) of the Solicitors (Amendment) Act, 1956, substituted as from Nov. 1, 1956, the following words for those of s. 16 (1) (a) above:

"(a) Where a person who is or was a clerk to a solicitor but is not himself a solicitor has been convicted—(i) of larceny, embezzlement or fraudulent conversion; or (ii) of any other criminal offence in respect of any money or property belonging to or held or controlled by the solicitor by whom he is or was employed or any client of that solicitor . . ."

Held: the disciplinary committee had had jurisdiction under the amended s. 16 of the Solicitors Act, 1941, to make an order disqualifying the appellant for the future, although the cause for making the order was something that happened before the jurisdiction was extended by the Act of 1956.

Appeal dismissed.

[**Editorial Note.** The Solicitors Act, 1957, which was brought into force on July 15, 1957, by the Solicitors Act (Commencement) Order, 1957 (S.I. 1957 No. 1194), repealed and replaced the Solicitors Act, 1941. Section 16 of the Act of 1941, as amended, is replaced by s. 38 of the Act of 1957. The decision in the present case may be compared with that in *R.* v. *Vine* ((1875), L.R. 10 Q.B. 195).

As to the retrospective effect attributable to statutes, see 31 HALSBURY'S LAWS (2nd Edn.) 515, para. 670, p. 537, para. 704, text and note (i); and for cases on the subject, see 42 DIGEST 693, 694, *1083-1096*.

For the Solicitors Act, 1941, s. 16, see 24 HALSBURY'S STATUTES (2nd Edn.) 103; and for the Solicitors (Amendment) Act, 1956, s. 11, see 36 HALSBURY'S STATUTES (2nd Edn.) 770.]

Case referred to:

(1) *West* v. *Gwynne*, [1911] 2 Ch. 1; 80 L.J.Ch. 578; 104 L.T. 759; 30 Digest (Repl.) 180, *283*.

Appeal.

This was an appeal by an unadmitted solicitor's clerk against an order made by the disciplinary committee of the Law Society on Sept. 20, 1957, directing that from that date no solicitor should take the appellant into his employment without the written permission of the Law Society. The order was made on an application dated Apr. 23, 1957, under s. 16 of the Solicitors Act, 1941, which was amended by s. 11 of the Solicitors (Amendment) Act, 1956. The appellant had been convicted on Apr. 14, 1953, on charges of larceny; but the charges did not relate to "money or property belonging to or held or controlled by the solicitor by whom he . . . was employed or any client of such solicitor", which was necessary before an order could be made under s. 16 of the Solicitors Act, 1941, in its unamended form. The Act of 1956 by s. 11 amended s. 16 of the Act of 1941 to include convictions of larceny irrespective of ownership. The amendment took effect on Nov. 1, 1956.

The appellant contended that the offence for which he was convicted was committed before s. 11 of the Solicitors (Amendment) Act, 1956, came into force; and that the disciplinary committee had no jurisdiction to make an order which was retroactive in its effect. The respondents contended that the order was valid because although the power to make the order did not arise until after the Act of 1956 had come into force, the conviction on which the order could be made might be a conviction before the date when the amendment of s. 16 of the Act of 1941 took effect.

G. Cohen for the appellant, the solicitor's clerk.

J. R. Cumming-Bruce for the respondents, the Law Society.

Cur. adv. vult.

LORD GODDARD, C.J., read the following judgment: The appellant, an unadmitted solicitor's clerk, appeals against an order of Sept. 20, 1957, whereby the disciplinary committee of the Law Society directed that no solicitor should, in connexion with his practice, take or retain the appellant into or in his employment or remunerate him without the written permission of the Law Society. The order was made on an application under s. 16 (1) of the Solicitors Act, 1941, as amended by s. 11 of the Solicitors (Amendment) Act, 1956.

By the Act of 1941 it was provided that where a solicitor's clerk who was not himself a solicitor has been convicted of larceny, embezzlement, fraudulent conversion or any other criminal offence in respect of any money or property belonging to or held or controlled by the solicitor by whom he is or was employed or any client of that solicitor an application for an order such as was made in this case might be made to the disciplinary committee of the Law Society. The amending Act of 1956 allowed the society to apply for an order where a clerk had been convicted of larceny, embezzlement or fraudulent conversion of any property irrespective of whether it belonged to his employer or one of his clients. This appellant was convicted of larceny in 1953 of property which belonged neither to his employer nor to a client of his and he accordingly contends that to apply the provisions of the Act of 1956 to a person convicted before that Act came into operation would be to make its operation retrospective. In all editions of MAXWELL ON THE INTERPRETATION OF STATUTES it is stated that it is a fundamental rule of English law that no statute should be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by a necessary or distinct implication and this passage has received judicial approval by the Court of Appeal; see *West* v. *Gwynne* (1) ([1911] 2 Ch. 1 at p. 15 per KENNEDY, L.J.). In my opinion, however, this Act is not in truth retrospective. It enables an order to be made disqualifying a person from acting as a solicitor's clerk in the future and what happened in the past is the cause or reason for the making of the order; but the order has no retrospective effect. It would be retrospective if the Act provided that anything done before the Act came into force or before the order was made should be void or voidable or if a penalty were inflicted for having acted in this or any other capacity before the Act came into force or before the order was made. This Act simply enables a disqualification to be imposed for the future which in no way affects anything done by the appellant in the past. Accordingly in our opinion the disciplinary committee had jurisdiction to make the order complained of and the appeal fails.

BARRY, J.: I agree, and have nothing to add.

HAVERS, J.: I agree.

Appeal dismissed.

Solicitors: *Linsley-Thomas & Co.* (for the appellant); *Hempsons* (for the respondents).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

BYATT *v.* BYATT.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Stevenson, J.), October 31, November 1, 12, 13, 14, 1957.]

Magistrates—Husband and wife—Appeal—Fraud—Notice of motion—Jurisdiction—Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict.* c. 39), *s.* 11.

The fact that the ground of appeal is fraud or conduct akin to duress does not make it improper to proceed by motion of appeal in order to obtain the discharge of a separation order made by justices on the ground of the wife's adultery.

[As to procedure on appeals from magistrates' courts, see 12 HALSBURY'S LAWS (3rd Edn.) 509, para. 1116.

For the Summary Jurisdiction (Married Women) Act, 1895, s. 11, see 11 HALSBURY'S STATUTES (2nd Edn.) 854.]

Cases referred to:

(1) *Jonesco* v. *Beard,* [1930] A.C. 298; 99 L.J.Ch. 228; 142 L.T. 616; Digest (Practice) 604, *2448.*

(2) *Hip Foong Hong* v. *Neotia & Co.,* [1918] A.C. 888; 87 L.J.P.C. 144; 119 L.T. 588; Digest (Practice) 602, *2433.*

Appeal.

In this case the wife appealed against an order of the Edmonton justices dated Sept. 6, 1956. By a complaint dated Aug. 16, 1956, the husband alleged that the wife had within the preceding six months been guilty of adultery with a person unknown at a place unknown. The wife did not attend the hearing of the complaint and the case proceeded in her absence. Two letters written by the wife were put before the justices, one addressed to the husband, the other addressed to the court, in both of which she said that she had committed adultery. The justices made a separation order in favour of the husband. The wife appealed by notice of motion in which she asked for leave to admit fresh evidence and alleged as her grounds of appeal, among others, that the two letters produced before the justices had been written by her under fear and duress and at the dictation of the husband, that the admission of adultery was as the husband well knew untrue, and that she had never committed adultery; and the wife filed an affidavit setting out her version of the facts. At the hearing before the Divisional Court it was contended that it was not proper to proceed by motion to raise allegations of this nature, and the case is reported on this procedural point.

J. N. Dunlop for the wife.
Paul Curtis-Bennett for the husband.

Nov. 1. **LORD MERRIMAN, P.:** About the preliminary point I merely wish to say this, out of courtesy to the Court of Appeal, so that they may know what our views on the matter are. A preliminary point has been taken, which is based on the Matrimonial Causes Rules, 1957, r. 73 (2). This provides that an appeal from justices under s. 11 of the Summary Jurisdiction (Married Women) Act, 1895,

> " shall be by notice of motion stating the grounds of appeal and whether the whole or a part only of the order is complained of."

In the present case we have extended the time for the wife to appeal against a finding of adultery on which, on the complaint of the husband, the justices have made a separation order. The wife has filed an affidavit the substance of which, without going into detail, is that, at the demand of her husband, she wrote a letter, some time before there were any proceedings in the magistrates' court, admitting adultery, and when the proceedings were started by the husband's complaint she wrote a further letter to the court in which she confirmed her admission of adultery. The wife did not attend the court and the case proceeded in her absence. The husband gave evidence which was, in effect, limited to producing those letters. The wife has filed an affidavit in which she says, rightly or wrongly, that the whole thing is false, that she was afraid of her husband, and that, in effect, she was forced to write these letters. The word duress has been used. It may or may not be the proper term in the circumstances. It is alleged that the husband put forward those letters in circumstances in which he knew them to contain false statements—in other words that this separation order was obtained contrary to the justice of the case.

This separation order has not merely the immediate effect of condemning the wife as an adulteress in any magistrates' court proceedings—it plainly would, I think, prevent her from bringing any claim in a magistrates' court for maintenance, for, as long as this order stands, she would be confronted with an order of a court of competent jurisdiction which would be conclusive against her—but this separation order has also wider implications than that, because it could be produced under s. 7 (2) of the Matrimonial Causes Act, 1950*. That enactment provides:

> " On any such petition† for divorce, the court may treat the decree of judicial separation or the said order [that is, in effect, this separation order] as sufficient proof of the adultery . . . but the court shall not pronounce a decree of divorce without receiving evidence from the petitioner."

This separation order has, therefore, a potential bearing of very great importance on the status of the parties.

I mentioned that appeals, the right to bring which is derived from s. 11 of the Act of 1895, are to be by motion to this court. We have been confronted with the preliminary point that this motion is wholly improper. It is not put as high as to say that there is no right to bring the motion, but there has been cited the judgment of LORD BUCKMASTER in *Jonesco* v. *Beard* (1) ([1930] A.C. 298) in which he says (ibid., at p. 300):

> " Viewed simply as a matter of procedure the course taken was irregular. It has long been the settled practice of the court that the proper method of impeaching a completed judgment on the ground of fraud is by action in which, as in any other action based on fraud, the particulars of the fraud must be exactly given and the allegation established by the strict proof such a charge requires . . . (ibid., at p. 301) That, however, there is jurisdiction in special cases to set aside a judgment for fraud on a motion for a new trial may be accepted."

Then LORD BUCKMASTER cites *Hip Foong Hong* v. *Neotia & Co.* (2) ([1918] A.C. 888), in which, after saying that the trial had been held below and dealt with on the merits, he had added (ibid., at p. 894):

> "They‡ have only to add that, where a new trial is sought upon the ground of fraud, procedure by motion and affidavit is not the most satisfactory and convenient method of determining the dispute. The fraud must be both alleged and proved; and the better course in such a case is to take independent proceedings to set aside the judgment upon the ground of fraud, when the whole issue can be properly defined, fought out, and determined, though a motion for a new trial is also an available weapon and in some cases may be more convenient."

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* 29 HALSBURY'S STATUTES (2nd Edn.) 396.

† "I.e., any petition presented by a petitioner who has been granted a judicial separation or an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, upon the same or substantially the same facts as those proved in support of the petition for divorce."

‡ I.e., the Judicial Committee.

It will be observed that in both those cases, the appeal in the House of Lords and the appeal in the Privy Council, the whole merits were gone into in spite of the cautionary note that it was better not to proceed by notice of motion but to proceed by action. Both cases recognised that there may be occasions on which it is convenient to proceed in the way now before the court, and in my opinion the class of civil action of which Lord Buckmaster was speaking is very far removed from the sort of thing with which we are dealing here. Indeed, I go further. It seems to me that a very close analogy is provided by another aspect of our jurisdiction. I refer to the cases under the Matrimonial Causes Rules, 1957, r. 36 (1), under which this court can entertain applications for the rehearing of cases in which a decree nisi has been pronounced where no error of the judge at the trial is alleged. So far, let me say, the rule is strictly analogous. It is conceded, and it could not be otherwise than conceded, that these two separate written confessions, one addressed to the husband and the other addressed to the clerk of the court, could properly be accepted by the justices, with the husband's own evidence, as proving the charge which he brought. I do not go into the question whether it would have been better to secure the attendance of the wife before acting solely on her written confession; I content myself with saying that they were entitled to act on it. So that no error at the trial can be alleged.

It is true that in cases under r. 36 (1) it is not necessary that fraud should be the ground of the application. Speaking generally, the ground is usually that for some reason or another, and it may even be deliberate abstention by the party bringing the application, a party who really wishes to defend has not had an opportunity of defending. Fraud is not necessarily involved, but it sometimes is, and I can recall many cases where there has been some deliberate trick to avoid the respondent having, for example, notice of the date of the trial, or where an affidavit of service, which was in fact false, has been imposed on the court; but it has never been suggested, in my experience, that merely because it is necessary to move this court to set aside the decree nisi and order a rehearing before another judge the fact that fraud is alleged is a bar to proceeding by motion. I think myself that merely as a matter of convenience, though it is not a complete analogy, the procedure under r. 36 (1), which is in effect the procedure adopted in the present case, of supporting the motion with an affidavit of the circumstances on which the application is based, is a very close analogy. In my opinion this preliminary point is quite hopeless and ought to be disallowed, as we have disallowed it.

There remains, then, the question, how to deal with this matter? As the matter stands at present the wife alone has filed an affidavit, the husband so far has not, possibly because of the supposed validity of this preliminary point or for some other reason, chosen to answer it, although when it came to the point we were told that there is actually in court a completed draft of the affidavit which it is now desired to file. However, we are not shutting the husband out because of his delay. After all, the wife is out of time, and we have extended the time for her, and we are prepared to deal with the husband by the same measure. We have given leave to the husband to file an affidavit. If it is felt to be right, as it may very well be, that this matter should not stand simply on cross-affidavits, we have given leave for either side to give notice to cross-examine the other. That, as far as one can see, should enable us on oral evidence to decide the essential question whether the husband has put forward these letters knowing them to be false. If so, there would be the question whether there is any other evidence of adultery, and it would be possible to suggest this to the wife in cross-examination on her affidavit, in which she says that she never has committed adultery. However that may be, we think that that aspect of the matter should be left until it arises in practice, but we do think that it is desirable that the question Aye or No, has this husband put forward evidence which he knew to

A be false, should be dealt with by oral evidence rather than be dependent on conflicting affidavits. So, having given leave to either party to give notice to cross-examine the other, we simply give leave to apply to fix a suitable day, when we are prepared to hear the evidence.

STEVENSON, J.: I agree.

B [Nov. 14. The court, having heard the oral evidence of both parties and their witnesses, allowed the appeal and discharged the order of Sept. 6, 1956.]

Order accordingly.

Solicitors: *S. Beach & Co.* (for the wife); *J. C. Martin* (for the husband).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

C

D

R. *v.* JOYCE.

[CENTRAL CRIMINAL COURT (Slade, J., and a jury), November 6, 7, 8, 11, 12, 13, 14, 1957.]

E *Criminal Law—Evidence—Statement to police—Inducement to make statement—Interview with police officer before being charged—Accused told officer would " need " statement from him—Whether consequent statement admissible at trial.*

A police officer who was investigating complaints of incest and indecent assault against the accused invited him to go to the police station, saying F " I need to take a statement from you ". The accused did accompany the officer to the station where a statement was taken from him. At the trial when the prosecutor sought to put in this statement the defence submitted that it was not admissible in evidence because the words used by the officer amounted to an inducement relating to the accusation although in fact the accused was not charged with the offences until several weeks after the G interview.

Held: the statement was admissible in evidence, since the words " I need to take a statement from you ", or even words covering a suggestion that a person might have to accompany police officers to the station because they needed a statement from him when he got there, were not an inducement in any way relating to the charge or accusation.

H [As to the effect of inducement on the admissibility of a confession in evidence, see 10 HALSBURY'S LAWS (3rd Edn.) 470, para. 862; and for cases on what amounts to inducement, see 14 DIGEST (Repl.) 480-483, *4578-4622*.]

Cases referred to:

(1) *R.* v. *Doherty* (1), (1874), 13 Cox, C.C. 23; *R.* v. *Doherty* (2), (1874), 13 Cox, C.C. 24.

I

(2) *R.* v. *James*, (1909), 2 Cr. App. Rep. 319; 14 Digest (Repl.) 468, *4510*.

(3) *R.* v. *Reason*, (1872), 12 Cox, C.C. 228; 14 Digest (Repl.) 475, *4553*.

(4) *R.* v. *Rue*, (1876), 34 L.T. 400; 13 Cox, C.C. 209; 14 Digest (Repl.) 481, *4592*.

(5) *R.* v. *Thomas*, (1834), 6 C. & P. 353; 172 E.R. 1273; 14 Digest (Repl.) 480, *4583*.

(6) *R.* v. *Thompson*, [1893] 2 Q.B. 12; 62 L.J.M.C. 93; 69 L.T. 22; 57 J.P. 312; 14 Digest (Repl.) 468, *4521*.

Trial on indictment.

The accused, John Stanislaus Joyce, was charged, on an indictment containing two counts of incest with his daughter, aged fifteen, and two counts of indecent assault against her. He was found not guilty on all counts and was discharged. The case is reported only on the legal submission made by the defence that statements alleged to have been made to a police officer before he was charged were inadmissible.

It was proved in evidence that on the morning of Sunday, July 28, 1957, the daughter lodged a complaint against the accused at the local police station. On the same day at about 11.30 p.m. Detective Inspector Carter and another officer called on the accused at his home, told him that they were police officers investigating a complaint made against him by his daughter, and invited him to accompany them to the police station. During the conversation the words said to have been used by the police inspector were " I need to take a statement from you ". The accused, who had at once denied that he was guilty of any offence against his daughter, finally agreed to go to the police station where he made a statement which was taken down in writing and orally answered questions. He refused to sign the statement. He was arrested in September, 1957, and charged with the offences set out in the indictment. When the police inspector was called, counsel for the defence, in the absence of the jury, submitted that the evidence showed that the accused was taken to the police station against his will before any charge had been laid against him and that the words used by the inspector " I need to take a statement " really amounted to an inducement rendering the statement inadmissible.

J. H. Buzzard and *M. Worsley* for the Crown.
A. S. Wells for the accused.

SLADE, J.: I do not want to say more than is necessary now, since the case, of course, is to continue with the jury.

I have considered the submission at some length because it is disquieting for anyone who has to try a number of sexual cases to observe, on the one hand, the proportion in which an acquittal takes place through lack of corroboration and because of the warning which the judge is bound to give to a jury; and to observe, on the other hand, the number of cases where corroboration is found in some oral statement alleged to have been made by the accused and to constitute an admission which, if put into the context for which the defence contends, may well have amounted to a denial or at least to no more than a colourless explanation of his alleged conduct. I am not going to say more because counsel know what I mean in this particular case.

The objection to the admissibility of this evidence arises in this way. Certain incidents were alleged by the complainant which culminated in an incident on the morning of Sunday, July 28, 1957. Later that day the complainant went to the police station and made certain accusations against her father. At 11.30 p.m. two police officers called at the father's house. They stated who they were, explained the nature of their business, and had some conversation with him in which he denied the accusations that his daughter had made against him. Then, having made a search of the accused's clothing, they invited him (to use a neutral word) to accompany them to Clapham police station.

The accused, who had been in bed, had been awakened and had hastily put on a pair of trousers over his pyjamas. He had been working all that day, although it was a Sunday, and, being not unnaturally reluctant to turn out at that hour of the night, demurred at first to accompanying them to the police station but then said " All right, I will come with you then. She has been stopping out, you know, and she has been telling lies. I have had to chastise her". That is according to the police evidence. Then, again, according to the police evidence, which on this point is rather more favourable to the accused than his own evidence in the witness-box in the absence of the jury during the trial, Detective Inspector

A Carter told the accused, and he was confirmed in substance by Detective Sergeant Coleman, that he would *need* to take a statement from him.

It is right to say that the accused probably would not even have accompanied the police officers to the station if he had not thought, rightly or wrongly, that (to use his own words) he had very little choice in the matter, and I will assume that that was the reason why he did so. It is further fair to say that the accused B might very well have refused to answer any questions at all, even the formal ones as to the members of his family and their ages and who occupied the bedrooms and so on and so forth, if he had not been previously told: " I need to take a statement from you ".

The question which I have to ask myself is whether that is a sufficient inducement in law to exclude any admission thereafter alleged to have been made by C the accused. That it is an inducement of some kind is manifest. One would not normally leave one's house to go to the police station about midnight if one had not been asked to do so in such terms that one thought one had no choice in the matter, and that must mean that there was an inducement operating on one's mind to make one go. If one makes a statement after being told, " I need to take a statement from you ", then obviously some inducement in the colloquial sense D is held out to one to make it; but an inducement of that nature is not a sufficient inducement in law to render inadmissible a statement resulting from it. To render a confession or admission admissible the prosecution must prove affirmatively that no inducement *relating to the charge or accusation* was held out to the accused to make it. A confession or admission must be excluded if it is made (i) in consequence of (ii) any inducement (iii) of a temporal character (iv) connected with E the accusation or relating to the charge (v) held out to the accused by a person having some authority over the subject-matter of the charge or accusation.

In my judgment the words, " I need to take a statement from you ", or even words covering a suggestion that a man will have to come to the station because the police need to take a statement from him when he gets there, is not an inducement in any way relating to the charge or accusation. The prosecution F therefore have satisfied me that evidence is admissible of the oral admissions alleged to have been made by the accused.

Solicitors: *Director of Public Prosecutions* (for the Crown); *Alexander A. Kassman* (for the accused).

[*Reported by* T. J. KELLY, ESQ., *Barrister-at-Law.*]

A

AGRIMPEX HUNGARIAN TRADING COMPANY FOR AGRICULTURAL PRODUCTS *v.* SOCIEDAD FINANCIERA DE BIENES RAICES S.A.

[QUEEN'S BENCH DIVISION (Ashworth, J.), October 21, 22, 23, 24, 25, November 6, 7, 8, 18, 1957.]

B

Shipping—Demurrage—Time lost waiting for berth—Delay due to cargo not being available and consequently no berthing permit being issued—Police clearance not granted until end of waiting time—Ship kept lying in roads—Port charterparty—Whether ship an arrived ship.

In August, 1954, the charterers, who had bought a cargo of maize f.o.b. Argentine ports, entered into a charterparty wherein they agreed with the owners of a vessel that she, having loaded a part cargo of maize at an Argentine port, should proceed to load the rest of the cargo " in the port of Buenos Aires ". The vessel duly arrived in Buenos Aires roads and anchored there at 1.30 p.m. on Oct. 12, 1954. At that date a resolution, passed by the Argentine Grain Board in September, 1954, was in force. This provided that vessels for which a cargo of maize was not immediately available at Buenos Aires should wait in the roads. Loading of such a cargo did not usually take place in the roads. No cargo was available on Oct. 12, and the vessel waited in the roads until Oct. 29. Before a vessel could move from the roads into the dock area a police permit and a berthing permit were necessary. Berthing permits were granted only on certificate (obtainable by the shipper and exporter) that cargo was available. The grant of a police permit was, in the circumstances of this case, substantially a formal matter. On Oct. 29 cargo was available and a berthing permit was obtained. It was agreed between the parties that it had not been possible to have cargo available or to obtain a berthing permit before the times when these in fact were made available or obtained. The police visit to the vessel for clearance did not take place until Oct. 29. On that day the vessel moved to a loading berth. The charterers, having paid under protest to the owners demurrage for the period Oct. 12 to Oct. 29, brought an action for its return and for the amount of lay time saved in loading on the footing that the vessel was not an arrived ship at Buenos Aires until Oct. 29. The owners counterclaimed for damages for delay from Oct. 12 to Oct. 29 on the ground that if the vessel were not an arrived ship until Oct. 29, the cause of her not being an arrived ship on Oct. 12 was the charterers' failure to make available a cargo for her until Oct. 29.

C D E F G

Held: (i) under a port charterparty a vessel was not an arrived ship until she was within the legal, fiscal and administrative limits of the port (see p. 632, letter I, post), and was within its commercial area for vessels loading the type of cargo concerned (see p. 633, letter C, post); accordingly the vessel in the present case was not an arrived ship when in the roads because—

(a) before the resolution of Sept. 1, 1954, the commercial area of the port did not include the roads, and

(b) the resolution did not have the effect of extending the commercial area to the roads as the commercial area was not a fluctuating area whose limits depended on the number of waiting vessels (see p. 635, letter D, post).

H I

Leonis S.S. Co., Ltd. v. *Joseph Rank, Ltd.* ([1908] 1 K.B. 499) followed and explained.

Hudson's Bay Co. v. *Domingo Mumbru S.A.* ((1922), 10 Lloyd's Rep. 476) distinguished.

Roland-Linie Schiffahrt G.m.b.H. v. *Spillers, Ltd.* ([1956] 3 All E.R. 383) applied.

(ii) in the absence of a berthing permit the vessel was not an arrived ship because without the permit the ship was not ready to load (see p. 637, letter C, post); but the absence of a police permit, the granting of which on the facts was a formality, did not have the consequence of preventing the vessel being an arrived ship (see p. 636, letter H, post; *Armement Adolf Deppe* v. *John Robinson & Co., Ltd.*, [1917] 2 K.B. 204, applied).

(iii) the cause of the ship not being an arrived ship shortly after reaching the roads and of her being delayed there until Oct. 29, was that no cargo (and therefore no berthing permit) was available, and the charterers, being under an absolute duty to have ready a sufficient cargo, were liable in damages for the delay so caused (see p. 639, letters E and B, post).

Ardan S.S. Co. v. *Andrew Weir & Co.* ([1905] A.C. 501) followed.

Vergottis v. *William Cory & Son, Ltd.* ([1926] 2 K.B. 344) considered.

(iv) the charterers, therefore, were entitled (by virtue of (i)) to the sums that they claimed, and the owners were entitled (by virtue of (iii)) to the damages that they counterclaimed.

[As to when a ship is an arrived ship, see 30 HALSBURY'S LAWS (2nd Edn.) 422-427, para. 592; as to readiness to load, see ibid., 427, 428, paras. 593, 594; and as to the charterer's duty to provide a cargo, see ibid., 434-442, paras. 602-605.

For cases on when a ship is an arrived ship, see 41 DIGEST 568-572, *3921-3957*; for cases on readiness to load, see ibid., 447-450, *2804-2819*; and for cases on the charterer's duty to provide a cargo, see ibid., 453-456, *2843-2867*.]

Cases referred to:

(1) *Leonis S.S. Co., Ltd.* v. *Rank (Joseph), Ltd.*, [1908] 1 K.B. 499; 77 L.J.K.B. 224; *revsg.*, [1907] 1 K.B. 344; 41 Digest 569, *3937*.

(2) *Pyman Bros.* v. *Dreyfus Bros. & Co.*, (1889), 24 Q.B.D. 152; sub nom. *Re Pyman & Co. & Dreyfus & Co.*, 59 L.J.Q.B. 13; 61 L.T. 724; 41 Digest 571, *3947*.

(3) *Hudson's Bay Co.* v. *Domingo Mumbru S.A.*, (1922), 10 Lloyd's Rep. 476; *affg.*, (1921), 9 Lloyd's Rep. 196.

(4) *Van Nievelt Goudrian & Co., Stoomvaart Maatschappij* v. *Forslind (C. H.) & Son*, (1925), 133 L.T. 457; 30 Com. Cas. 263; 41 Digest 568, *3925*.

(5) *Roland-Linie Schiffahrt G.m.b.H.* v. *Spillers, Ltd.*, [1956] 3 All E.R. 383; [1957] 1 Q.B. 109; 3rd Digest Supp.

(6) *Armement Adolf Deppe* v. *Robinson (John) & Co., Ltd.*, [1917] 2 K.B. 204; 86 L.J.K.B. 1103; 116 L.T. 664; 41 Digest 529, *3568*.

(7) *The Austin Friars*, (1894), 71 L.T. 27; 41 Digest 450, *2819*.

(8) *Mackay* v. *Dick*, (1881), 6 App. Cas. 251; 39 Digest 647, *2424*.

(9) *Little* v. *Stevenson & Co.*, [1896] A.C. 108; 65 L.J.P.C. 69; 74 L.T. 529; 41 Digest 457, *2874*.

(10) *Jones, Ltd.* v. *Green & Co.*, [1904] 2 K.B. 275; 73 L.J.K.B. 601; 90 L.T. 768; 41 Digest 457, *2872*.

(11) *Vergottis* v. *Cory (William) & Son, Ltd.*, [1926] 2 K.B. 344; 95 L.J.K.B. 1002; 135 L.T. 254; 41 Digest 565, *3899*.

(12) *Hogarth* v. *Cory Brothers & Co.*, (1926), L.R. 53 Ind. App. 230; 95 L.J.P.C. 204; 136 L.T. 172; 41 Digest 579, *4030*.

(13) *Lilly & Co.* v. *Stevenson (D. M.) & Co.*, (1895), 22 R. (Ct. of Sess.) 278; 32 Sc.L.R. 212; 41 Digest 561, *3868ii*.

(14) *Krog & Co.* v. *Burns & Lindemann, The Avis*, (1903), 5 F. (Ct. of Sess.) 1189; 40 Sc.L.R. 874; 41 Digest 456 *a*.

(15) *Ardan S.S. Co.* v. *Weir (Andrew) & Co.*, [1905] A.C. 501; 74 L.J.P.C. 143; 93 L.T. 559; 41 Digest 453, *2848*.

Action.

A

In this action the plaintiffs, Agrimpex Hungarian Trading Company for Agricultural Products, a Hungarian company carrying on business in Budapest (referred to hereinafter as the charterers), claimed, against Sociedad Financiera de Bienes Raices S.A., a Panamanian company (referred to hereinafter as the owners), a despatch rebate of £1,064 4s. 8d. and the return of £1,887 10s. being a sum paid by the charterers to the owners, under protest, as demurrage; the B owners denied liability to repay the demurrage, and counterclaimed for the amount of any liability arising from the charterer's claim, less a sum of £25, on the ground of the charterers' breach of charterparty. After the action had begun, £200, which it was admitted was due and owing to the charterers, was paid over to them so that the total claim of the charterers against the owners C amounted to £2,751 14s. 8d.

The charterers were responsible for buying in bulk maize and other cereals required by the Hungarian government, and in June, 1954, they entered into a contract by which they agreed to buy from Bunge A. G. Zurich two parcels totalling 27,000 tons of Plate maize to be shipped in September, 1954, f.o.b. Argentine ports. Under the contract, the shippers were Bunge & Born Ltda. D of Buenos Aires, but it was for the charterers to supply tonnage. The owners owned the s.s. Aello, which flew the Costa Rican flag, and by a charterparty dated Aug. 27, 1954, signed in Hamburg, made between the owners and the charterers, it was agreed that the vessel should proceed to the ports or places mentioned in cl. 3 of the charterparty for the purpose of loading a full and complete cargo of wheat, and/or maize, and/or rye in bulk, and should thereafter E proceed to Hamburg to discharge and deliver the cargo.

Clause 3 provided, inter alia:—

> "3. The steamer shall load as follows, namely, at one or two safe loading ports or places in the River Parana not higher than San Lorenzo . . . quantity at charterers' option but not more than steamer . . . can F safely carry over Martin Garcia Bar . . . and the balance of the cargo in the port of Buenos Aires or Eva Peron or Montevideo at charterers' option."

The port of Eva Peron is now known as La Plata and is so referred to in this report. The charterparty further provided:—

G

> "9. Steamer to shift at her own expense to a second safe shoot or berth, in any station, at each loading port or place if required by charterers. If it is necessary for the steamer to get up steam to enable her to shift to a second loading shoot or berth notice to be given before loading at the first berth is completed otherwise time lost to count as lay days . . .
>
> "13. The steamer shall be loaded at the rate of 500 tons per running day H Sundays and holidays and Saturdays after 1 p.m. excepted, otherwise demurrage shall be paid by the charterers at the rate of £200 per running day or pro rata for part of a day.
>
> "15. . . . time occupied in shifting between the loading ports or places . . . not to count as lay days.
>
> "16. Despatch rebate (which is to be paid to charterers before steamer I sails) shall be payable for all time saved in loading (including Sundays and holidays and Saturdays after 1 p.m.) at the rate of £100 . . . per day or pro rata for part of a day.
>
> "30. If the cargo cannot be loaded by reason of . . . obstructions or stoppages beyond the control of the charterers . . . in the docks, or other loading place . . . the time for loading . . . shall not count during the continuance of such causes . . . In case of any delay by reason of the before-mentioned

A causes, no claim for damages or demurrage, shall be made by the . . . owners. For the purpose, however, of settling despatch rebate accounts, any time lost by the steamer through any of the above causes shall be counted as time used in loading."

The Aello, having loaded a part cargo at Rosario (where the lay time used B was seven days, sixteen hours), proceeded to the port of Buenos Aires to load the remainder of the cargo; she anchored in Buenos Aires roads at 1.30 p.m. on Oct. 12, 1954, where she remained until Oct. 29, 1954. At 10 a.m. on Oct. 29 a pilot went on board the Aello and she began to move in; she berthed at the New Port elevator and was ready to start loading at 2 p.m. on Oct. 29, and in fact began loading at 3.15 p.m. that day.

C The reasons why vessels chartered for loading maize were delayed and compelled to anchor in Buenos Aires roads were found by ASHWORTH, J., to be as follows. At all material times in 1954, the sale and export of maize from the Argentine were controlled by two authorities of the Argentine government, the body controlling sale being known as I.A.P.I., and the body controlling export, D including the storage of maize at Buenos Aires and its delivery on board ship, being Junta Nacional de Granos (referred to hereinafter as the Grain Board). In the early part of 1954, I.A.P.I. sold a large quantity of maize for export and the purchasers duly chartered vessels to take delivery, but the supplies of maize came forward very slowly and by August, 1954, vessels awaiting delivery at Buenos Aires were being seriously delayed. For some time, waiting E vessels were allowed to wait in the basins or alongside loading ships, but this system proved unsatisfactory, and on Sept. 1, 1954, the Grain Board decided that ships for which a cargo of maize was not immediately available at Buenos Aires should wait in the roads; this decision was still in force in October, 1954, when the present vessel reached the roads, so that, as no cargo was immediately F available, she was compelled to wait in the roads until Oct. 29, when a cargo became available. Before the vessel could proceed from the roads to a loading place, a berthing permit known as a giro was required; a giro was obtainable from the Argentine customs authorities, but application for it had to be accompanied by a certificate of the Grain Board stating that the required cargo was available. At the trial, the following admissions which were incorporated in a G formal document, were made by the parties:—

> " 1. The [charterers] did not have available at Buenos Aires any completion cargo for the vessel in time to enable the appropriate certificate of the [Grain Board] and a giro to be issued before they were in fact issued. 2. It was not possible for the [charterers] or anyone else on their behalf H to obtain such a cargo except by the issue of that certificate. 3. At all material times (i) it was not possible for the [charterers] Bunge & Born Ltda. (the shippers and exporters of the cargo), or (to the extent that they were concerned) Agencia Maritima Sudocean S.R.L. [the official agents of the Aello under the charterparty] to have had available at Buenos Aires a completion cargo of any description, or the certificate of the [Grain Board], I or a giro, before these were in fact procured by them; (ii) the [charterers], Bunge & Born Ltda. and (to the extent that they were concerned) Agencia Maritima Sudocean S.R.L. acted reasonably in every step which they took to procure the issue of a certificate of the [Grain Board] and of a giro; (iii) there was nothing which the [charterers], Bunge & Born Ltda., or (to the extent that they were concerned) Agencia Maritima Sudocean S.R.L., could have done which would have resulted in a certificate of the [Grain Board] or a giro being issued before they were in fact issued. 4. Bunge &

> Born Ltda. and Agencia Maritima Sudocean S.R.L. at all material times knew the following facts: (i) no giro could be obtained for the vessel unless and until a certificate had been issued by the [Grain Board] certifying that the latter body had allotted a parcel of grain (whether maize, wheat or rye) for loading on the vessel: (ii) such a certificate could only be obtained by or on behalf of Bunge & Born Ltda., who were the purchasers of the intended completion cargo from I.A.P.I. and the proposed shippers and exporters thereof. 5. No such certificate was obtained by or on behalf of Bunge & Born Ltda. in time to enable a giro to be issued permitting the vessel to berth before she did. 6. The [charterers] personally had no knowledge of the system in force in relation to applications for certificates of the [Grain Board] and giros and accordingly did not know that no giro could be obtained until the certificate of the [Grain Board] had been issued, nor did they know who could apply for such a certificate."

While the certificate of the Grain Board could only be obtained by or on behalf of Bunge & Born Ltda., as shippers and exporters, application for the giro, or berthing permit, had to be made by the customs agents of the vessel, viz., Agencia Maritima Sudocean S.R.L.

With regard to the port of Buenos Aires, the following facts were found by HIS LORDSHIP. The works and installations constructed for berthing, discharging and loading vessels were situated as shown on an exhibit to an affidavit filed on behalf of the charterers and are referred to hereinafter as the dock area. Owing to the character of the river bed, it was necessary to use one of two channels, the North or South channel, to obtain access to the dock area, and these channels met at a point nine kilometres from the north basin. A single dredged channel led outwards from this junction to a position known as Intersection, thirty-seven kilometres from the north basin. On either side of the dredged channel were two anchorages, the quarantine and the free anchorage which were included in the area known as the Buenos Aires roads. The quarantine anchorage was the place where vessels generally anchored on their arrival in the River Plate pending examination by the sanitary authorities and customs inspection was also carried out in the roads. The Aello did not require examination either by the sanitary authorities or by the customs officers when she arrived in the roads on Oct. 12, having already been examined at the port of Rosario; she did, however, require clearance from the police before loading at Buenos Aires and it was agreed between the parties that the police visit to the vessel for this purpose did not take place until Oct. 29. In 1954 vessels carrying more than twenty-five tons of inflammable cargo or explosives were required to discharge such cargo into lighters on arriving in the roads; further, dues on the full harbour scale were payable by vessels anchored in the roads if they discharged or loaded merchandise there, and certain dues were also payable by vessels anchored in the roads which did " not carry out any commercial operation ". The discharge of cargo to lighten vessels before they proceeded up river was also carried out in the roads.

The charterers contended that the Aello was not an arrived ship at the port of Buenos Aires, and, therefore, lay time did not begin to run until 2 p.m. on Oct. 29, viz., when the Aello had moved in from the roads and was berthed. Alternatively, they contended that she was not ready to load and, therefore, was not an arrived ship, until Oct. 29 because (a) a giro, i.e., a berthing permit, was not obtained by or issued to the vessel before Oct. 29, and (b) a police clearance of the vessel and the issue of a police permit (which was required before commencing to load), were not and could not have been completed until the vessel had berthed, viz., until Oct. 29. Accordingly, as loading at Buenos Aires was completed at 11.30 a.m. on Nov. 6, 1954, the charterers alleged that ten days fifteen hours and five minutes of the lay time provided by the charterparty was saved, and that, under cl. 16 of the charterparty, they were entitled to the amount of despatch rebate now claimed. The charterers further contended that even if the vessel was an arrived ship when she anchored in the roads, time for loading did not begin until Oct. 29 because of congestion of shipping in the docks which amounted to an obstruction beyond the charterers' control within cl. 30 of the charterparty, and they denied that demurrage was payable to the owners.

By their points of defence, the owners contended that the Aello became an arrived ship at 1.30 p.m. on Oct. 12 (when she anchored in Buenos Aires roads), and that, accordingly, demurrage, amounting to £1,887 10s. was payable by the charterers in respect of a period of nine days, ten hours and thirty minutes. By their counterclaim, the owners contended that they were entitled to a sum equal to any liability arising from the charterers' claim less £25 (which represented demurrage for the period of three hours it would have taken the Aello to reach the inner harbour of Buenos Aires), on the ground that, even if she was not an arrived ship at 1.30 p.m. on Oct. 12, she would have become an arrived ship by 4.30 p.m. on Oct. 12 (when she could have reached a berth in the inner harbour), if the charterers had not been in breach of the charterparty by failing to have a cargo available for loading before Oct. 29. The owners contended that it was an implied term of the charterparty that by the time the Aello arrived in the roads, the charterers would have procured or enabled to be procured a berthing permit, or the certificate necessary to acquire a berthing permit, and that, in breach of the term, no cargo was made available for loading before Oct. 29, so that neither a certificate nor a berthing permit could be issued before that date; a berthing permit could not be obtained until a certificate was issued by the Grain Board, certifying that the Board had allotted a parcel of grain for loading in the vessel. The owners further contended that the certificate could be obtained only by Bunge & Born Ltda., the shippers and exporters of the cargo, who were to be regarded as the charterers' agents, and as the charterers were at all material times aware of the above facts regarding the issue of a berthing permit, they could not be heard to rely on its absence. The owners also contended that the absence of a berthing permit did not, of itself, prevent a vessel from being an arrived ship. With regard to the police permit, the owners contended that police clearance of the Aello and the application for and issue of a police permit were a mere formality and could have been carried out immediately she was berthed, within a period of a few minutes.

The charterers denied the breach of charterparty, and contended that the liability of the owners to repay the sum paid under protest for demurrage, viz., £1,887 10s. was not recoverable as damages for the alleged breach, being in law too remote.

Eustace Roskill, Q.C., and *J. F. Donaldson* for the charterers, the plaintiffs.
A. A. Mocatta, Q.C., and *R. A. MacCrindle* for the owners, the defendants.

Cur. adv. vult.

Nov. 18. **ASHWORTH, J.**, read the following judgment: The plaintiffs' claim in this case arises out of a charterparty dated Aug. 27, 1954, made between them as charterers and the defendants as owners of the s.s. Aello. I was informed by counsel that the case is a test case, intended by the parties to raise questions which have for some considerable time given rise to difficulty in the trade, and in order to obtain the court's decision without undue delay the parties agreed to waive their right to have the points decided first by arbitration. [HIS LORDSHIP then stated the facts and continued:] It is in my view clear that Buenos Aires roads are used as a place where vessels are regularly though not invariably inspected officially on arrival in the River Plate. What other use A is made of them ? In particular, are they used for anything which may properly be termed a commercial operation ? One type of operation which was undoubtedly carried out in the roads in 1954 was the discharge of inflammables and explosives if the quantity exceeded twenty-five tons. Under art. 1777 of the Digesto Maritimo & Fluvial de la Republica Argentina (hereinafter called the Digest) such cargo must be discharged into lighters when the vessel arrives B in the roads. The lighters then either carry such cargo to its destination or remain in the roads until such time as the vessel finishes discharging or loading in the dock area, when the dangerous cargo is again taken on board. In this connexion reference may conveniently be made to the fact that a scale of dues has been fixed in respect of vessels which anchor in the roads. The details are set out in the affidavit of Rafael de la Vega filed on behalf of the owners, and C they show that certain dues are payable by vessels which anchor in the roads and " do not carry out any commercial operations " and that dues on the full harbour scale are payable if vessels when anchored in the roads discharge merchandise for the port, or load merchandise from the port.

Another type of operation which is carried out in the roads is the discharge of cargo from a vessel in order to lighten her before she proceeds up river, and D in the year 1947 an instance of this type gave rise to a dispute as to the dues payable. The decision of the Finance Ministry was that entrance and light dues were payable on the ground that the " commercial operation of transhipping cargo was involved ". In my view these facts afford strong support for the contentions that the roads are within the legal, fiscal and administrative limits of the port of Buenos Aires and, secondly, that at least for some classes of cargo E a vessel may be said to have arrived in the commercial area of the port of Buenos Aires when she anchors in the roads, but they are in no sense conclusive on the question whether a vessel due to load maize at Buenos Aires can be said to have arrived in the commercial area of that port when she anchors in the roads.

In the search for authoritative guidance as to the limits of the port of Buenos Aires one naturally turns to the Digest which is an official publication issued by F the Argentine government. In ch. LIII of the Digest there are set out regulations of the port of the Capital and La Plata, and in art. 1702 it is provided:

> "Under the denomination of 'port of the Capital and La Plata' are comprised the docks and basins built on the water front of this city, the Riachuelo, entrance channels, outer anchorages and the port of La Plata." G

The next art. 1703, deals with the ports (in the plural) of the Capital and La Plata and provides that they are to be considered as divided into two parts and four sections, namely, the inner part comprising (first section) basins and docks, (second section) riachuelo and south dock, (third section) port of La Plata, and the outer part comprising (fourth section) channels and anchorages. The H idea underlying these provisions appears to me to be that of two-ports-in-one: that is to say, there are two separate ports, the Capital, which is of course Buenos Aires, and La Plata, but inasmuch as they are not far apart and to some extent share the advantage of a common anchorage in the shape of the roads, they are treated for at least some administrative purposes as a single joint port.

In my judgment, under a charterparty such as is involved in the present I case, a ship cannot be said to be an arrived ship at a named port unless she is at least within the legal, fiscal and administrative limits of that port. Before me, counsel for the owners was prepared to accept this principle, but he reserved the right to contend otherwise elsewhere, if necessary. On the evidence before me I have no hesitation in holding that Buenos Aires roads are within the legal, fiscal and administrative limits of the port of Buenos Aires. The articles in the Digest to which I have referred and the facts relating to the collection of dues

A seem to me to justify this conclusion, which is also supported by the evidence
regarding the official inspections carried out in the roads and (so far as it goes)
the "Mar" Year Book. Although no concession on this point was made on
behalf of the charterers, it may be noted that no direct evidence was tendered
on their behalf suggesting that the legal, fiscal and administrative limits of the
port of Buenos Aires are nearer the dock area than the roads. It is true that
B for the purpose of fixing the time when a vessel is to be regarded as having
sailed from the port of Buenos Aires the time of her passing a vangardia or
hailing station situate at the outer edge of the dock area is taken, and not the
time of her passing Intersection, which would normally be some two to three
hours later. But I do not regard this piece of evidence as sufficient to displace
the conclusion already indicated.

C The second condition which in my judgment must be satisfied before a ship
can be regarded as an arrived ship is that she should be within the commercial
area of the port in question. This principle was accepted both by counsel for
the charterers and by counsel for the owners, although they were acutely at
issue in regard to the meaning to be attached to the expression "commercial
area". Moreover, counsel for the charterers contended that even if a ship
D were within the commercial area of a port, she would not be an arrived ship
unless she was at a place where loading can and usually does take place. In
regard to this last-mentioned contention, it is right to record that, while vigorously
disputing its correctness, counsel for the owners was prepared to concede
that loading of maize could not and did not usually take place in Buenos Aires
roads. In the course of the argument on this part of the case reference was
E made to a considerable number of reported decisions, but the case on which
attention was chiefly focussed was *Leonis S.S. Co., Ltd.* v. *Joseph Rank, Ltd.* (1)
([1907] 1 K.B. 344; [1908] 1 K.B. 499). After that case had been argued in
the Court of Appeal, reserved judgments were delivered by BUCKLEY, L.J., and
KENNEDY, L.J., respectively, LORD ALVERSTONE, C.J., expressing his agreement
with both. It was urged before me by counsel for the charterers that although
F BUCKLEY and KENNEDY, L.JJ., were in agreement as to the result, namely,
that the appeal should be allowed, they were not in agreement in their pronouncements
on the question now under discussion. For my part I am not prepared
to accede to the suggestion that there was any difference in principle between the
views of the lords justices and having regard to the fact that LORD ALVERSTONE,
C.J., expressed his agreement with both judgments it is, to say the least of it,
G unlikely that any such difference existed. I am inclined to think that one
reason why some difference between the lords justices has been thought to
exist is to be found in the choice by BUCKLEY, L.J., of the expression "place of
discharge" to describe the area to which KENNEDY, L.J., referred as the
"commercial area". The fact that BUCKLEY, L.J., repeatedly uses the word
"discharge" has in my opinion given rise to the mistaken idea that in order to
H be in the commercial area of a port, a ship must be at a place where discharge is
usual or at least possible. When that case was before CHANNELL, J. ([1907]
1 K.B. 344), he decided it in favour of the charterers on the ground that the ship
did not reach a usual place of loading but merely reached a place where loading
was possible. It seems to me that if the lords justices had intended to allow
the appeal on the ground that possibility of loading was enough (but was also
I essential) they would have said so in plain language. In fact, KENNEDY, L.J.,
said in terms ([1908] 1 K.B. at p. 527), that the possibility of loading was not an
essential factor, and although BUCKLEY, L.J., did not say so directly, I think
that on a fair reading of his judgment there is nothing inconsistent with that
statement. Indeed, in referring (ibid., at p. 517) to *Pyman Bros.* v. *Dreyfus
Bros. & Co.* (2) ((1889), 24 Q.B.D. 152), he said:

> "The facts were that there were no practicable means of loading her
> except at a quay berth, and that a quay berth could not at the time of her

arrival be obtained. That contingency was one the burden of which falls, not on the shipowner, but on the charterer."

The main emphasis of the judgments in *Leonis S.S. Co., Ltd.* v. *Joseph Rank, Ltd.* (1) appears to me to be directed to the crucial distinction between on the one hand a charterparty in which a berth is named or a charterer is expressly given power to designate one, and on the other hand a charterparty in which the destination is a port. In the former case, a ship is only an arrived ship when she reaches the berth named or designated; in the latter case subject to certain conditions she becomes an arrived ship when she reaches an area, conveniently referred to as the commercial area, irrespective of the question whether having reached that area she can in fact load or discharge at the place where she anchors. The conditions in question are those set out in KENNEDY, L.J.'s judgment ([1908] 1 K.B. at p. 521), namely, (a) the area must be that area of the port on arrival within which the master can effectively place his ship at the disposal of the charterer, (b) the vessel must be as near as circumstances permit to the actual loading " spot " and (c) the vessel must be in a place where ships waiting for access to that spot usually lie.

Some fifteen years after the decision in *Leonis S.S. Co., Ltd.* v. *Jospeh Rank, Ltd.* (1) there came before the Court of Appeal *Hudson's Bay Co.* v. *Domingo Mumbru S.A.* (3) ((1922), 10 Lloyd's Rep. 476). It was first heard by SHEARMAN, J. ((1921), 7 Lloyd's Rep. 51), then by BAILHACHE, J. ((1921), 9 Lloyd's Rep. 196), and finally by the Court of Appeal consisting of BANKES, ATKIN and YOUNGER, L.JJ. In that case, as in the present case, the dispute related to the port of Buenos Aires and the main issue was whether the ship was an arrived ship when lying in the roads. In passing, it is worth noting that the roads were either assumed or admitted to be within the legal, fiscal and administrative limits of the port. The charterparty in that case, however, did not provide for the ship to load the balance of her cargo in the port of Buenos Aires; that provision appeared in the original printed form of the charterparty, but had been struck out and the following words substituted:—" at one or two safe loading places always afloat in the port of Buenos Aires ". There is thus a clear distinction, which I regard as important, between the charterparty considered in *Hudson's Bay Co.* v. *Domingo Mumbru S.A.* (3) and the charterparty now before me. The alteration in the printed form was plainly deliberate and was no doubt inserted for the purpose of converting what is called a " port charterparty " into something similar to a " berth charterparty ". The result was that the ship could not be considered an arrived ship when lying in the roads, since in that case it was found by the arbitrator that the roads were not a place where vessels do load or discharge. It was said on behalf of the charterers that the decision in *Hudson's Bay Co.* v. *Domingo Mumbru S.A.* (3) coupled with the judgment of BUCKLEY, L.J., in *Leonis S.S. Co., Ltd.* v. *Joseph Rank, Ltd.* (1) establish the proposition that before a vessel can be regarded as arrived she must be at a place within the commercial area of the port where ships can and usually do load and discharge. This argument involves the conclusion that when KENNEDY, L.J., said in *Leonis S.S. Co., Ltd.* v. *Joseph Rank, Ltd.* (1) ([1908] 1 K.B. at p. 527), it is " . . . immaterial whether she was in a place in which the physical act of loading was possible or impossible " he was in error. I am quite unable to accept this argument. In the course of his judgment in *Hudson's Bay Co.* v. *Domingo Mumbru S.A.* (3) (10 Lloyd's Rep. at p. 479), ATKIN, L.J., refers to KENNEDY, L.J.'s judgment as " now the leading judgment on questions of this kind " and in my view there is no inconsistency between the two decisions, once it is appreciated that the shipowners' obligation under the respective charterparties was not the same. Further support for this conclusion is to be found in *Van Nievelt Goudrian & Co., Stoomvaart Maatschappij* v. *C. H. Forslind &*

Son (4) ((1925), 133 L.T. 457), in particular in the judgment of Scrutton, L.J., at pp. 458, 459. I do not think it necessary to lengthen this judgment by references to the cases decided in England and Scotland before *Leonis S.S. Co., Ltd.* v. *Joseph Rank, Ltd.* (1) was heard. Many of them were cited to me, but in so far as they contain dicta which cannot be reconciled with that decision I prefer to follow it.

The question still remains unanswered: was the Aello when lying in the roads in the commercial area of the port of Buenos Aires within the meaning of that expression given to it by Kennedy, L.J.? I agree with the contention that in a large port the commercial area for one type of cargo may not be the same as that for another type. Local custom is no doubt in some cases a deciding factor, but quite apart from custom I see no difficulty in holding that there may be more than one commercial area within the limits of a port. In each case, as it seems to me, the nature of the cargo to be loaded or discharged is a relevant factor.

It was said on behalf of the charterers that if one applies the test "where do vessels awaiting orders for a particular type of cargo usually lie?", the result is a fluctuating commercial area, the limits of which depend on the number of waiting vessels. I do not agree. What fluctuates is the extent to which the commercial area is occupied, not the commercial area itself, and if the commercial area is full so that the ship has to wait outside, the result is that the ship is not an arrived ship. This view is, I think, in accord with the decision of Sellers, J., in *Roland-Linie Schiffahrt G.m.b.H.* v. *Spillers, Ltd.* (5) ([1956] 3 All E.R. 383), where the shipowners only succeeded because of a special provision in the charterparty.

On the other hand I recognise that a commercial area may shrink or increase in size with the decline or development of a port. But if no such process is taking place, I think that in respect of any port it should be possible to say at any given moment how far the relevant commercial area extends.

In the present case, the evidence contained in the affidavits was somewhat conflicting, possibly because the deponents in some instances tended to be advocates rather than witnesses. Of one fact, however, I feel reasonably confident, namely, that until Sept. 1, 1954, the place where vessels due to load grain usually lay was in the dock area and not in the roads. If the resolution of that date had not been passed, vessels due to load grain would have continued to enter and lie in the dock area until a cargo became available. Further, I feel equally certain that at least until Sept. 1, 1954, vessels due to load grain did not lie in the roads awaiting orders. After Sept. 1, such vessels were compelled to lie in the roads but in my view this exclusion of vessels from the dock area did not have the effect of extending the commercial area to the roads. The contrary view would indeed involve a fluctuating commercial area, which I regard as inconsistent with the principles laid down by Kennedy, L.J. It is not necessary for me to decide the precise limits of the commercial area of the port of Buenos Aires applicable to grain ships, but I do decide that in October, 1954, when the vessel anchored in the roads she was not within the commercial area of the port. She was therefore not an arrived ship on Oct. 12, and the owners were not entitled to claim demurrage on the footing that she was. Before I leave this issue, I ought to mention that in the course of the argument the question was raised whether the date of the charterparty is the appropriate date for the purpose of ascertaining the limits of the commercial area or the date of the vessel's arrival within the legal, fiscal and administrative limits of the port. In this connexion it is worth repeating that the charterparty was dated Aug. 27, a few days before the resolution prohibiting grain vessels from waiting in the dock area. Since I have reached the conclusion that the roads were not within the commercial area for vessels due to load grain either on Aug. 27 or on Oct. 12, 1954, the point does not call for decision and I express no opinion on it.

The charterers contend further that even if geographically speaking the Aello was an arrived ship on Oct. 12, she was not in fact ready to load. Two grounds are relied on in support of this contention: first, no police permit had been issued and, secondly, no giro* had been obtained. So far as the facts are concerned it is clear that neither a police permit nor a giro had been issued, but the owners deny that either of these facts is fatal to their legal position.

So far as the police permit is concerned, the evidence establishes that before loading could begin a police permit was required and that some form of police inspection had to take place before a permit would be issued. I am satisfied also that this inspection could have taken place when the vessel was anchored in the roads, although this course would have involved the trouble and expense of arranging for police officers to go out from the dock area to the roads. In the affidavits filed on behalf of the owners there is more than one reference to the point now under consideration, and if that evidence is accepted it would seem that in the case of a vessel which has already loaded part of her cargo at an up-river port, and has therefore satisfied the police authorities there, the police inspection at Buenos Aires when she arrives to load the balance of her cargo is little more than a formality, compliance with which will not normally hold up loading operations. Although this is a point on which the charterers rely, it is perhaps significant that in the affidavits filed on their behalf there is nothing to suggest that the obtaining of a police permit for a vessel which has already loaded part of her cargo up-river is a more serious matter than the owners suggest. Nevertheless counsel for the charterers pressed on me the argument that, formality or not, a police permit at Buenos Aires was essential and that without one a ship was not ready to load and could not be regarded as arrived.

In *Armement Adolf Deppe* v. *John Robinson & Co., Ltd.* (6) ([1917] 2 K.B. 204), the Court of Appeal held that the owners of an arrived ship for which no berth was immediately available were not obliged to have discharging gear installed and ready for action during the period when the ship was waiting at a buoy. It was held that notwithstanding the absence of such gear the ship was ready to discharge, since the gear could have been installed within three hours of the berth becoming available. It is no doubt true, as counsel for the charterers pointed out, that the missing link, so to speak, in that case was something which the owners could by themselves, their servants or agents put right in a short time, whereas in the present case the issue of a police permit was not within the owners' control. Relying on the decision in *The Austin Friars* (7) ((1894), 71 L.T. 27), he argued that notwithstanding the evidence produced by the owners to which I have referred, there could be no certainty that the police would be ready and willing to inspect as soon as the Aello reached a berth, and accordingly until the police permit was in fact issued, the ship was not ready to load. Not without some hesitation (which would have been very much greater if the charterers had adduced evidence indicating that in practice the obtaining of a police permit was apt to be a matter involving difficulty or delay) I have come to the conclusion that the principle applied in *Armement Adolf Deppe* v. *John Robinson & Co., Ltd.* (6) is applicable in this case too. I accept the evidence of the owners' witnesses to the effect that in the circumstances the issue of a police permit was only a formality and I hold that the absence of such a permit did not of itself constitute a bar to the vessel being considered an arrived ship on Oct. 12.

This brings me to consider what I regard as the most difficult of all the problems in this case, namely, what are the legal consequences which result from the fact that a giro or berth permit was not obtained for the vessel until Oct. 29, 1954. Although I have stated the problem as a single question, more than one issue is involved, and so far as possible I try to deal with these issues separately.

In the first place, are the charterers right in contending that in the absence of a giro, the Aello could not be regarded as an arrived ship ? The owners

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* I.e., berthing permit.

A contend that the issue of a giro was a formality of no greater importance than the issue of a police permit, and that the vessel should be regarded as an arrived ship on Oct. 12 notwithstanding the absence of a giro. I need not refer to the relevant evidence in detail, and may perhaps confine myself to the opinion that, in the light of that evidence, there seems to me to be a substantial difference between a giro and a police permit. The absence of a giro would not and did B not merely delay loading; loading was in the circumstances absolutely impossible and the vessel could not move inwards from the roads until a giro was issued. The master of a vessel in the roads which only lacked a police permit could fairly say: " I am ready to move in and start loading, subject to a formal inspection which will not take up much time, and which will be completed by the time you are ready to start putting cargo on board ". But the master could not make C such a statement if he had no giro, and in my judgment, subject to the further issues about to be considered, the absence of a giro prevented the Aello from being an arrived ship before Oct. 29. It was argued by the owners that this conclusion would convert a port charterparty into a berth charterparty, since a giro is in effect a berthing permit. I do not agree. I prefer to adopt the expression used by counsel for the charterers that a giro is to be regarded as the key D which unlocks the door of the port. The fact that this key normally unlocked the door of a berth as well does not, in my view, displace the conclusion that without it a vessel could not enter the port so as to start loading; in other words, without a giro the vessel was not ready to load.

Faced with this difficulty, the owners put forward two arguments in answer. Both of them depend on the admitted facts; (a) that application for a giro E would only be entertained if it was accompanied by a certificate issued by the Grain Board and (b) the shippers (Bunge & Born Ltda.) were the proper parties to apply to the Grain Board for the requisite certificate.

In the first place it was said on behalf of the owners that inasmuch as the absence of a giro between Oct. 12 and Oct. 29 resulted inevitably from the absence between those dates of a certificate, the charterers could not be heard F to rely on the point that the vessel had no giro, since it was the charterers' responsibility through the shippers nominated in their contract of purchase from Bunge, Zurich, to apply for and obtain the necessary certificate. As I understood the argument, it was to the effect that quite apart from any contractual duty, express or implied, absolute or qualified, imposed on the charterers by the charterparty, they were precluded from relying on the absence of a docu-G ment due to be obtained by the owners, but obtainable only when accompanied by another document obtainable only by the charterers or their agents. No case was cited to me as authority for so wide a proposition, and in my view it is not well founded. There are, no doubt, many cases in which a party has been precluded from relying on the other party's failure to perform some act, when that failure resulted from the first party's own omission; see, for example, *Mackay* H v. *Dick* (8) ((1881), 6 App. Cas. 251 at p. 263). In my view, however, the precluded party's own omission must be an omission to do something which he was either expressly or impliedly obliged to do.

The second argument of the owners was that the charterers were in fact in breach of a duty owed by them under the charterparty, and that by this breach of duty they prevented the vessel from being an arrived ship. This contention is I to be found in para. 3 (a) (ii) of the re-amended rejoinder; as a matter of convenience this paragraph is also made the basis of a counterclaim, so as to enable the owners to recover by way of damages a sum equal to such sum as may be found payable or re-payable to the charterers in respect of their claim. On this issue the kernel of the dispute is the question: what is the nature of the duty owed by a charterer in regard to availability of cargo before the chartered vessel arrives at her charterparty destination ? The question may also be expressed, with more specific reference to the facts of this case, as follows:—

if cargo has to be available for loading in order to enable the ship to become an arrived ship, is the charterer under an absolute duty to have the cargo available or is he merely under a duty to take all reasonable steps for that purpose? In stating these questions, I have assumed that some duty is impliedly imposed on the charterer, and counsel for the charterers did not seriously contend otherwise. As one might expect, the problem is not new, and it has been before the courts in several reported cases, but contrary to one's expectation the answers given or apparently given in those cases seem in some instances to be conflicting. The problem is of special importance in the present case because it is admitted that if the charterers' duty only extends to what is reasonable, the owners have no cause for complaint. In other words, it is only if a charterer is under an absolute duty to have cargo available, that the owners can succeed. I was informed by counsel that in any event the present case will be taken to the Court of Appeal, and for that reason I do not think it necessary to quote at length the passages in the reported cases on which the parties respectively relied. In support of the charterers' contention I was referred to *Little* v. *Stevenson & Co.* (9) ([1896] A.C. 108), especially the speech of LORD HERSCHELL (ibid., at pp. 118, 119); *Jones, Ltd.* v. *Green & Co.* (10) ([1904] 2 K.B. 275), especially the judgments of VAUGHAN WILLIAMS, L.J. (ibid., at p. 280) and of STIRLING, L.J. (ibid., at p. 285); *Vergottis* v. *William Cory & Son, Ltd.* (11) ([1926] 2 K.B. 344); *Hogarth* v. *Cory Brothers & Co.* (12) ((1926), L.R. 53 Ind. App. 230). For the owners, reliance was chiefly placed on *Lilly & Co.* v. *D. M. Stevenson & Co.* (13) ((1895), 22 R. (Ct. of Sess.) 278); *Krog & Co.* v. *Burns & Lindemann, The Avis* (14) ((1903), 5 F. (Ct. of Sess.) 1189) and *Ardan S.S. Co.* v. *Andrew Weir & Co.* (15) ([1905] A.C. 501). The headnote in the last-mentioned case states the effect of the decision in the following terms:

> ". . . the defendants were liable in damages on the ground that it was their primary duty as charterers to furnish the stipulated cargo; and there was nothing to be found in the charterparty or the evidence which qualified this absolute obligation."

In my view the speeches of the EARL OF HALSBURY, L.C., and LORD DAVEY confirm that headnote, subject to one qualification (ibid., at p. 512), namely, that a charterer is only bound

> ". . . to have his cargo ready when the ship is ready to receive it in ordinary course, and that he is not bound to be prepared for a contingency or fortuitous circumstance not contemplated by either of the parties."

This qualification was in my opinion required in order to bring the decision into line with the decision given nine years earlier in *Little* v. *Stevenson & Co.* (9). The words "in ordinary course" seem to me to be contrasted with what may be called "extraordinary course", an expression which fairly describes the situation involved in *Little* v. *Stevenson & Co.* (9). If one were to attempt to illustrate the principle laid down in *Ardan S.S. Co.* v. *Andrew Weir & Co.* (15), the following might serve as an example: –suppose that the destination of a ship is a berth at port X, and that when the ship arrives outside the port there are several berths available; suppose further that the port authorities would not permit a ship to occupy a berth unless she was able to load at once. If in such a case the ship had to wait outside the port because the charterer had no cargo available, the owners would be entitled to claim damages for the charterer's failure to discharge his absolute duty to have cargo available when the ship was ready to receive it in ordinary course. On the other hand, if when the ship arrived outside the port there was no berth available owing to congestion of shipping, the time for the performance of the charterer's duty in relation to availability of cargo would not have arrived. In such a case the cause of the ship not being an arrived ship would be congestion of shipping and not the non-availability

A B C D E F G H I

of cargo, and in the absence of any special provision in the charterparty (as in *Roland-Linie Schiffahrt G.m.b.H.* v. *Spillers, Ltd.* (5), [1956] 3 All E.R. 383) the loss involved in the delay would fall on the shipowners.

My conclusion is that the decision in *Ardan S.S. Co.* v. *Andrew Weir & Co.* (15) compels me to hold that the charterer's duty in relation to availability of cargo is in its nature absolute, and if by failing to provide cargo he prevents a ship from becoming an arrived ship in ordinary course, by which I mean on arrival when there is room available in the berth or area which constitutes the charterparty destination, he is liable to pay damages. In my view the only respect in which reasonableness may be a relevant factor is in regard to the amount of cargo which must be available when the ship arrives. Counsel for the owners was content to limit the charterer's absolute duty to this extent, namely, that he is not bound to have the whole of the cargo ready but only a reasonable amount, and I think that the reported cases support this view. But the point does not arise in the present case, since there was no cargo whatsoever available when the vessel arrived in the roads. I realise that this conclusion differs from that expressed by the Court of Appeal in *Jones, Ltd.* v. *Green & Co.* (10), but that case was cited and distinguished in *Ardan S.S. Co.* v. *Andrew Weir & Co.* (15) ([1905] A.C. 501), and in the circumstances can hardly be said to be binding on me. I realise also that in *Vergottis* v. *William Cory & Son, Ltd.* (11) GREER, J., would have been disinclined to reach this conclusion if he had not felt able to decide in favour of the plaintiff on another ground. This only makes the problem more difficult; it does not supply the answer, and if one is faced with conflicting authorities, there is often no escape from the task of choosing between them.

On the evidence before me, I am of opinion that the cause of the Aello not being an arrived ship some three hours after her arrival in the roads (that being the time which she would have taken to reach the dock area after leaving Intersection) was the charterers' failure to have a cargo available. It seems clear that on Oct. 12, 1954, there was no congestion in the dock area such as had existed in August; if a cargo had been available, the vessel would have moved into the commercial area of the port at once, and thus become an arrived ship, and in all probability loading would have started immediately. Further, I hold that the Aello arrived in the roads in ordinary course, and that there was no fortuitous circumstance (to use LORD DAVEY's expression) which excused the charterers from performance of their otherwise absolute and unqualified obligation. In an effort to escape the consequences of a conclusion such as I have just indicated, the charterers contended that this was a case in which it had been proved or was to be assumed that there were (per the EARL OF HALSBURY, L.C., in *Ardan S.S. Co.* v. *Andrew Weir & Co.* (15), [1905] A.C. at p. 511):

> " . . . particular circumstances known to both the parties, and with reference to what they may be supposed to contract, which may affect both the providing and the loading of the cargo."

It is said that the owners, either themselves or through their agents, knew the position at Buenos Aires in regard to giros and the conditions on which they were issued, and further knew that the vessel might have to wait outside the port so that she would not be an arrived ship. In my judgment there are several answers to this contention. In the first place, I am not satisfied that any such knowledge can be attributed to the owners themselves, and in so far as reliance is placed on the knowledge of agents, I do not think that the Agencia Maritima Sudocean S.R.L. can properly be regarded as agents of the owners for this purpose. That firm was nominated in cl. 33 of the charterparty for the purpose of clearing the Aello at customs houses, and payment for such services was the owners' responsibility. In my view this limited agency, which was only to be performed when the ship reached her destination, is wholly insufficient for the purpose of affecting the owners at the date of the charterparty with such knowledge as that firm possessed. Taken by itself, the fact that agents, whose duties only arise in the course of the performance of a contract, and who have played no part in its negotiation, possess certain knowledge does not in my view justify the conclusion that the contracting party himself contracted in the light of those agents' knowledge.

Secondly, the charterparty is dated Aug. 27, 1954, and at that date there was nothing to indicate that the ship would be refused access to the dock area, although she might well have to wait there. But in such circumstances she would be an arrived ship, and on any view the charterers would then be under an absolute duty to have a cargo available.

Thirdly, at the date of the charterparty, the owners did not know which of three types of cargo, maize, wheat or rye, the charterers would elect to load and, as I understand it, there was not at any material time any difficulty in providing a cargo of wheat or rye. Similarly the charterers had an option to complete the cargo either at Buenos Aires or La Plata or Montevideo, and at the date of the charterparty the owners did not know which port would be selected. I am quite unable to hold that this is a case which comes within the scope of the decision in *Jones, Ltd.* v. *Green & Co.* (10) ([1904] 2 K.B. 275). On the contrary, I hold that the parties to the charterparty did not enter into it with reference to the special circumstances which eventually prevailed when the vessel reached the roads.

The only other point which I need mention is that in para. 3 of the charterers' re-amended points of reply reference is made to cl. 30 of the charterparty, which deals with various causes that might render loading impossible. Counsel for the charterers conceded before me that the clause did not afford any protection to the charterers in the present case and I say no more about it.

It was agreed by counsel that if I were to hold that the vessel was not an arrived ship on Oct. 12, but that the charterers were in breach of contract which prevented her from being an arrived ship, the owners' counterclaim would succeed. That is the result of this judgment.

Judgment for the charterers for £2,751 14s. 8d. on the claim; judgment for the owners for £2,726 14s. 8d. on the counterclaim.

Solicitors: *Richards, Butler & Co.* (for the charterers, the plaintiffs); *Holman, Fenwick & Willan* (for the owners, the defendants).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

Re UNITED RAILWAYS OF THE HAVANA AND REGLA WAREHOUSES, LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), October 8, 9, 10, 11, 22, 23, 24, 25, 28, 29, 30, November 4, 19, 1957.]

Conflict of Laws—Contract—Discharge of contract—Maturing of obligation—Recovery of debt—Whether proper law of contract or law of debtor's residence applicable.

The question whether a contract has been discharged must be determined according to the proper law of the contract, and not according to the lex situs of a debt due and payable arising under the contract, if that law is different; moreover the maturing of the obligation of the debtor under a contract into a debt does not of itself extinguish the pre-existing obligation, so as to force the creditor to have recourse to the law of the debtor's residence in order to enforce the debt (see p. 658, letter I, to p. 659, letter C, post; cf., p. 651, letter I, post).

Gibbs & Sons v. *Société Industrielle et Commerciale des Métaux* ((1890), 25 Q.B.D. 399) applied.

Dictum of VAISEY, J., in *Re Banque des Marchands de Moscou* (*Koupetschesky*) ([1952] 1 All E.R. at p. 1271) explained.

Jabbour v. *Custodian of Israeli Absentee Property* ([1954] 1 All E.R. 145) and *Metliss* v. *National Bank of Greece & Athens, S.A.* ([1957] 2 All E.R. 1) considered.

In 1921 an English company, owning a railway in Cuba, entered into a transaction for raising money in the United States of America by the issue of fifteen year 7½ per cent. trust certificates, carrying interest and repayable at a premium, to be administered by a trustee company, a corporation of the Commonwealth of Pennsylvania. For this purpose the railway company assigned its rolling stock in Cuba to a subsidiary company of the railway company incorporated in the State of Delaware. By lease executed in 1921 in New York the subsidiary company let the rolling stock to the railway company for fifteen years at a rental, payable at the office of the trustee company in Philadelphia, and covenanted that there should be no assignment or transfer of the railway company's rights or interest in the rolling stock. The lease included provision that the parties intended to enter into it and execute it in accordance with the laws of Cuba and to register it under those laws, and also to record it in such territories of the United States as might be required by law. By an agreement, substantially contemporaneous with the lease and also executed in New York, the subsidiary company assigned its rights as lessor under the lease and its interest in the rolling stock to the trustee company as trustee for the certificate holders; the agreement provided for the re-assignment of the rolling stock to the subsidiary company when all payments had been made. The subsidiary company subsequently re-assigned its interest (subject to the lease and agreement) in the rolling stock to the railway company. Money was raised in the United States by the issue of certificates, the rental from the lease providing funds for the service and the payment of the debt through the trustee company. In and after February, 1931, the railway company defaulted in paying the instalments payable under the lease. In 1953 the railway (including the rolling stock) became the subject of state acquisition under laws of Cuba. The acquisition took the form of a sale by the railway company of its undertaking and assets. By an agreement in 1953 the liabilities in respect of which the Republic of Cuba liberated the railway company included the responsibilities that derived under the certificates. In the subsequent voluntary liquidation of the railway company in England the trustee company lodged a proof for instalments unpaid under the lease and other sums. The liquidators rejected the proof on the ground that by Cuban law the obligations of the lease were extinguished. On appeal the trustee company pursued alternatively two further claims, each alternative to the other, viz., damages for breach of the covenant not to assign the rolling stock or damages for conversion thereof.

Held: the proof was wrongly rejected because, the lease and the agreement by the subsidiary company being parts of one transaction, the proper law of each was the law of the Commonwealth of Pennsylvania and under that law the obligations of the lease still continued; the trustee company was entitled, therefore, to elect whether to prove either for the debt or for damages for breach of covenant or for damages for conversion, the amount receivable by the trustee company being limited to the sum required to satisfy proper claims of the certificate holders.

[As to the law applicable to the discharge of contracts, see 7 HALSBURY'S LAWS (3rd Edn.) 82, 83, paras. 151, 152; and for cases on the subject, see 11 DIGEST (Repl.) 438-440, *805-822*.]

Cases referred to:

(1) *Ellis* v. *M'Henry*, (1871), L.R. 6 C.P. 228; 40 L.J.C.P. 109; 23 L.T. 861; 11 Digest (Repl.) 447, *861*.

(2) *Swiss Bank Corpn.* v. *Boehmische Industrial Bank*, [1923] 1 K.B. 673; 92 L.J.K.B. 600; 128 L.T. 809; 11 Digest (Repl.) 540, *1502*.

(3) *Re Helbert Wagg & Co., Ltd., Re Prudential Assurance Co., Ltd.*, [1956] 1 All E.R. 129; [1956] 1 Ch. 323; 3rd Digest Supp.

(4) *Jabbour* v. *Custodian of Israeli Absentee Property*, [1954] 1 All E.R. 145; 3rd Digest Supp.

(5) *Re Russian Bank for Foreign Trade*, [1933] Ch. 745; 102 L.J.Ch. 309; 149 L.T. 65; Digest Supp.

(6) *Re Banque des Marchands de Moscou* (*Koupetschesky*), *Royal Exchange Assurance* v. *The Liquidator*, *Re Banque des Marchands de Moscou* (*Koupetschesky*), *Wilenkin* v. *The Liquidator*, [1952] 1 All E.R. 1269; 11 Digest (Repl.) 425, *734*.

(7) *Princess Paley Olga* v. *Weisz*, [1929] 1 K.B. 718; 98 L.J.K.B. 465; 141 L.T. 207; 11 Digest (Repl.) 612, *421*.

(8) *Perry* v. *Equitable Life Assurance Society of U.S.A.*, (1929), 45 T.L.R. 468; 11 Digest (Repl.) 422, *721*.

(9) *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux*, (1890), 25 Q.B.D. 399; 59 L.J.Q.B. 510; 63 L.T. 503; 11 Digest (Repl.) 423, *723*.

(10) *Smith* v. *Buchanan*, (1800), 1 East, 6; 102 E.R. 3; 4 Digest 597, *5455*.

(11) *Metliss* v. *National Bank of Greece & Athens, S.A.*, [1957] 2 All E.R. 1; [1957] 2 Q.B. 33; *affd.* H.L. sub nom. *National Bank of Greece & Athens, S.A.* v. *Metliss*, ante, p. 608.

(12) *Re Chesterman's Trusts, Mott* v. *Browning*, [1923] 2 Ch. 466; 93 L.J.Ch. 263; 130 L.T. 109; 35 Digest 169, *12*.

(13) *Tancred* v. *Allgood*, (1859), 4 H. & N. 438; 28 L.J.Ex. 362; 33 L.T.O.S. 150; 21 Digest 501, *762*.

(14) *Belsize Motor Supply Co.* v. *Cox*, [1914] 1 K.B. 244; 83 L.J.K.B. 261; 110 L.T. 151; 3 Digest 93, *247*.

Adjourned Summons.

This summons was issued on the application of the Pennsylvania Company for Banking and Trusts (whose principal place of business was in Pennsylvania in the United States of America) claiming to be a creditor of United Railways of the Havana and Regla Warehouses, Ltd. (in voluntary liquidation), for an order that the decision of the respondents as joint liquidators in rejecting the proof of the applicant be reversed and that the proof might be ordered to be admitted in full.

R. O. Wilberforce, Q.C., and *T. D. D. Divine* for the applicant, the Pennsylvania Company for Banking and Trusts.

John Megaw, Q.C., and *Richard H. Hunt* for the respondents, the liquidators.

Cur. adv. vult.

Nov. 19. **WYNN-PARRY, J.**, read the following judgment: United Railways of the Havana and Regla Warehouses, Ltd., to which I will refer as "the company", was incorporated in England on Aug. 2, 1898. It conducted a railway undertaking in Cuba, and owned assets in Cuba in connexion therewith. Prior to and during the year 1921 the company purchased rolling stock, consisting of locomotives and cars to an aggregate amount of over $14,000,000. For the purpose of financing part of this amount it was decided to raise $6,000,000 in the United States of America under what is known as the Philadelphia Plan, which, as the name suggests, is an essentially American scheme for financing a project. A variation from or addition to the procedure normally followed in carrying out the Philadelphia Plan was, however, adopted. In February, 1921, the company caused to be incorporated in the State of Delaware a corporation under the name of Cuba Rolling Stock Company, to which I will refer as "the car company". The car company was a subsidiary of the company. It is the use of this company in the manner which I will describe, which constitutes the variation from or addition to the Philadelphia Plan to which I have referred.

On Mar. 25, 1921, the company sold to the car company the whole of the rolling stock, and assigned the contracts for future delivery of so much thereof as had not been delivered. The purchase price was the actual cost of the rolling stock delivered in Cuba. By way of confirming the sale and carrying it into effect, the company and the car company executed a document dated Apr. 11, 1921, which is described as a bill of sale before a notary public in New York. On Apr. 18, 1921, a document, described therein as a lease and agreement, to which I shall refer as "the lease" was executed between the car company as lessor and the company as lessee. The lease was executed in New York before a notary public by attornies in fact for the car company and the company respectively. The attorney in fact for the company was appointed by resolution of a board meeting held in New York pursuant to a power given at a board meeting in London held on Feb. 3, 1921. The recitals to the lease, so far as material, read as follows:

> "Whereas, the lessee has power under its charter and the laws of the Republic of Cuba and the Acts of the United Kingdom of Great Britain and Ireland to enter into and perform this agreement, and has taken all necessary corporate action to authorise the execution and delivery hereof.
>
> "And whereas, at the time of the execution hereof the lessor holds contracts for the construction and acquisition of, or is the absolute owner of, the railroad equipment and/or rolling stock hereinafter described, and has agreed to deliver forthwith or as soon as the same shall be completed, such railroad equipment and/or rolling stock to the lessee, which agrees to receive the same, such delivery by the lessor and acceptance hereof by the lessee to be upon the terms and under the conditions herein set forth:

> " And whereas, the lessor desires, upon the execution hereof, and in the manner hereinafter set forth, to assign, transfer and set over to the Commercial Trust Company*, of Philadelphia, as trustee, all the lessor's right, title and interest in and to this lease and the rents reserved hereunder, and in and to the railroad equipment and/or rolling stock hereby demised;
>
> " And whereas the lessee, in consideration of certain rights given it to pay rentals in United Railways of Havana fifteen year 7½ per cent. Equipment Trust certificates, and within six months after certain payments of rental to tender additional certificates and receive cash in exchange therefor, all as hereinafter specifically set forth, consents to said contemplated assignment."

Then the lease witnesses:

> "That for and in consideration of the sum of one dollar ($1) paid by the lessee to the lessor, as well as of the rentals and covenants hereinafter mentioned, the lessor has let and leased and by these presents does let and lease to the lessee, for the term of fifteen years from Feb. 15, 1921, unless sooner terminated as hereinafter provided, the following described railroad equipment and/or rolling stock, to wit . . . ";

and there follows a detailed list of the rolling stock. It is then provided that the rolling stock is leased

> " at and for the rental hereinafter set out, and upon the terms, conditions, and covenants following, to wit:—First.—The lessee shall and will pay to the lessor or its assigns at the office of Commercial Trust Company, hereinafter called the trustee, in the City of Philadelphia, Pennsylvania, or at the office of Central Union Trust Company of New York, in the City of New York when payment in New York is hereinafter specifically required, as rental for the said railroad equipment and/or rolling stock without deduction for any taxes, duties, charges or assessments, which the lessee may be required to pay or withhold under the laws of the United States of America or of any other country: . . ."

Pausing there, it is made clear that the primary place of payment is Philadelphia. New York is only used for the payment of interest, as emerges from the provisions of para. I (a), which follows, and which, so far as material, reads as follows:

> " I. Half yearly on Feb. 14, and on Aug. 14 in each year, the first payment to be made on Aug. 14, 1921, (a) A sum payable in New York equal to 3¾ per cent. of the par value of certain certificates not exceeding $6,000,000 issued under an agreement bearing even date herewith between Cuban Rolling Stock Company, and Commercial Trust Company, trustee, and outstanding and unpaid on Feb. 14 and Aug. 14, respectively in each year, during the term of this lease, and an amount equal to the accrued dividends on the certificates purchased by the trustee during the preceding six months under the provisions of the said agreement; less such sums derived from investments by the trustee of undistributed rentals in its hands, as reported from time to time by it to the lessee as applicable to the payment of dividend warrants on the aforesaid certificates."

I shall have to deal with these certificates when I come to consider the next document, which was brought into existence in order to carry out the scheme in accordance with the Philadelphia Plan. Sub-paragraphs (b) and (c) of para. I deal with the reasonable expenses of the car company and taxes on the property leased or the income therefrom which are to be paid by the company and would be payable in Philadelphia. By para. II provision is made for half-yearly payments on Aug. 14 and Feb. 14 in each year covering the period from Aug. 14, 1921, to Feb. 14, 1936, of sums which are treated as rentals. The payments of interest under para. I (a) and the half-yearly payments under para. II are calculated to cover the interest and capital and premium payable in respect of the certificates referred to in para. I (a). It is then provided that all the half-yearly payments mentioned in para. II are to be made in gold coin of the United States of America of the 1921 standard of weight and fineness; and there follows a provision allowing, under certain conditions, payment by delivery up of certificates purchased by the company. The last provision of cl. First allows the company to pay on any rental day a lump sum sufficient to

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* The applicant in these proceedings, the Pennsylvania Company for Banking and Trusts, was the successor in office as trustee in place of the Commercial Trust Co. of Philadelphia, see p. 650, letter H, post.

> "enable the trustee to call for retirement and to retire on the dividend date next ensuing all outstanding United Railways of Havana fifteen year 7½ per cent. Equipment Trust certificates by the payment of the par value thereof and a premium of ten per cent. thereon, and accrued dividends thereon to the date of retirement."

This provision serves to emphasise that the payments under the lease are designed to provide the principal and interest reserved by the certificates, the lease, as will later be seen, forming the security for those payments.

Clause Second provides that all the rolling stock and replacements, the subject of the lease are

> "to be plainly marked and kept marked on both sides thereof with the words: 'Commercial Trust Company, Trustee, Phila., Pa., owner and lessor, U.H. Equipt. Trust No. ————.'"

Clause Fourth requires the company

> "to keep the said railroad equipment and/or rolling stock insured in some incorporated insurance company or companies of good standing, organised under the laws of the United States of America or of the United Kingdom of Great Britain and Ireland, to be approved by the trustee, assignee of the lessor . . ."

Clause Fifth, so far as material, reads as follows:

> "The lessee further covenants that there shall be no assignment or transfer of its rights or interest in said railroad equipment and/or rolling stock under this lease, or any underletting of said leased property, without the consent of the lessor and its assigns endorsed hereon . . ."

Clause Sixth provides that in case of default in the payment of any of the rentals, the car company may declare the lease terminated and may take possession of the rolling stock.

Clause Eighth is of importance, and, so far as material, reads as follows:

> "It is understood and agreed by and between the lessor and the lessee, that the lessor may forthwith, upon the execution hereof, assign, transfer, and set over unto Commercial Trust Company, of Philadelphia, as trustee, all the lessor's right, title, and interest in and to said railroad equipment and/or rolling stock hereby leased unto the lessee, and as well all of the lessor's claims, demands, and remedies, under this lease accruing or to accrue . . . and that when it, the lessee, shall have fully paid all the rents, which it has herein covenanted to pay, the said railroad equipment and/or rolling stock may be re-assigned by said Commercial Trust Company, of Philadelphia, trustee, to the lessor, and upon such re-assignment and the

> expiration of the term of this lease, all said railroad equipment and/or rolling stock shall revert to the lessor . . ."

Clause Eleventh and cl. Twelfth are also important and I propose to read them in full.

> " Eleventh.—It is the intention of the parties to this lease to enter into and execute this lease in accordance with the provisions of the laws of the Republic of Cuba to the end that this lease may be deposited or filed and/or registered thereunder, and the railway company agrees to so deposit and/or register or file the same, and to record the same in such State or Territories of the United States as may be required by law, and to perform any other act required by law that may be necessary to protect the trustee's title. In case it becomes necessary that this lease be translated into the Spanish language in order that it may be filed and/or registered in the proper offices in the Republic of Cuba, then and in that event it is understood and agreed that the English text shall govern in case of any conflict between the English and Spanish texts.
>
> " Twelfth.—The parties hereto submit themselves to the jurisdiction of the tribunals of the City of Havana, in the Republic of Cuba, for all notifications, summonses and other judicial or extra judicial formalities to which this lease shall give rise, with express renunciation of their own jurisdiction if different."

At the same time as the lease was executed, there was also executed in New York an agreement, to which I will refer as " the agreement ", between the car company and Commercial Trust Company of Philadelphia, a corporation of the Commonwealth of Pennsylvania, to which, and to whose successors as such trustee, I will refer as " the trustee ". The agreement recites the lease, and the second recital, so far as material, is:

> " And whereas, the car company has purchased the said railroad equipment and/or rolling stock particularly mentioned in the lease and has agreed to apply in part payment therefor the proceeds of six million dollars ($6,000,000) par value of Equipment Trust Certificates, to be issued under the terms of this agreement, and known as certificates of the United Railways of Havana fifteen year 7½ per cent. Equipment Trust . . ."

Then by cl. First the car company assigns to the trustee as trustee for the certificate holders, the lease and all its interest in the rolling stock. By cl. Second the trustee covenants

> " that it will from time to time execute and deliver to the car company or upon its order in writing United Railways of Havana fifteen year 7½ per cent. Equipment Trust Certificates [which I will call " the certificates "] aggregating in par value $6,000,000."

Then the clause sets out the intended form of the certificates. It is unnecessary to read the form in full, but it is to be noted that it is framed to fit in with the payment provisions of the lease. For instance, the due date of payment is Feb. 15, 1936, the day after the day fixed for payment of the last rental under the lease. Payment is to be made at the office of the trustee in Philadelphia in gold coin of the United States of America, as provided in the lease,

> " but only from and out of the rentals when paid as provided for in the lease . . . which rentals are payable to the trustee for the benefit of "

the certificate holders.

Clause Fourth deals with the issue of the certificates. It is not, I think, necessary to consider the terms of this clause. The money which the company required and which the certificates secured, to use the word in a loose sense, was provided pursuant to an underwriting agreement consisting of a letter dated Feb. 9, 1921, written by Messrs. Dillon Read & Co., of New York, as underwriters, to the then chairman of the company, and accepted by him. Clause Seventh is of importance. It opens thus:

> " In the event of default by the railway company, as aforesaid, if it be thought necessary or convenient for the purpose of enforcing and carrying out all the terms and stipulations of the lease and this agreement under the laws and statutes of the Republic of Cuba . . ."

then provision is made for the assignment of the lease and all rights thereunder,

> " to any person or other corporation as substituted trustee authorised to act or doing business in the Republic of Cuba . . ."

Clause Eleventh and cl. Twelfth are similar in terms to cl. Eleventh and cl. Twelfth in the lease, except that the last paragraph of cl. Twelfth appears in the lease as the last paragraph of cl. Eleventh.

By an agreement dated Apr. 27, 1922, the car company re-sold the rolling stock to the company, " subject to and with the benefit of the lease and the agreement ". The position, therefore, at this point (without prejudice to any question of Cuban law) was that the company had received the net proceeds of the sale of the certificates to the public. It had the right, subject to performing its obligations under the lease, to have the property in the rolling stock re-vested in it*. In the meantime its only right to the rolling stock was as lessee under the lease. The benefit of the company's obligations under the lease was vested in the trustee as trustee for the certificate holders. Finally, as a result of the re-sale by the car company to the company, the car company dropped out of the picture and was later dissolved.

Prior to Feb. 14, 1931, the company redeemed certificates to the face value of $3,800,000. Further, it purchased, as it was entitled to do, certificates to the face value of $1,867,000. It defaulted in paying the instalment of $205,000 due on Feb. 14, 1931, and all subsequent instalments. It has thus defaulted in respect of the last eleven instalments of capital. In this connexion it is important to bear in mind that the certificates themselves impose no liability on the company. The company's liability, assuming that it still exists, arises solely under the lease. Its liability is to pay to the trustee the proper sum in United States of America dollars necessary to discharge its obligations under that document. The certificates in effect do no more than evidence the amount which the holders thereof are entitled inter se to receive from the trustee, in so far as the trustee receives payment from the company.

Although defaulting as regards principal, the company continued to pay interest as provided by the lease down to and including Aug. 14, 1934. The trustee took no step under cl. Sixth of the lease to declare the lease terminated. Apart, therefore, from any impact on the continued existence of the lease which Cuban law may have, assuming that it applies in this case, the lease must be treated as continuing, the company being in default thereunder. The trustee took no step under the same clause to take possession of the rolling stock; but this circumstance I regard as colourless. Further, I take the view that it would not have been possible for the trustee to have obtained possession of the rolling stock for reasons which will appear when I come to consider the effect of the relevant provision of Cuban law, namely, Military Order No. 34 of 1902.

In 1934, 1940 and 1941 legislation was brought in force in Cuba establishing a moratorium owing to the economic depression which had developed during the early 1930's. The benefit of the moratorium laws extended to public service railroad companies. I shall have to consider the provisions of these laws in some detail, but I propose to defer any reference to their contents until I come to consider the questions of Cuban law which have been debated.

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* Provision was made by cl. Tenth of the agreement for the re-assignment of the rolling stock by the trustee to the car company on payment of the last of the half-yearly payments and the premium provided for by the agreement.

On June 6, 1949, an interventor was appointed by the Cuban government, who took over the management and control of the company's undertaking. By 1952 it had become clear that the company's financial position was so acute that the only solution was that the whole of its undertaking and assets should be sold to the Cuban government, if that could be effected. To facilitate this a scheme of arrangement between the holders of the company's various classes of debenture stock and shares was prepared, brought before the court and sanctioned by VAISEY, J., on Dec. 15, 1952. Neither the holders of the certificates nor the trustee on their behalf were parties to the scheme, but the certificates are mentioned in Part IV, para. 13 of the Preliminary to the Scheme, where there is a statement that the certificates are not affected by the scheme.

Negotiations for the acquisition of the company's undertaking and assets in Cuba took place and a number of documents were brought into existence, to which I must now refer. The first is Law-Decree No. 980, dated July 24, 1953. Article 1 opens thus:

> " This Law-Decree is entitled ' Law-Decree on the acquisition, operation and rehabilitation of the United Railways of Havana and subsidiary companies ' ".

Article 3 authorises the Minister of the Treasury to initiate and conduct negotiations for the acquisition by voluntary agreement, or, failing that, by expropriation, with the object of conveying the undertakings and property acquired to a company to be incorporated for the purpose. Chapter III, art. 6, deals with the incorporation of this company, to which I shall hereafter refer as " Occidentales ". Article 8 provides that the State will convey the properties acquired from the company to Occidentales,

> " and the latter shall assume the liabilities which the State shall have contracted by the acquisition of the said properties."

Article 13 provides that Occidentales " cannot sell the real estate they acquire as conveyed by the State except " as specifically provided in that article. Article 14 opens with the words " The State on making the conveyance . . ." I mention these provisions because, as I construe this Law-Decree according to the principles of construction of English law (and it is agreed that there is no or no material difference between the principles of construction of English law and those of Cuban law) what is envisaged is, first, a sale by the company to the Cuban State, and then a re-sale by the State to Occidentales. The matter becomes material when one comes to consider the Cuban law in this regard, because the two experts on Cuban law differed as to the effect of the transaction as carried out by this Law-Decree and the three documents to which I am about to refer. Dr. Gorrin, for the applicant, regarded the transaction as a sale to the State and then a re-sale by the State to Occidentales. On the other hand, Dr. de Cubas, for the liquidator, expressed the view that a Cuban court would treat the matter as being one in which only one sale was involved.

The next document to which I must refer is called " preliminary agreement ". It is dated Sept. 5, 1953. It concerns the company (which is called " the Uniteds ") and a wholly-owned subsidiary of the company, to which I will refer as " Terminal ", as vendors and the Cuban State as purchasers, and provides, in effect, for the sale of the respective undertakings and assets of the two companies to the Cuban State for $13,000,000,

> " which amount will be received . . . at the moment of signing the public deeds, by virtue of which there shall be transferred to the State in full and absolute dominion the assets and properties described in Annex A."

Clause Fourth (B) is important, and I read it:

> " The price agreed upon shall be received by ' the Uniteds ' and ' the Terminal ' free from all responsibility with respect to liabilities outstanding in Cuba, represented by debts, obligations and responsibilities arising out of the operations of the properties which are to be acquired by the State, whether involving operations prior to June 10, 1949, on which date said properties passed to the management of the interventors of the Government of Cuba, or subsequent to that date."

Included in Annex A as assets is this item " $1,867,000 of nominal value, amount of the company's holding of the 7½ per cent. Equipment Certificates ".

On the same day, namely, Sept. 5, 1953, as the preliminary agreement was executed, another agreement—to which I will refer as " the confidential agreement "—was executed, the parties being the Cuban State, the National Bank of Cuba and the company. It is of importance and I propose to read parts of it. It states that the parties have agreed:

> " First: That among the liabilities in respect of which the State liberates ' the Uniteds ' from all responsibility, in accordance with letter B of cl. Fourth of the preliminary agreement signed on this same date between the same parties, it is understood to be included the responsibilities that may derive from the 7½ per cent. Equipment Trust Certificates which were issued under agreement dated Feb. 15, 1921, between the Cuban Rolling Stock Company and Commercial Trust Company, as trustees . . .
>
> " Second: That what is established by this agreement does not signify that the State or ' the Uniteds ' acknowledge or admit that there can exist legal merit in any claim, demand or proceedings that may be established as a result of the referred to 7½ per cent. Equipment Trust Certificates, but that it is exclusively established what is mentioned in this agreement in respect thereof for the supposed case that a sentence may be handed down as a result of any claim, demand or proceedings derived from said 7½ per cent. Equipment Trust Certificates, whether it be before courts of justice of the republic or in foreign courts."

And, finally, in cl. Fifth, it is provided:

> " That the contents of the present confidential agreement cannot be revealed by any of the signing parties, but it will be understood that it binds them just as if it had been stipulated in the preliminary agreement referred to in para. First."

I shall have to consider the effect of the confidential agreement and its impact on cl. Fourth (B) of the preliminary agreement when I come to deal with the questions of Cuban law which have been debated.

I pass now to Law-Decree 1197, dated Nov. 26, 1953. The second recital is of importance. It states:

> " Whereas: In accordance with the provisions of Military Order No. 34 of 1902, it was agreed in section (B) of cl. Fourth of the preliminary agreement executed between the government and the [company and two other companies] that the said companies as vendors would receive the agreed price free from all responsibility with respect to liabilities outstanding in Cuba, represented by debts, obligations and responsibilities arising out of the operations of the properties to be acquired by the State, and it is therefore appropriate to declare that the provisions of section (u), art. 1 of Chapter V of the aforesaid Military Order are inapplicable to the liquidation of the three selling companies, since upon the passing of such liabilities to the Cuban government the latter shall adopt such measures as it may deem appropriate for the liquidation thereof."

Article Second provides that:

> " Section (u), art. 1, Chapter V, of Military Order No. 34 of 1902 is declared inapplicable to the liquidation and dissolution of the "

company and two other companies.

I come now to the deed of purchase, which is dated Dec. 1, 1953. By this deed the sale by the company of its undertaking and assets to the Cuban State was completed, the sale being " in a real and effective manner absolutely free from incumbrances." The Seventeenth clause provides:

> " That in consequence of the sale hereby accomplished, they transfer in favour of the Cuban State the full and absolute dominion and possession, with such further rights and equities, real and personal, without any exception, as the vendors have or hold in the properties before mentioned, the Cuban State receiving them as its own, acquired by a just and legitimate title, as is the present deed, which at all times shall be considered as symbol of real delivery and possession and leaving the Cuban State subrogated in the same place and stead of the vendors."

The Twentieth clause reads as follows:

> " That in the purchase-sale are included all the assets and any other properties situated in the Republic of Cuba, without exception whatsoever, which comprise and constitute the railroad system which the vendors have been operating."

On the same date as the deed of sale was executed, viz., Dec. 12, 1953, a document, which is not in evidence and the precise terms of which are not known, was executed, the parties being the Cuban State and Occidentales, by which the Cuban State sold to Occidentales the undertakings which it had acquired from the company. It was thought at first that this sale comprised all the assets acquired, but it emerged in evidence during the hearing that certain property was retained by the State. The details do not matter: the important circumstance is that not all the property acquired by the State was re-sold by it, a matter which obviously has a bearing on the question whether under Cuban law there was a sale to the State and then, as a separate step, a re-sale by the State, or only one sale from the company to Occidentales. The purchase price was duly paid by the Cuban State in United States Treasury Bonds. These were then sold for sterling, the proceeds being applied in effect in accordance with the provision of the scheme of arrangement. On Mar. 4, 1954, the company went into voluntary liquidation.

On June 18, 1954, the applicant, who is the present trustee for the certificate holders, lodged a proof. The basis of the claim appears in para. 4 of the proof, which reads as follows:

> " The claimant is the present trustee for the holders of the said certificates being the successor in office of Commercial Trust Company of Philadelphia the original trustee thereof. The liability of the company to the claimant which is the subject-matter of this proof arises under or by virtue of a covenant by the company with Cuban Rolling Stock Company contained in an agreement dated Feb. 15, 1921, but executed on Apr. 18, 1921, between the said Cuban Rolling Stock Company of the one part and the company of the other part the benefit whereof including the ownership of the said railway equipment was by a trust agreement dated Feb. 15, 1921, but executed on Apr. 18, 1921, assigned by the said Cuban Rolling Stock Company to the said original trustee of whom the claimant is the successor in title."

Paragraph 2 of the proof seeks to quantify the claim of the applicant as trustee in respect of the last eleven instalments payable under cl. First II of the lease and the premium of 2½ per cent. on their face value and interest. Paragraph 2

(b) quantifies a claim for reasonable expenses under cl. First I (b) of the lease. Paragraph 2 (c) deals with a claim for expenses incurred or to be incurred by the applicant as trustee since Mar. 4, 1954. Paragraph 2 (d) quantifies a claim in respect of the certificates of the face value of $1,867,000, which had been purchased by the company. I am not concerned with this claim, because any claim in respect of these certificates was renounced and on that basis Roxburgh, J., by an order of Dec. 4, 1956, in effect upheld the rejection of the proof so far as regards the claim in respect of these certificates.

The main claim is a claim in contract under the lease. Two alternative claims in para. 4 were abandoned at this hearing, but the applicant pursues, as alternative to his main claim and as alternative to each other, two further claims, the first for damages for breach of the covenant in the lease not to assign the rolling stock without the consent of the trustee, and the second for damages for conversion of the rolling stock by the company. In connexion with the last two items, it is relevant to mention that in a letter dated July 2, 1953, from the secretary of the company to the trustee, it was stated that for financial reasons the insurances effected by the company were being reduced in amount, and, in pursuance of that policy, the insurance of the rolling stock had been reduced to a value of $2,000,000,

> "being the estimate of the present day value of this rolling stock calculated by reference to an inventory made in June, 1948, subject to depreciation since then."

On Nov. 19 the liquidators rejected the proof. From this rejection the applicant has appealed to this court; and on the hearing of the summons, a number of difficult and complicated questions of law have emerged with which I must now proceed to deal.

The first question to which I propose to address myself is whether the obligation of the company under the lease is still subsisting or whether it has been discharged. The answer to this question depends in the first instance on ascertaining which law is the correct law to apply.

Only two systems of law were really canvassed, the law of Pennsylvania, and the law of Cuba. If it is correct to apply the law of Pennsylvania, it is because the correct law to apply is the proper law of the contract, and the proper law of the contract is the law of Pennsylvania. If it is correct to apply the law of Cuba, it is either because the correct law to apply is the proper law of the contract and the proper law of the contract is Cuban law, or because the effect of a debt emerging from the contract and achieving a separate existence is that the correct law to apply is the lex situs and the debt is situate in Cuba. If the law of Pennsylvania applies, then there is no ground for saying that the company's obligations under the lease have been discharged. If the law of Cuba applies, then one is faced with a volume of very conflicting evidence from the two distinguished Cuban lawyers who have given evidence.

I propose to deal first with the question whether the correct law to apply is the proper law of the contract or the lex situs. The proposition of counsel for the liquidators is to this effect: the proper law of a contract is not relevant on the question whether or not a debt arising out of the contract and due and payable has been extinguished, except in so far as the ascertainment of the proper law may throw some light on the situs of the debt. The fact that a debt arises out of a contract is purely history. Once it is due and payable it is a chose in action with a separate existence: and the circumstance that there may be other terms of the contract which are executory is irrelevant. The proposition then is as simple as this: if the debt can be sued for, then the lex situs must be applied in order to see whether it has been discharged or not: if, however, the debt is still a future debt, in the sense that it is not presently payable, then it is the proper law of the contract which is to be applied.

The first case on which counsel relied was *Ellis* v. *M'Henry* (1) ((1871), L.R. 6 C.P. 228). In that case, which was a bankruptcy case, Bovill, C.J., said (ibid., at p. 234):

> "In the first place, there is no doubt that a debt or liability arising in any country may be discharged by the laws of that country, and that such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in the courts of that country, but in every other country. This is the law of England, and is a principle of private international law adopted in other countries . . . Secondly, as a general proposition, it is also true that the discharge of a debt or liability by the law of a country other than that in which the debt arises, does not relieve the debtor in any other country."

In my view this case does not support the proposition contended for. As is pointed out in Dicey's Conflict of Laws (6th Edn.), p. 653, the reference to the country in which a debt or liability arises is, in modern parlance, a reference to the proper law of the contract. In Cheshire on Private International Law (5th Edn.), p. 499, this case is treated as one which was concerned with the proper law of the contract, and certainly not as one in which the lex situs was involved; and this is the view which for myself I take of this case.

The next case cited by counsel was *Swiss Bank Corpn.* v. *Boehmische Industrial Bank* (2) ([1923] 1 K.B. 673). The headnote reads as follows:

> "Judgment having been recovered against a foreign corporation, who submitted to the jurisdiction, a garnishee summons was issued to attach a debt due from a London bank to the foreign corporation:—*Held*, that the judgment creditors were entitled to have an order nisi made absolute, inasmuch as payment under a garnishee order operates as a discharge of the amount paid and is recognised by international law as having that effect, and consequently there was no real risk of the garnishees being obliged to pay the debt over again to the foreign corporation, and there was therefore nothing inequitable in making the order absolute."

I am concerned here with the question whether a contractual obligation has been discharged or has not been discharged, and I do not consider that cases relating to title are of much assistance. Further, it should be observed that in this case the debt owing by the bank was not only situate in England but was governed by English law. Cheshire on Private International Law (5th Edn.), p. 246, treats this case as one governed by the proper law of the contract.

The next case on which counsel for the liquidators relied was *Re Helbert Wagg & Co., Ltd., Re Prudential Assurance Co., Ltd.* (3) ([1956] 1 All E.R. 129). In the course of his judgment Upjohn, J., said (ibid., at p. 134):

> "The first question that I must determine is whether the applicability of the moratorium law is to be tested by reference to the local situation of the debt or by the proper law of the contract. I am concerned with the effect of a law passed in 1933 on a series of debts which, although accrued, only became payable on or after Sept. 3, 1939. In my judgment the question whether a liability to pay a debt payable on a future date has become modified or annulled by legislation must depend on the question whether such legislation affects the contractual obligation, for the matter still rests in contract. It does not seem appropriate to speak of a debt having a local situation until it is payable and can be recovered by suit, and its situs primarily depends on the residence of the debtor when it is recoverable. I think that distinction was recognised by Pearson, J., in *Jabbour* v. *Custodian of Israeli Absentee Property* (4) ([1954] 1 All E.R. 145) where he was concerned with debts or choses in action such as a claim for unliquidated damages which could be sued for at the date of the modifying legislation.

> The power of legislation to affect a contract by modifying or annulling some term thereof is a question of discharge of the contract which in general is governed by the proper law . . ."

Counsel seeks to use that passage in this way. He says first that it shows that the reason for looking at the proper law is that, if the liability is a liability to pay on a date after the relevant legislation, then it is correct to apply the proper law of the contract. On that basis, he says, it follows by necessary inference that if the debt can be sued for before the date of the legislation, then the debt has a situs and it is the lex situs which should be applied. I am unable to follow counsel in drawing the inference which he seeks to draw. I regard that passage from the judgment of UPJOHN, J., as recognising that the questions regarding the discharge of a contract are in general governed by the proper law of that contract, and that cases where the obligation is a debt payable in the future are a fortiori cases which must be governed by the proper law.

In *Re Russian Bank for Foreign Trade* (5) ([1933] Ch. 745), on which counsel relied, no question was raised which involved a choice between the proper law of the contract and the lex situs. Apart from the question of jurisdiction to make an order winding up the bank, which MAUGHAM, J., held that he had, the dispute between the parties was whether or not the debt, on which the petition was founded, existed or did not exist. If it was situated in Russia, the view of MAUGHAM, J., was that it must be taken to have been destroyed by the Russian legislation. If, on the other hand, it was situate in England, the Russian legislation, being of a confiscatory nature, could not operate to extinguish the debt. MAUGHAM, J., took the view that he had insufficient evidence to resolve that dispute, but ordered the company to be wound up, notwithstanding that the debt was disputed. On that analysis, and assuming it to be correct, I do not see how that case supports the proposition contended for.

Taking the cases in the order in which counsel for the liquidators cited them, the next case to be considered is *Re Banque des Marchands de Moscou* (*Koupetschesky*), *Royal Exchange Assurance* v. *The Liquidator* (6) ([1952] 1 All E.R. 1269). Here again no conflict was raised between the proper law and the lex situs. In the course of his judgment VAISEY, J., said (ibid., at p. 1271):

> " It is not, and cannot be, I think, disputed that according to our law the debt is situate where the debtor is, and I do not think it can be disputed that these claims have to be regulated by Russian law and English law does not come into this matter at all."

Later he said (ibid., at p. 1274):

> " Counsel for the applicants admitted that, if the case was governed by the principle laid down by MAUGHAM, J., in *Re Russian Bank for Foreign Trade* (5), the claim of his client must necessarily fail. I think it does fail, and I think that it fails on that comparatively short and simple ground. It seems to me that the claim of the Royal Exchange Assurance is governed by Russian law. I think that that was the proper law of the contract between those claimants and the bank."

It was suggested by counsel that the reference of VAISEY, J., to the proper law of the contract was per incuriam: but I find it difficult to accept this view because of the sentence which followed:

> " I think that that claim can be and could have been discharged according to the provisions, and, I think, only according to the provisions of Russian law, and that the rights and remedies of the claimants were all put an end to by one or other of the decrees applicable in this case."

As I read it, VAISEY, J., was saying that under the proper law of the contract, which would be the correct law to apply when considering whether an effective discharge of the obligation had been effected, the obligation had been discharged. For myself I should have thought that on the facts disclosed in the report the proper law of the contract was Russian law. If that be so there was a coincidence of proper law and lex situs. Apart from this consideration, the case can be regarded as covered by the decision of MAUGHAM, J., in *Re Russian Bank for Foreign Trade* (5).

The next authority cited was *Jabbour* v. *Custodian of Israeli Absentee Property* (4) ([1954] 1 All E.R. 145). In that case PEARSON, J., having held that an indemnity claim under an insurance policy was a chose in action, proceeded to consider the situation of the particular chose in action. It is, I think, important to bear in mind that this case involved simply a consideration of the title to the chose in action. It did not involve the question what is the correct law to apply to the discharge of a contract. PEARSON, J., had to consider the effect, in connexion with the question of title, of the Emergency Regulations concerning Properties of Absentees made by the Israeli Finance Minister in 1948 and the Absentee Property Law of 1950. As regards the effect of the regulations his finding was as follows:

> "Having regard to the ordinary scope of the word 'movables' and to the inherent improbability that debts and choses in action would be left unaffected by such regulations, and to the language of reg. 7 and reg. 22 (a) (2), I hold, after taking into account Mr. Megaw's argument, that the chose in action—the claim against the insurance company—was a 'movable' and therefore 'property' for the purposes of the regulations. [HIS LORDSHIP referred to further provisions in the regulations and continued:] I hold that under these regulations the chose in action—the claim against the insurance company—became vested in the custodian."

He then proceeded to consider whether the position had been altered by the Absentee Property Law of 1950. His conclusion on that question is thus expressed:

> "It follows, in my opinion, that the provision for continued vesting, contained in reg. 5 (d) of the regulations and carried on with only minor alterations by s. 4 (c) of the Law, has the effect of keeping the chose in action continuously vested in the custodian notwithstanding the replacement of the regulations by the Law. That is a proper extraterritorial operation of the Law. Personal property, which has become vested in a state department, or official of some country by legislation of that country, while the property was situated in that country, does not cease to be so vested by reason of its subsequent removal to another country; see *Princess Paley Olga* v. *Weisz* (7) ([1929] 1 K.B. 718). I should add that in the present case it is not proved that the chose in action had ceased to be situated in Israel by Mar. 31, 1950, or at any time. I therefore hold that the defendant succeeds in this issue, because the chose in action became vested in the defendant under the Regulations of 1948 and remained vested in the defendant under the Law of 1950."

So that the ground of his decision is that the title to the chose in action was in the custodian because it had become vested in him by virtue of the legislation. That would have been sufficient to dispose of the case, but PEARSON, J., thought it right to advert to an argument which had been addressed to him, and he proceeded as follows ([1954] 1 All E.R. at p. 154):

> "It is right, however, to say something about a contention of counsel for the defendant, to which much argument was directed on both sides, because, if his contention is correct, the case should be decided in his favour on a different ground. He contended that the law by which a debt or chose in action can properly be affected (whether by discharge or modification or transfer of the right) is the proper law of the contract rather than the lex

> situs. Counsel for the plaintiffs contended, inter alia, that the only law by which a debt or chose in action can properly be so affected is the lex situs. The problem arises because a debt or chose in action can be regarded in two ways: (i) it can be regarded properly as movable property, and when so regarded it naturally falls under the lex situs; (ii) it can be regarded as a still unperformed obligation under a contract, and, therefore, it might be still subject to the proper law of the contract and liable to be discharged or altered by that law. A legislative provision that a debt or a chose in action owing to A shall be discharged by payment to B could be regarded either as involving a transfer of the ownership of the property from A to B, or as an alteration of the contractual obligation by substituting B for A and as the obligee. I am inclined to think that there is a short answer to the contention of counsel for the defendant in this case. The Israeli Law of 1950 is, on the face of it, a law dealing with property and not with contract, and, therefore, it should be construed as applying only within those territorial limits which are appropriate to property legislation. Accordingly, an initial vesting under that Law could only be of a property situated in Israel, and if counsel for the defendant had to show that this chose in action was caught de novo by the Law of 1950, he would fail to do so for want of proof that the chose in action was situated in Israel at or after the time when the Law came into force."

He then deals in some detail with the authorities cited in support of the respective arguments, and makes this comment (ibid., at p. 155) on *Perry* v. *Equitable Life Assurance Society of U.S.A.* (8) ((1929), 45 T.L.R. 468):

> "That is a clear decision that a contract can be annulled, the contractual nexus between the parties can be dissolved, by legislation of the country whose law is the proper law of the contract. It is to be observed, however, that as no payment would have become due under the policy before 1923, and the contract was annulled in 1919, if not earlier, no chose in action had arisen, so there was nothing to which any lex situs could apply."

The last two passages from the judgment of PEARSON, J., to which I desire to refer are these ([1954] 1 All E.R. at p. 156):

> "On the other side there are a number of authorities which tend to show that only the lex situs can alter the title to debts and choses in action . . . Evidently, there is a considerable weight of authority in favour of the view that only the lex situs can alter the title to debts and choses in action, and the authorities cited to prove the contrary proposition do not seem to have that effect. On principle, there is the consideration that, if the action to recover a debt or chose in action is brought in the country where it is properly recoverable and, therefore, situated, and if there is a conflict between the lex situs and the proper law (the one having legislation which vests the debt or chose in action in A and the other having legislation which vests the debt or chose in action in B), the court trying the action will be bound to apply its own law which is the lex situs."

These expressions of opinion certainly do not go the length of saying that on a question whether a contract has been discharged, the lex situs ousts the proper law of the contract. The only opinion expressed is that it is probably the lex situs which must be applied when the question to be resolved is whether or not the title to debts or choses in action has been altered. I, therefore, take the view that this case still leaves open the question which I have to decide.

Those are the authorities on which counsel for the liquidators relied for his main proposition. I turn now to the authorities which counsel for the applicant cited on this point. The first was *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux* (9) ((1890), 25 Q.B.D. 399), which case, it is to be observed, was not cited to PEARSON, J., or mentioned in his judgment. The headnote reads as follows: A

> "A party to a contract made and to be performed in England is not discharged from liability under such contract by a discharge in bankruptcy or liquidation under the law of a foreign country in which he is domiciled."

The relevant facts appear from the opening sentences of the judgment of LORD ESHER, M.R. (ibid., at p. 403): B

> "In this case the defendants, a French company, entered into negotiations for the purchase of copper through a London metal-broker, who effected contracts between them and the plaintiffs in England in the ordinary way. He drew up bought and sold notes, by which the contract was expressed to be according to the rules of the London Metal Exchange. One of these C notes he sent to the plaintiffs, and the other he sent to the defendants; and both parties retained the notes so sent to them. The contracts were for the purchase of copper to be delivered in England. It appears to me impossible to deny that these were English contracts. The contracts being so made, the defendants became bound to accept the copper contracted to be sold. The plaintiffs were always ready and willing to deliver the copper; but D the defendants were not ready to accept, and absolved the plaintiffs from tendering it. Consequently, acccording to English law, the plaintiffs are entitled to sue the defendants for non-acceptance of the copper, the measure of damages being the difference between the contract and market price at the time of the breaches of contract. But the defendants are a French company domiciled in and governed by the law of France. They have E been, by a judgment of the Tribunal of Commerce of the Seine, pronounced to be in judicial liquidation. It was asserted by the defendants by way of defence to the action that the pronouncing of that judgment by the French tribunal by the law of France operated as a discharge of the defendants from liability to an action on the contracts; and it was asserted that it so discharged them in more than one way. It was said that such a judgment F dissolved the French company, so that it no longer existed, and so dissolved their liability to be sued on the contracts. It was further said, that the fact of the plaintiffs having by their agents offered proof of their claims before the French tribunal operated as a discharge of the defendants' liability to this action."

Later he said (ibid., at p. 405): G

> "The question really is, whether anything has been proved which is an answer to the plaintiffs' action in this country according to the law of England. It is clear that these were English contracts according to two rules of law; first, because they were made in England; secondly, because they were to be performed in England. The general rule as to the law which H governs a contract is that the law of the country, either where the contract is made, or where it is to be so performed that it must be considered to be a contract of that country, is the law which governs such contract; not merely with regard to its construction, but also with regard to all the conditions applicable to it as a contract. I say 'applicable to it as a contract' to exclude mere matters of procedure, which do not affect the contract as such, I but relate merely to the procedure of the court in which litigation may take place upon the contract. The parties are taken to have agreed that the law of such country shall be the law which is applicable to the contract. Therefore, if there be a bankruptcy law, or any other law of such country, by which a person who would otherwise be liable under the contract would be discharged, and the facts be such as to bring that law into operation, such law would be a law affecting the contract, and would be applicable to it in the country where the action is brought. That, at any rate, is the law of England

> on the subject. So, where a contract is made or is to be performed in a foreign country, so as to be a contract of that country, and there is a bankruptcy law, or the equivalent of a bankruptcy law, of that country, by which, under the circumstances that have occurred, a party to the contract is discharged from liability, he will be discharged from liability in this country. But it is only in virtue of the principle which I have mentioned that such a discharge from a contract takes place. It is now, however, suggested that, where by the law of the country in which the defendants are domiciled the defendants would, under the circumstances which have arisen, be discharged from liability under a contract, although the contract was not made nor to be performed in such country, it ought to be held that they are discharged in this country. It seems to me obvious that such a proposition is not in accordance with the principle which I have stated. The law invoked is not a law of the country to which the contract belongs, or one by which the contracting parties can be taken to have agreed to be bound; it is the law of another country by which they have not agreed to be bound. As Lord Kenyon said, in *Smith* v. *Buchanan* (10) ((1800), 1 East, 6), it is sought to bind the plaintiffs by a law with which they have nothing to do, and to which they have not given any assent either express or implied. The proposition contended for seems to me to contravene the general principle to which I have alluded as governing these matters, and to suggest a principle for which there is no foundation in law or reason. Why should the plaintiffs be bound by the law of a country to which they do not belong, and by which they have not contracted to be bound? Therefore, if it were true that in any of the modes suggested the defendants were by the law of France discharged from liability, I should say that such law did not bind the plaintiffs, and that they were nevertheless entitled, according to English law, to maintain their action upon an English contract."

That case is a strong case and it has, so far as I know, never been questioned. It is quite true that at the time when that case was decided in 1890, the phrase "proper law of the contract" had not emerged, but there can be no doubt that Lord Esher, M.R., was stating as well established that the discharge of a contract is to be governed by its proper law. The case is cited, and in my view justifiably cited, by Dr. Cheshire, Private International Law (5th Edn.), p. 246, for this proposition:

> "There is no doubt, either on principle or authority, that discharge affects the substance of the obligation and that it is governed by the proper law of the contract."

It is cited by Dicey, Conflict of Laws (6th Edn.), p. 651, in support of r. 143:

> "The validity of the discharge of a contract (otherwise than by bankruptcy) depends upon the proper law of the contract."

The other case on which counsel for the applicant relied was *Metliss* v. *National Bank of Greece & Athens, S.A.* (11) ([1957] 2 All E.R. 1)*. The essential facts emerge from a single sentence at the beginning of the judgment of Romer, L.J. (ibid., at p. 8):

> "In this case the bondholder is suing the new amalgamated company on a guarantee to which the company was not a party. The guarantors were the National Bank of Greece but the bondholder's case is that by reason of a decree passed in Greece (which was the country of the National Bank's domicil) the bank ceased to exist in 1953 and the whole of its assets and liabilities, including the liability to the bondholder under the guarantee, became vested in the new amalgamated company."

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* Subsequently affirmed, see ante, p. 608.

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Denning, L.J., said ([1957] 2 All E.R. at p. 3):

> "Notwithstanding that moratorium, if an English bondholder had brought an action in the English courts for the interest due to him, either against the principal debtor, the National Mortgage Bank of Greece, or against the guarantors, the National Bank of Greece, or against both, the English courts would without doubt have given judgment for the interest due. The English courts would not have recognised the moratorium. B The proper law of the contract was English law and no enactment of the Greek government could affect the matter . . ."

For this proposition he cites authority. At the end of his judgment he says (ibid., at p. 7):

> "This brings me to the second point. The new amalgamated company C says that if the English courts recognise Greek law so as to make it liable as universal successor, so also they should recognise the Greek law of moratorium. The English courts cannot, it is said, when dealing with the liability of the new amalgamated company, take the Greek law in part and reject it in part. They must recognise it in whole or ignore it altogether. This is a forceful argument, but I do not think we can give effect to it. The D rules of private international law do not permit it. The debtor is a Greek debtor but the debt is an English debt. When we are considering the personality of the debtor or succession to his personal effects, we must apply Greek law because he is a Greek; but when we are considering the amount of the debt and the obligation to pay it, we must apply English law because it is an English debt. If the old National Bank of Greece had continued in E existence, the English courts would give judgment against that company for immediate payment without regard to the moratorium. Greek law has destroyed the old National Bank of Greece and has set up the new amalgamated company in its place. We recognise that Greek law has power of life and death over the company which it created, and we must accept the substitute whom it has provided; but when the substitute stands in F our courts to answer for an English debt, it must answer according to English law, which says that the debt must be paid according to its terms."

It is clear from those two passages that he is treating the debt as English because the proper law of the contract was English. This was also the view of Romer, L.J., who said ([1957] 2 All E.R. at p. 8):

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> "The bondholder does not, and could not, rely on novation, but he rests his claim solely on the decree coupled with the fact (now admitted by the new amalgamated company) that the proper law of the contract of guarantee was English. The new amalgamated company's answer, in short, is that our courts will not recognise or enforce against it a liability which it did not contractually accept but which was imposed on it by foreign law, viz., H by the law of Greece."

And finally Parker, L.J., in his judgment, said (ibid., at p. 13):

> "The application of the foreign law to status does not involve applying the foreign law as to obligations. What was transferred was the liability under the guarantee, whatever it might from time to time be. If the old I National Bank of Greece was liable to be sued in England, as it was, so is the new amalgamated company."

It appears to me therefore that this case supports the view that it is to the proper law to which one must turn to find out whether a contract has been discharged or not.

In this state of the authorities, I come to the conclusion that the proposition contended for by counsel for the liquidators is not established as a rule of English private international law. To my mind it would offend against both principle and considerations of convenience. It must be remembered that, as DR. CHESHIRE says, "discharge affects the substance of the obligation", whereas questions of title to and assignment of the benefit or burden of the obligation do not. Every contract has a proper law: it is the law which the parties either expressly or impliedly have chosen to govern their contractual relations. One of the most important aspects of any contract is the manner in which it is to be discharged, and one would suppose that the parties would intend the law which they have chosen as the proper law to govern that important matter—discharge. But according to the proposition advanced, the maturing of the obligation of the debtor under the contract into a debt of itself takes that debt out of the contract, and therefore extinguishes the pre-existing obligation, and forces the creditor, whether he wishes to do so or not, to have recourse to the law of the debtor's residence in order to enforce the debt. I cannot regard this as sound in principle. It is not supported by the authorities. Indeed to my view it is contrary to the reasoning of LORD ESHER, M.R., in *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux* (9). I therefore hold that it is the proper law of this contract which must be applied in the present case to determine whether the lease has been discharged or not.

The next question, therefore, is what is the proper law of the lease. The lease is expressly recited in the agreement, and in the lease there is a recital of the intention immediately to assign the benefit of the lease to the trustee. The two documents are essential parts of the same transaction, namely, the Philadelphia Plan. In these circumstances one would expect that they each would have the same proper law, and I hold that they have.

Now, but for cl. Eleventh and cl. Twelfth in each document I should not hesitate to hold that the proper law of each document is the law of the Commonwealth of Pennsylvania. The object of the transaction was to raise money in the United States of America by an essentially American method connected particularly with Pennsylvania. Pursuant to the Philadelphia Plan, the trustee was a Philadelphian corporation having its place of business in Philadelphia. The money to be raised was to be in American dollars primarily from the American public. Payment of capital under the certificates and of rentals under the lease were to be made in gold coin of the United States of America in Philadelphia. The lease was brought into being in order to give the trustee on behalf of the holders of certificates something in the nature of a security, and the fact that the rolling stock was to be used in Cuba would not alter my view that the proper law of the contract was the law of Pennsylvania. There is a further point: it is very difficult to imagine why the parties to the agreement should choose the law of Cuba as the proper law of the agreement. Clause Seventh of the agreement appears to me strongly to militate against the conclusion that they have done so. It presupposes that a choice is open to the trustee whether it will sue in Cuba or not, but if cl. Eleventh and cl. Twelfth have the effect that the parties have submitted to the jurisdiction of the Cuban courts and the law of Cuba for all purposes, then the trustee has no such choice.

Clause Eleventh of the lease expresses the intention of the parties to enter into and execute the lease in accordance with the laws of Cuba, "to the end that" the lease may be registered in Cuba. Counsel for the liquidators submitted that the words "to the end that" merely introduced a consequence, but did not cut down the generality of the preceding words. I do not share that view. In my opinion, those words state the purpose for which the lease is to be executed in accordance with the laws of Cuba, and they are exhaustive of the purpose. That purpose is the same as the purpose of the latter part of the clause, namely, to protect the trustee's title. In my judgment on its true construction cl. Eleventh is narrow in its scope and does not have the effect of making the law of Cuba the proper law of the lease or the agreement.

The effect of cl. Twelfth depends primarily on its construction, and reference to authorities is not helpful unless on examination the meaning and scope of the clause appear doubtful. It is to be observed that the submission is not general: it is not for all purposes, but for purposes which are expressed in the clause, namely, " for all notifications, summonses and other judicial or extra-judicial formalities to which this lease shall give rise ". The presence of the word " other " has the effect that the word " formalities " qualifies everything from " notifications " onwards. The clause, therefore, is dealing with matters of form and is complementary to cl. Eleventh. The last phrase " with express renunciation of their own jurisdiction " is, as must follow from the use of the word " with ", a renunciation for the purposes only of the limited submission. I would apply the same reasoning and the same construction to cl. Eleventh and cl. Twelfth of the agreement.

In the result I conclude that the proper law of both the lease and the agreement is the law of the Commonwealth of Pennsylvania. It follows, therefore, that the lease has not been discharged and that the trustee is entitled to prove in the liquidation of the company for whatever be the proper sum in sterling, a matter with which I shall have to deal later in this judgment.

The amount for which the trustee is entitled to prove should be ascertained as follows. There must first be ascertained what is due to the trustee under the lease. Expressed in dollars this consists of (i) the first, third and fourth items set out at the end of para. 2 (a) of the proof, and (ii) what on inquiry shall be found to be the correct sum in dollars under para. 2 (b) and (c)*. As regards the premium of 2½ per cent. on the face value of the certificates, this arises under the agreement and not under the lease and should not be taken into account at this stage of the calculation. Then the dollars must be converted into sterling. As regards principal, this represents eleven instalments of rental, and so each instalment should be converted at the rate of exchange obtaining when it fell due. As regards the first claim for interest, this represents interest payable under the lease and therefore payable half-yearly on Feb. 14 and Aug. 14 of each year. Therefore the total sum claimed under this head should be broken down into half-yearly amounts and converted at the rate of exchange obtaining on the respective dates when each half-yearly payment should have been made. The second claim for interest is really a claim for rent on the basis of holding over. I think therefore that, for purposes of conversion into sterling, the same method should be adopted as for the first claim for interest.

The sums making up what is found to be the correct figure under para. 2 (b) must be converted into sterling at the rate obtaining on the respective dates of payment, while the sum found due under para. (c) must be converted into sterling at the rate obtaining at the commencement of the winding-up, namely, Mar. 4, 1954. If, of course, any of the items comprised in sub-para. (b) were incurred in sterling, there will be no need to convert into dollars and then back to sterling.

The sum resulting from the above calculation will represent the sum for which the trustee is entitled to prove in the liquidation. As the trustee is a trustee, however, it can only receive in respect of its proof a sum sufficient to satisfy the proper claims of the certificate holders. In this regard I think that counsel for the applicant is right in his submission that the principle underlying the decision in *Re Chesterman's Trusts, Mott* v. *Browning* (12) ([1923] 2 Ch. 466) applies. I do not see how otherwise to deal with the matter.

The proper course, therefore, is to ascertain the sum in dollars to which the certificate holders are entitled for principal, outstanding interest and the premium of 2½ per cent. To that total must be added the sums found due under sub-para. (b) and sub-para. (c) of para. 2 of the Proof. Then there must be ascertained the amount of sterling which would have been required at the date of the liquidation to purchase the aggregate amount of dollars so ascertained. This total will represent the maximum amount which the trustee on behalf of the certificate holders can receive in respect of the sum proved for. How much the trustee will in fact receive will depend on the dividend payable in respect of the sum proved for.

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* For a description of the claims under para. 2 (a) (b) (c) of the proof, see p. 650, letter I, to p. 651, letter A, ante.

What I have said in this judgment up to this point would be sufficient to dispose of the whole matter, but, in case the matter should be taken to the Court of Appeal, there was canvassed before me the incidence of the law of Cuba on the alternative bases either (1) that the main point fell to be determined by reference to the law of Cuba and that the situs was Cuba, or (2) that the main point fell to be determined by the proper law of the contract and the proper law was Cuban law. In those circumstances it is only right that I should express my view on, at any rate, the main points of Cuban law which have been debated before me. [HIS LORDSHIP then considered the main points of Cuban law and concluded (a) that the transaction of state acquisition of the railway undertaking and assets involved no novation compulsory or otherwise, (b) that one who is not the true owner of a chattel cannot destinate it so as to give it the character of real estate, unless as a matter of law he must be presumed to be the true owner, (c) that the company could not for the purposes of the moratorium laws be regarded as being a public service railroad company after Dec. 1, 1953, when it ceased to have a railroad, and (d) that, on the assumption that Cuban law applied to the case, the law of the Commonwealth of Pennsylvania would be held in Cuban law to be the proper law of the contract and the right of the trustee to prove in the liquidation would be the same as that previously stated. HIS LORDSHIP continued:] There remain to be considered the two further claims which counsel for the applicant put forward as alternative to his main claim in contract. The first is a claim for damages for conversion. His contention is that the trustee was, on Dec. 1, 1953, the owner of the rolling stock, and that therefore the act of the company in selling it without the consent of the trustee amounted to conversion.

I have held earlier in this judgment that the transfer of the rolling stock by the car company to the trustee was valid under Cuban law, the company at the end of the original transaction being in the position of a bailee of the rolling stock. It is not disputed, as I understand the evidence, that on Dec. 1, 1953, the trustee had the right to possession of the rolling stock (assuming my views of the relevant Cuban law are correct) notwithstanding the appointment of the interventor. In those circumstances I accept the view of Dr. Gorrin that the sale and transfer of the rolling stock to the Cuban State was unjustifiable under Cuban law. The sale was a tort under English law: it was a conversion by a wrongful sale. Counsel for the liquidators relied on the case of *Tancred* v. *Allgood* (13) ((1859), 4 H. & N. 438). On examination, however, I agree with counsel for the applicant that this was not a case of conversion at all. It was an action against the sheriff and not against the bailee. In 33 HALSBURY'S LAWS OF ENGLAND (2nd Edn.), p. 21, note (l), it is treated as a case of trespass, and I think rightly.

What then is the measure of damages? Counsel for the liquidators relied on *Belsize Motor Supply Co.* v. *Cox* (14) ([1914] 1 K.B. 244) for the proposition that where the bailee has an interest in the property, the measure of damages is not the full value of the thing converted, but only the value of the owner's interest therein. Counsel for the applicant accepted this proposition, and that the company had an interest in the rolling stock: but, invoking *Belsize Motor Supply Co.* v. *Cox* (14), he contended that the interest of the trustee in the rolling stock at the date of conversion was the amount of the outstanding instalments, and, I suppose interest thereon as provided in the lease, these being the payments which would have had to have been made by the company in order to make itself full owner of the rolling stock. In my view this is the correct formula for calculating the damages on this claim in conversion. If the trustee

were to prove under this head of claim, then in my judgment it would be entitled A
to prove for such a sum in sterling as when converted into dollars at the rate obtaining on Dec. 1, 1953, would produce the amount of dollars resulting from the application of the formula to which I have just referred.

I come now to the last point, the claim for damages for breach of the covenant in cl. Fifth of the lease against assignment of the rolling stock without the consent of the trustee. I approach this claim on the basis that the property in the rolling B
stock effectively passed to the trustee in 1921 and that the covenants in the lease did not cease to be binding by virtue of the so-called re-sale agreement in 1922. I, therefore, come to the conclusion that by the sale of Dec. 1, 1953, which admittedly was made without the consent of the trustee, the company committed a breach of the covenant in question. As regards the question of damages, counsel for the liquidators submitted that the phrase "its right or interest" in C
cl. Fifth refers only to its reversionary interest in the lease, and that therefore the act of the company can have resulted in no damage to the trustee. This appears to me to be putting much too narrow a construction on the clause. The document is a commercial document and must be construed so as to give business efficacy to it. I am unable to credit that the parties could have intended to confine the operation of the covenant to the company's reversionary interest. D
The clause is clearly introduced for the protection of the trustee, who, unless its permission is first obtained, is entitled to insist that the company shall remain the lessee under the lease and shall not be entitled to substitute any other person. In other words, the clause is dealing with the whole of the company's interest as lessee and not merely with its so-called reversionary interest.

I do not, therefore, regard this as a claim for which only nominal damages E
should be awarded. To ascertain the quantum of damage one should ascertain the position which would have resulted if the clause had been complied with, and the consent of the trustee had been given. In such circumstances, the trustee should have been joined in the sale, in which case it would have received that portion of the purchase price properly attributable to the rolling stock. The company valued the rolling stock for insurance purposes in July, 1953*. F
I see no reason to treat it as being of any less value in December, 1953. I have no evidence as to the rate of depreciation; while on the other hand the evidence shows that the company in July, 1953, was cutting down its insurance commitments so far as it possibly could. It must I think be a reasonable inference that the insurance value was the lowest which could properly be placed on the rolling stock in July, 1953. If the trustee were to prove under this head of G
claim, then in my judgment it would be entitled to prove for such a sum in sterling as when converted into dollars at the rate of exchange obtaining on Dec. 1, 1953, would produce the amount of the insurance value.

Finally, I should observe that if the trustee were to prove under either of the last two heads, the maximum sum which he could retain would be the sum required to satisfy the claims of the certificate holders calculated as set out H
earlier in this judgment.

In the result, the trustee has the choice of proving under one of the three heads†.

Order accordingly.

Solicitors: *Herbert Smith & Co.* (for the applicant); *Norton, Rose & Co.* (for the respondents).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

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* See p. 651, letters C and D, ante.

† For the trustee's main claim, see p. 650, letter I, to p. 651, letter A, ante, and for the alternative claims, see p. 651, letter B, ante.

Re BLEACHERS' ASSOCIATION, LTD.'S LEASES. WEINBERGS WEATHERPROOFS, LTD. *v.* RADCLIFFE PAPER MILL CO., LTD.

[CHANCERY DIVISION (Harman, J.), November 6, 7, 27, 1957.]

Landlord and Tenant—Notice to quit—Business premises—Lease for twenty years determinable by either party by notice at end of seventh year—Notice, in accordance with lease, given by landlord after Landlord and Tenant Act, 1954, *in operation—Notice not in form required by Act—Effect of notice—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2 c. 56), *s.* 24 (1), *s.* 25 (1).

By the terms of a lease of business premises for twenty years from Sept. 29, 1950, either party could determine the lease at the end of seven or fourteen years by giving the other party six months' notice. On Jan. 18, 1957, the landlords gave notice to the tenants of their intention to determine the lease on Sept. 29, 1957, i.e., at the end of the first seven years. The tenants contended that, under s. 24 (1)* of the Landlord and Tenant Act, 1954, the notice was of no effect, as it did not comply with the provisions of s. 25† of the Act, and that, accordingly, the lease could not now be terminated before Sept. 29, 1964.

Held: the notice of Jan. 18, 1957, was effective to determine the term demised by the lease but, as the notice was not in the form required by s. 25 (1) of the Act of 1954, a tenancy continued by virtue of s. 24 (1) until terminated in accordance with Part 2 of the Act of 1954.

Castle Laundry (*London*), *Ltd.* v. *Read* ([1955] 2 All E.R. 154) considered.

[For the Landlord and Tenant Act, 1954, s. 24, s. 25, s. 26, s. 29, and s. 69 (1), see 34 HALSBURY'S STATUTES (2nd Edn.) 409-413, 443.

For a summary of the Landlord and Tenant (Notices) Regulations, 1954, see HALSBURY'S STATUTORY INSTRUMENTS, 1957 Supp., p. 193.]

Cases referred to:

(1) *Orman Bros., Ltd.* v. *Greenbaum*, [1955] 1 All E.R. 610; 3rd Digest Supp.

(2) *Castle Laundry* (*London*), *Ltd.* v. *Read*, [1955] 2 All E.R. 154; [1955] 1 Q.B. 586; 3rd Digest Supp.

(3) *Bolton* (*H. L.*) (*Engineering*) *Co., Ltd.* v. *Graham* (*T. J.*) *& Sons, Ltd.*, [1956] 3 All E.R. 624; 3rd Digest Supp.

(4) *Milletts* (*Victoria*), *Ltd.* v. *Northley House, Ltd.*, [1956] J.P.L. 743.

Adjourned Summons.

The plaintiffs, Weinbergs Weatherproofs, Ltd., by their originating summons dated June 6, 1957, asked for a declaration (a) that on the true construction of two leases (dated, respectively, Oct. 17, 1950, and Jan. 7, 1953) and the Landlord and Tenant Act, 1954, a notice dated Jan. 18, 1957, given to the plaintiffs by the defendants, Radcliffe Paper Mill Co., Ltd., was ineffective to determine the terms respectively granted by the leases on Sept. 29, 1957; and (b) that, accordingly, the defendants were not entitled to give to the plaintiffs any notice under the Act of 1954 to terminate their tenancy of the property comprised in the leases on any date before Sept. 29, 1964.

A. J. Balcombe for the plaintiffs, the tenants.

Alan Fletcher for the defendants, the landlords.

Cur. adv. vult.

Nov. 27. **HARMAN, J.**, read the following judgment: The plaintiffs are lessees under two leases, the reversions expectant on which are now vested in the defendants. This summons raises a question under Part 2 of the Landlord and

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* The relevant terms of the sub-section are printed at p. 665, letter D, post.

† The relevant terms of the section are printed at p. 665, letter E, post.

Tenant Act, 1954, as to the effect of a notice served by the defendants as landlords on the plaintiffs as tenants. The first lease bears date Oct. 17, 1950, and was made between Bleachers' Association, Ltd., as landlords, and the plaintiffs, as tenants, and by it the landlords demised to the tenants certain rooms in a building known as "the Clough Bleachworks", at Radcliffe in the county of Lancaster. The habendum is in these terms:

> "To hold the same unto [the tenants] for the term of twenty years from Sept. 29, 1950 (subject as hereinafter provided in cl. 5 hereof for the earlier determination of the term) . . ."

The rent is £270 a year payable quarterly in arrear. The lease contains the usual lessee's covenants to repair and so forth, a proviso for re-entry (in cl. 3) and a covenant for quiet enjoyment (cl. 4). Clause 5 is in these words:

> "Provided always and it is hereby agreed that if [the tenants] shall be desirous of determining this present lease at the expiration of the first seven or fourteen years of the term hereby granted and of such their desire shall give six calendar months' previous notice in writing to [the landlords] and shall pay all the rent and perform and observe all the covenants hereinbefore reserved and contained and on the part of [the tenants] to be paid performed and observed up to such determination or if [the landlords] shall be desirous of determining this present lease at the expiration of the first seven or fourteen years of the term hereby granted and of such their desire shall give six months' previous notice in writing to [the tenants] then in either of the said cases immediately after the expiration of the said terms of seven years or fourteen years as the case may be this present demise and everything herein contained shall cease and be void . . ."

The second lease was made on Jan. 7, 1953, between the same parties and was expressed to be supplemental to the first lease. By it the landlords demised to the tenants certain further rooms in the same building and the habendum is in these terms:

> "To hold the said premises except and reserving as aforesaid unto [the tenants] for the term of eighteen years from Sept. 29, 1952 (subject as provided in and co-terminus (sic) with cl. 5 of the principal lease) . . ."

The rent is £130 a year. The lessee's covenants are made by reference to the principal lease, and cl. 3 is in these terms:

> "The covenant on the part of [the landlords] contained in cl. 4 of the principal lease and provisos contained in cl. 3 and 5 thereof shall be deemed to be incorporated herein as if the same were herein repeated with the same or the like substitutions or modifications as are mentioned in cl. 2 hereof."

It will be recollected that the proviso contained in cl. 5 of the principal lease was that which I have read giving a right to break the term. The tenants occupied all the rooms demised by both leases and that is the position today.

In the present year the landlords sold the whole of the Clough Bleachworks to the defendants and on Jan. 17, 1957, communicated this fact to the tenants. On the next day the defendants' solicitors sent to the tenants a document in the following terms:

> "In pursuance of the powers contained in the leases made Oct. 17, 1950, and Jan. 7, 1953, between the Bleachers' Association, Ltd. of the one part and yourselves of the other part under which the rooms numbered . . . thereby demised are held, we [the solicitors then give their name and the name of the defendants] do hereby give you notice that it is the intention of [the defendants] to determine the said leases and to put an end to the terms thereby respectively created on Sept. 29, 1957, being the end of the first seven years of the said terms."

It is the contention of the tenants that by reason of the Landlord and Tenant Act, 1954, s. 24, this notice is of no effect, and that they remain in occupation of the demised property under the two leases which cannot now be broken until the year 1964. The defendants, on the other hand, do not contend that the notice was sufficient to put an end to the leases at Michaelmas, 1957, but they argue that it was sufficient to abridge the leases at that date with the result that the tenants are now in occupation merely by the effect of the statute. It is no part of the tenants' case that the notice of Jan. 18, 1957, would not have been sufficient, but for the statute, to bring the terms under both leases to an end. No point was made that, in respect of the second lease, Michaelmas, 1957, was not the end of the first seven years of the term thereby granted (as the notice states), but the end of the fifth year.

A reference to the long title of the Landlord and Tenant Act, 1954, shows that the object of Part 2 was

> ". . . to enable tenants occupying property for business . . . purposes to obtain new tenancies in certain cases . . ."

It is agreed that the plaintiffs are tenants answering that description and that Part 2 of the Act applies to them. I need not, therefore, read s. 23. Section 24 (1) is in these terms:

> " A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act . . ."

Section 25 provides:

> " (1) The landlord may terminate a tenancy to which this Part of this Act applies by a notice given to the tenant in the prescribed form specifying the date at which the tenancy is to come to an end (hereinafter referred to as ' the date of termination ') . . . (2) Subject to the provisions of the next following sub-section, a notice under this section shall not have effect unless it is given not more than twelve nor less than six months before the date of termination specified therein."

Sub-section (3), sub-s. (4), sub-s. (5) and sub-s. (6) of s. 25 deal further with notices given under s. 25. It is not suggested that such a notice has been given. Section 26 deals with the tenant's request for a new tenancy and no such request has been made here. The definition section, s. 69, under the heading " notice to quit ", in sub-s. (1), is in these terms:

> " ' notice to quit ' means a notice to terminate a tenancy (whether a periodical tenancy or a tenancy for a term of years certain) given in accordance with the provisions (whether express or implied) of that tenancy."

The result is that a notice exercising a right to break a lease for a term of years is included in the expression " notice to quit " in this Act. It is to be observed, however, that this phrase does not refer to a notice given by the landlord under the Act, but to the common law notice given in accordance with the terms of the lease or the law apart from the Act.

The tenants' argument has the merit of simplicity, namely, that their tenancies are tenancies of twenty years' and eighteen years' duration ending at Michaelmas, 1970, and are still continuing as such because no notice has been given in accordance with s. 25. The defendants argue that the notice was, notwithstanding the Act, effective to cut down the terms of the two demises to seven and five years respectively, and that the tenants are now holding over merely by virtue of the statute, and not by virtue of the leases alone. If this be right, the defendants are in a position to serve on the tenants at any time a notice conforming to s. 25 and thus set the machinery of the Act in motion and so put an end to the tenants' right of occupation unless they successfully apply for a new tenancy under s. 26. In that view, it would also be open to the tenants to apply for a new tenancy, whether or not they be served by the defendants with notice under s. 25.

These sections have been discussed in the Queen's Bench Division. In *Orman Bros., Ltd.* v. *Greenbaum* (1) ([1955] 1 All E.R. 610) the Court of Appeal, affirming a decision of Devlin, J., held that a notice to quit which was not in conformity with the Act was invalid because, though given before the Act came into force, it was given for a date after that event. Lord Goddard, C.J., said (ibid., at p. 612):

> " Therefore we have reached this position: that the Act was passed on July 30, 1954, and came into force on Oct. 1, 1954, and that when the Act is in force the landlord must give a notice in the prescribed form. No one doubts that the words in s. 24 (1): ' A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act ' mean that the tenancy shall not come to an end unless it is terminated by the method laid down by the Act, i.e., by notice to quit in the prescribed form. I then turn to s. 66 (1) of the Act, which is in these terms: ' Any form of notice required by this Act to be prescribed shall be prescribed by regulations made by the Lord Chancellor by statutory instrument.' "

Lord Goddard, C.J., added (ibid., at p. 613):

> " We are dealing with a notice to quit given after the Landlord and Tenant (Notices) Regulations, 1954, came into force. The regulations came into force on Aug. 27, 1954, and the notice to quit was given on Aug. 31, 1954, and expired on Oct. 4, 1954, i.e., after the Act came into force. We are not dealing in this case with a notice to quit given before the regulations came into force, nor are we dealing with a case in which the notice to quit was given for a day before the Act came into force; we are dealing with a case where the regulations had come into force three days before the notice to quit was given, and where the date of expiry of the notice to quit was three days after the Act came into operation. In my opinion, when one bears that in mind, it is unarguable that the landlords had not to use the statutory form."

That judgment must, of course, be considered in relation to the facts of the case. The tenancy was a four-weekly one and no question of a break in a term arose. The only question was one of dates. It has no materiality for my purposes.

More relevant is *Castle Laundry (London), Ltd.* v. *Read* (2) ([1955] 2 All E.R. 154). In that case the lease was for a term of twenty-one years determinable at the end of the seventh or fourteenth year on six months' notice in writing. Such a notice was served by the landlord on June 11, 1954, before the Act was passed and was, admittedly, a good notice when served. The tenants argued that it was invalidated by the Act which came into force during its currency on Oct. 1, 1954. Sellers, J., held that this was not so, that the notice of June 11, 1954, was effective to cut the term down to seven years, though not to put an end to the tenancy, which was, as he held, terminated by a six months' notice in the statutory form dated Jan. 19, 1955. The argument there was chiefly as to the efficacy of the second or statutory notice, but the validity of that depended, of course, on whether the earlier notice cutting down the term to seven years was effective. The judge said ([1955] 2 All E.R. at p. 155):

> " The landlord desired to invoke that clause [as to the break] and to terminate the lease at the end of the seven years' period, and he gave notice on June 11, 1954, expressing his desire, and giving the tenants, the plaintiffs in this action, notice to quit and to deliver up possession on Dec. 25, 1954. It is agreed that that was a proper notice under the lease and one which, as far as the contractual relationship between the parties was concerned, would

> have brought this lease to an end on Dec. 25, 1954, that the other provisions in the lease which were available for its further performance would, in accordance with the clause I have read, have ceased to have any effect, and everything else would have been void."

He then discussed the intervention of the Act and the second notice, and said (ibid., at p. 156):

> "The notice which the landlord gave was a notice dated Jan. 19, 1955, and was a notice terminating the tenancy on July 22, 1955, which complies with s. 25 (2) as regards duration. I think that it is rightly said on behalf of the landlord, that, having regard to the fact that Oct. 1, 1954, has passed, the Act makes it impossible to terminate a tenancy unless it is terminated in accordance with the provisions of the Act. The Act, through the regulations, has specified the appropriate form of notice terminating the tenancy, and that notice must be given. The contractual tenancy, so it is said on behalf of the landlord, came to an end on Dec. 25, 1954, but, because of the operation of s. 24 of the Act, the tenancy did not come to an end. I think it may rightly be said to continue as a business statutory tenancy which, so the landlord contends, has been terminated by the notice which the Act requires."

The case is distinguishable from the present in that there the notice to break the term was given before the Act was passed and was, therefore, undoubtedly valid when given, and what the judge held was that the coming into force of the Act did not invalidate the notice in so far as it operated to break the term, though it made it ineffective to end the tenancy, which continued as what he called "a business statutory tenancy". This is a convenient phrase so long as one does not confuse it with the so-called "statutory tenancy" under the Rent Restrictions Acts, that, of course, being not a tenancy at all, whereas, having regard to the language used in the Act of 1954, the term must be thought of as continuing by way of a statutory extension: see the observations of Denning, L.J., in *H. L. Bolton (Engineering) Co., Ltd.* v. *T. J. Graham & Sons, Ltd.* (3) ([1956] 3 All E.R. 624), where he said (ibid., at p. 626):

> "The right view I think is that the common law tenancy subsisted with a statutory variation as to the mode of determination."

Sellers, J., also spoke ([1955] 2 All E.R. at p. 155) of the "contractual relationship" between the parties. The point was taken before me that in the present case the defendants were not the original lessors and, therefore, there was no privity of contract between them and the tenants, but only privity of estate*. In my view this has no importance, for it is not to be denied that an assign of the reversion retains as against an assign of the lease the right, given by the contract between the original lessor and the lessee, to break the term by notice. The decision of Sellers, J., was adversely commented on in a note in 71 Law Quarterly Review (1955), p. 329, where it is called "a hard case". With all respect to the author of that note, I do not agree with him. Nevertheless, the case, right or wrong, is not an authority for the view that a notice served, as in the present case, after the coming into force of the Act of 1954 is still valid to abridge the term of the lease. My attention was also called to a note of a decision of Pilcher, J., in *Milletts (Victoria), Ltd.* v. *Northley House, Ltd.* (4) ((1956), J.P.L. 743). The note is to be found in Woodfall on Landlord and Tenant (29th Edn.), 2nd Permanent Supp., vol. 1 (1957), p. 337, and appears to afford some support to the defendants, but the report is so brief as to be of little value. I say no more about it.

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* The relationship between the parties in *Castle Laundry (London), Ltd.* v. *Read* was not one in which there was privity of contract between them, see [1955] 2 All E.R. 154, letter H.

A In this state of the authorities I must, in effect, make up my own mind. In my judgment the notice has the limited effect for which the defendants contend. Having regard to s. 24 of the Act of 1954, it is not effective to put an end to the tenancies, but I do not see why it should be of no effect at all. What were the terms of years created by the leases?—not twenty years and eighteen years certain, but twenty and eighteen years determinable by notice at Michaelmas, 1957. B This was the bargain made by the tenants as parties to the leases, and the rights and obligations under the leases have devolved on the parties to this suit. It does not seem to me to be necessary, in order to give to the Act that effect which the statute intended, to deprive the landlords of the right to shorten the term in this way. The Act still leaves the tenants with the right of occupation which they would have had if the terms had originally been of seven and five C years respectively, and the right to claim a new tenancy whether the landlords serve a statutory notice to determine under s. 25 or no. The tenants have, therefore, got the right to obtain a new tenancy which they are promised in the long title to the Act, and I do not see why they should have something more which the instruments of lease under which they held did not give them. The principle must be that the bargain should not be altered by the statute more than D is necessary to give the statute its proper effect, and I hold accordingly that, though s. 24 operated to prevent the notice from causing the tenancies to come to an end, the notice was effective to break the terms as the instruments of lease provided that it should do. There is still time for the tenants to exercise their rights under s. 26 (2) if no statutory notice be served by the landlords or under s. 29 (2) and (3) if such a notice shall be served. E I draw some comfort from the fact that the learned editors of WOODFALL ON LANDLORD AND TENANT (29th Edn.), 2nd Permanent Supp, vol. 1, at p. 22, appear to take the same view as I have done on this question.

If the view above expressed be wrong, I have some difficulty in seeing how a landlord can ever avail himself of his right under a " break clause " in a lease. F To take the present case, the landlords, in order to exercise their rights at the end of the first seven or fourteen years of the term of the lease dated Oct. 17, 1950, must give six previous months' notice in writing to the lessees of their desire to determine the lease. This is to be contrasted with the requirements of s. 25 (1) of the Act of 1954 whereby the tenancy can be determined only by a notice " in the prescribed form ". These forms were prescribed by the Lord Chancellor G originally by the Landlord and Tenant (Notices) Regulations, 1954 (S.I. 1954 No. 1107), which, as amended* in respects not here relevant, was in force up to July 9, 1957. By reg. 4 of these regulations it is provided:

> " The forms in the appendix to these regulations or forms substantially to the like effect, shall be used for the following purposes, that is to say . . . H (vii) A notice under the provisions of s. 25 of the Act, being a notice terminating a tenancy to which Part 2 of the Act applies, shall be in Form 7."

Turning to Form 7, I do not see how, if the notice is to be substantially to the effect of that form, it can comply with the break clause, with the result that either the right to break will not be effectually exercised or the notice will not be I in the prescribed form and will, therefore, be ineffective. In the present case the result would be that no effective notice could ever be served until the twentieth year, a departure from the bargain between the parties which I cannot think to have been contemplated by the legislature. I hold, therefore, that the

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* These regulations were amended by the Landlord and Tenant (Notices) (No. 2) Regulations, 1954 (S.I. 1954 No. 1714). Both the Regulations of 1954 have been revoked and the relevant regulations are now the Landlord and Tenant (Notices) Regulations, 1957 (S.I. 1957 No. 1157), which came into operation on July 9, 1957.

A notice was effective to determine the terms given by the leases subject nevertheless to the provisions of the Act of 1954.

Declaration that the notices were effective to determine the terms created by the leases, subject nevertheless to the right of the plaintiffs to remain on as tenants under the terms of the leases until the tenancies were determined in accordance with the Landlord and Tenant Act, 1954.

B Solicitors: *Carr, Sandelson & Co.* (for the plaintiffs); *Woodcock, Ryland & Co.*, agents for *Woodcock & Sons,* Haslingden (for the defendants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

C

R. *v.* OLIVER.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Devlin and Pearson, JJ.), November 25, December 3, 1957.]

D *Criminal Law—Trial—Place of trial—Case sent for trial at next assizes but one—Whether any jurisdiction to make the order—Criminal Justice Act,* 1925 (15 *&* 16 *Geo.* 5 *c.* 86), *s.* 14 (2).

O. was indicted on a charge of murder and his trial began at Exeter City Assize on Nov. 4, 1957. On the following morning the attention of the court was drawn to newspaper reports of the previous day's proceedings, E prejudicial to the accused, and the jury were discharged. The judge, after discussion with counsel for the defence, ordered under s. 14 (2) of the Criminal Justice Act, 1925, that a new trial should be held at the winter assize (i.e., the next assize but one) for the County of Southampton to be held in March, 1958. On motion by the Attorney-General under the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 11 (3), for an order that the F trial should take place at the next session of the Central Criminal Court, commencing in December, 1957,

Held: the jurisdiction of a court of assize under s. 14 (2) of the Criminal Justice Act, 1925, to direct a trial to take place before a court of assize for some other place was limited to directing trial to take place at the next assize for that other place; accordingly the order for trial at Southampton G assizes had been made without jurisdiction and the trial would be directed to take place at the next session of the Central Criminal Court.

[As to the grounds for ordering change of venue, see 10 HALSBURY'S LAWS (3rd Edn.) 394, para. 716; and for cases on the subject, see 14 DIGEST (Repl.) 164, *1284-1288,* and 16 DIGEST 407, *2542* et seq.

For the Criminal Justice Act, 1925, s. 14, see 14 HALSBURY'S STATUTES (2nd H Edn.) 942.

For the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 11 (3), see 5 HALSBURY'S STATUTES (2nd Edn.) 1121.]

Cases referred to:

(1) *R.* v. *Holden,* (1833), 5 B. & Ad. 347; 2 Nev. & M. (K.B.) 167; 110 E.R. 819; 16 Digest 408, *2566.*

I (2) *R.* v. *Clement,* (1821), 4 B. & Ald. 218; 106 E.R. 918; *subsequent proceedings,* sub nom. *Re Clement,* (1822), 11 Price, 68; 16 Digest 10, *28.*

Motion.

The Attorney-General moved for an order under the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 11 (3), directing a trial for murder to take place at the next session of the Central Criminal Court. On Nov. 25, 1957, the court made the order and reserved their reasons. The facts appear in the judgment.

The Attorney-General (*Sir Reginald Manningham-Buller, Q.C.*), *E. S. Fay, Q.C.*, and *M. R. Hoare* for the Crown.

N. J. Skelhorn, Q.C., and *H. E. Park* for the respondent.

Cur. adv. vult.

Dec. 3. **LORD GODDARD, C.J.**, read the judgment of the court: On Nov. 4 this year the trial of John Henry Walter Oliver for murder began at the Exeter City Assize before SALMON, J. On the next morning counsel for the Crown called the attention of the learned judge to reports of the previous day's hearing which had appeared that morning in three national newspapers which circulated in Exeter. In the report of counsel's opening speech matters were included which in fact counsel had deliberately refrained from opening though they had been given in evidence and published in the local press during the magisterial proceedings. These matters had formed part of the statement which it was alleged the prisoner had made to the police, but in his discretion counsel had decided not to refer to them in opening and whether they would or would not have come out in the course of the trial is immaterial. When this was brought to his notice the learned judge decided to discharge the jury in case any of them had seen these inaccurate reports, which in his opinion and in that of counsel for the Crown and defence were highly prejudicial. The learned judge also directed that in these circumstances the trial should take place away from the City of Exeter, and after discussion with counsel for the defence he directed that the trial should take place at the assizes for the County of Southampton, not at the forthcoming Autumn Assize but at the Winter Assize which will not be held till March next year. While no doubt counsel for the prosecution agreed that it was desirable that the case should be tried elsewhere than in Exeter, he took no part in the discussion as to where or when it should be tried but offered no opposition to the order which was made.

The Attorney-General now moves this court under s. 11 (3) of the Administration of Justice (Miscellaneous Provisions) Act, 1938, for an order directing the trial to take place at the next session of the Central Criminal Court. That sub-section is in these terms:

> " If it appears to the High Court to be expedient in the interests of justice, the court may direct that an indictment or inquisition shall, instead of being tried at the court of assize or quarter sessions at which it would but for the direction be tried, be proceeded with and tried at such other court of assize, or, if the offence is within the jurisdiction of quarter sessions, at such other court of quarter sessions, as may be specified in the direction."

In making the order he did, the learned judge was relying on s. 14 (2) of the Criminal Justice Act, 1925, which reads as follows:

> " Where for any reason whatsoever the trial of a person who has been committed to be tried for an indictable offence before a court of assize or quarter sessions for any place is either not proceeded with or not brought to a final conclusion before that court, it shall be lawful for that court, if in its discretion it thinks it convenient so to do with a view either to expediting the trial or re-trial or the saving of expense or otherwise and is satisfied that the accused will not thereby suffer hardship, to direct that the trial or re-trial of the accused shall take place before a court of assize, or (if the offence is within the jurisdiction of a court of quarter sessions) before a court of quarter sessions, for some other place."

It is only right to say that it was at the suggestion of counsel for the defence that the learned judge ordered the case to go to the Winter Assize. From the shorthand note it appears that counsel expressed doubt whether it would be possible for the case to be tried at the forthcoming Autumn Assize, where there was already a heavy calendar, and before this court he contended that by that assize there would not be enough time for any prejudice to die down. This is

A not a ground which appeals to this court. We think it is almost fanciful to say that jurors in Hampshire would have been so interested in a trial for murder at Exeter that if they had read the reports in any of these papers they would remember the details so that they could not be trusted to try the case impartially. It is perhaps worth remembering what DENMAN, C.J., said as long ago as 1833 in *R.* v. *Holden* (1) ((1833), 5 B. & Ad. 347 at p. 355):

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> "When men are summoned into a jury box to decide upon a case of felony, such prejudice is very apt to die away: it is a kind of feeling which juries are learning more and more to lay aside; and we should rather relax that disposition by being too ready to suppose that they would be influenced by unjust impressions."

C Moreover, according to the shorthand note the ground on which the learned judge was asked to send the case to the Winter Assize was the possible difficulty of getting it tried at the Autumn Assize owing to the pressure of business, but it is right that I should say that he did have in mind the possibility of prejudice still existing and he has also told us that he did not send the case to the Central Criminal Court partly because he thought that this was not looked on with D favour and partly because he was not asked to do so.

This court is of opinion that it has power to entertain the application of the Attorney-General even if it was a matter within the learned judge's discretion, but if he had jurisdiction to make the order we should naturally be reluctant to interfere especially as it was supported by the defence and no objection was taken by the prosecution when it was made. As we have said, E the learned judge relied on s. 14 (2) of the Criminal Justice Act, 1925, but the Attorney-General contends that that section must be read as giving power to the court to direct trial at some other place than that to which the accused was committed but only to the next assize for that place.

It must be remembered that this section made a considerable change in the law of venue and for the first time enabled a court of assize or quarter sessions F to direct an indictment to be tried at a foreign court. For very many years statutory provision has been made for ensuring the prompt trials of persons charged with either felony or misdemeanour. Section 6 of the Habeas Corpus Act, 1679, contains stringent provisions to this end so that a prisoner not tried at the next sessions or gaol delivery may claim to be released on bail and if not tried at the following sessions may be discharged. Section 27 of the Criminal G Procedure Act, 1851, provides that the court may on the application of a person indicted or otherwise postpone the trial to the next subsequent session to give him time for the preparation of his defence or otherwise. The Assizes Relief Act, 1889, s. 3, provides for the discharge of a prisoner where he is not tried at the next quarter sessions, and s. 14 (5) of the Criminal Justice Act, 1925, contained* an express provision enabling the committal to be to the next quarter H sessions but one and then only if the next sessions were to be held within five days of the date of committal and only if the accused were bailed. All these statutory provisions are no doubt for the protection of the accused and it may be contended that there is no reason why the direction should not be for trial to an assize subsequent to the next one if the accused consents. But the section gives a new power to the court and in our opinion that power is to commit to I some other place and must be limited to the next assizes or sessions for that other place. We cannot think that Parliament intended to give so wide a power as is contended for in this case, especially in view of the provisions for ensuring trials at the next assizes or sessions to which we have referred. As the matter is one of jurisdiction consent cannot enlarge the power. Moreover, if the argument to the contrary which was addressed to us were to prevail, it would follow that it would be left to the discretion of the court either at the instance of the prosecutor or the defence to direct the trial to take place at any subsequent assize to be held for the county to which the indictment is sent, provided it was satisfied that the accused would not suffer hardship, which might in most cases at least be avoided by granting bail, though the prosecution might be seriously hampered by the death or absence of witnesses. In our opinion, if this power of changing venue to a foreign court is exercised, the case must be committed to the next assizes or sessions, subject in the case of the latter to the provisions formerly in s. 14 (5) which would have been an unnecessary subsection if the court already had had that power under s. 14 (2).

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* Section 14 (5) was repealed by the Magistrates' Courts Act, 1952, s. 132 and Sch. 6 and is now replaced by s. 10 (2) of the Act of 1952.

We accordingly thought we ought to exercise our powers under s. 11 (3) of the Administration of Justice (Miscellaneous Provisions) Act, 1938, and have already directed the trial to take place at the next session of the Central Criminal Court, that is to say, the present session, which began yesterday. While we do not encourage frequent recourse to that court as a place of trial, as it is usually more than fully occupied with its own cases, charges of murder are generally regarded as an exception and ought to be tried as quickly as possible, and indeed before the Act of 1938 if a case had to be removed for trial on the ground of local prejudice it was to the Old Bailey that it had to go: see the Central Criminal Court Act, 1856 (19 & 20 Vict. c. 16), commonly called " Palmer's Act ", repealed by the Act of 1938. We may say for future guidance that where removal is sought on the ground of prejudice and there is any doubt as to a suitable court to which to send it, it would be a convenient course for the court to discharge the jury and order a re-trial at the next assizes for the county or city where the indictment has been preferred, leaving it either to the prosecution or the defence to apply to this court for an order under s. 11 (3) of the Act of 1938 when it has been ascertained at what court the case can conveniently and expeditiously be disposed of.

At the end of the hearing and after we had announced our decision we were asked to direct that no report of these proceedings should appear in the Press, and we were referred to *R.* v. *Clement* (2) ((1821), 4 B. & Ald. 218), as an authority enabling the court to give such a direction. That was a case in which several persons were to be tried separately in respect of the same offence, and the court did direct that no report of any one case should appear until all were tried. We do not think it necessary to decide whether that case would enable us to forbid the publication of such proceedings as these because we are satisfied that no possible prejudice can be caused to the accused man, as no reference was made to the articles to which exception was taken during the hearing.

Order accordingly.

Solicitors: *Director of Public Prosecutions* (for the Crown); *Theodore Goddard & Co.*, agents for *Crosse & Crosse*, Exeter (for the respondent).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

ST. PANCRAS BOROUGH COUNCIL *v.* UNIVERSITY OF LONDON.

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Ormerod, L.JJ.), November 21, 22, 1957.]

Rates—Limitation of rates chargeable—Hereditament occupied for the purposes of a non-profit making organisation—Notice terminating the limitation of rates chargeable—When notice may be given—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *&* 5 *Eliz.* 2 *c.* 9), *s.* 8 (3).

The ratepayers were an organisation to which the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, applied. On Mar. 21, 1956, before the beginning of the first year (on Apr. 1, 1956) of the relevant new valuation list, but after the Act of 1955 came into operation (on July 27, 1955), a rating authority served on the ratepayers a notice under s. 8 (3)* of that Act that the limitation by s. 8 (2) (b) of rates chargeable on the ratepayers during the second and subsequent years of the new list would cease to apply as from Apr. 1, 1959, in relation to certain hereditaments of the ratepayers. The ratepayers challenged the validity of the notice.

Held: the notice was premature and invalid because the words in s. 8 (3), " where para. (b) of the last preceding sub-section has effect " introduced a condition that notice under s. 8 (3) could not be given effectively before s. 8 (2) (b) had become the operative enactment limiting the amount of rates currently chargeable (i.e., could not effectively be given before the expiration of the first year of the new valuation list) subject to the quaere expressed below.

Decision of WYNN-PARRY, J. ([1957] 2 All E.R. 395) affirmed.

Quaere: whether a notice under s. 8 (3) could effectively have been given during the first year of the new valuation list.

[For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, see 35 HALSBURY'S STATUTES (2nd Edn.) 394.]

Appeal.

This was an appeal by the plaintiffs, the Metropolitan Borough of St. Pancras, from an order of WYNN-PARRY, J., dated May 16, 1957, and reported [1957] 2 All E.R. 395, declaring that on the true construction of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (2) and (3), a notice, dated Mar. 21, 1956, served by the plaintiffs, the rating authority, purporting to terminate as from the end of March, 1959, limitation of rates chargeable on the ratepayers, the University of London, was premature and invalid.

R. E. Megarry, Q.C., and *C. F. Fletcher-Cooke* for the rating authority.
R. O. Wilberforce, Q.C., and *W. B. Harris* for the ratepayers.

LORD EVERSHED, M.R.: In my judgment this is really a plain case, and I entirely agree with the conclusion which WYNN-PARRY, J., reached. The question is one (in the end of all) of the effect, as a matter of English, of the first two-and-a-half lines of s. 8 (3) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. Section 8 was concerned to give to certain organisations a privilege, or the chance of a privilege, under the Act of 1955. There is no question that the ratepayers, the University of London, the respondents to this appeal, are an " organisation " within the scope of the section; and I, therefore, need not refer to s. 8 (1). Section 8 (2) states the nature of the privilege which may be obtained; and it is of two kinds, or rather (as counsel for the ratepayers put it to us) it arises in two distinct phases. The first phase is covered by para.

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* The relevant terms of s. 8 (3) are printed at p. 674, letter E, post.

(a) and is during what is called " the first year of the new list "—i.e., the new valuation list. The first year of the new list began on Apr. 1, 1956. During that year an organisation of the type mentioned, if it remains such at all relevant times, is not to be chargeable for rates in any sum exceeding that in respect of which it was charged for the last year of the old list. Then para. (b) of the sub-section deals with the succeeding years; and, again assuming that the hereditament in question remains unaltered and that the organisation still remains one within the scope of sub-s. (1), the proportion of the new rate for the second and subsequent years which the organisation will bear in respect of the given hereditament will be the same proportion as the rate actually paid during the first year of the new assessment bore to the rate which, apart from the sub-section, would have been chargeable. Sub-section (3) gives to rating authorities the right to determine, or put a limit on the extent or duration of, those privileges. I may add that by s. 8 (4) the rating authority is given a further discretion (notwithstanding, as I understand it, anything else that it may have done or not have done) to make remissions in cases of particular ratepayers—all of which goes to show that the section, over a period of time (and again I am borrowing from what fell from counsel for the ratepayers), is designed to give a breathing space during which it may be seen how the new rating will work in practice, particularly in regard to organisations of the kind mentioned.

I return to s. 8 (3) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, which gives to the rating authority the power to determine privileges. It opens as follows:

> " Where para. (b) of the last preceding sub-section has effect in the case of a hereditament, the rating authority may at any time give notice to the occupiers of the hereditament that, as from the end of a year specified in the notice, being a year ending not less than thirty-six months after the date on which the notice is given, the limitation imposed by virtue of that paragraph shall either cease to apply to the hereditament or shall be modified as mentioned in the notice . . ."

I have stated that in this case the first year of the new list began on Apr. 1, 1956. The Act itself had come into operation on July 27, 1955. The rating authority in this case, the Mayor, Aldermen and Councillors of the Metropolitan Borough of St. Pancras, had, let it be said, made themselves very alert as to the nature and extent of their duties and powers under this new Act; and, on Mar. 21, 1956, before the first year of the new list had begun, they served what I may call a sub-s. (3) notice on the University of London in respect of the hereditament in question. If that notice was a good notice, then it would take practical effect from the end of the year specified in the notice, being the " year ending not less than thirty-six months after the date on which the notice " was given. Thus this notice, if good, would begin to operate after Apr. 1, 1959. The University of London, however, challenged the validity of the notice on the simple ground that it was premature and that sub-s. (3) did not and could not, on a fair significance of its terms, have contemplated the giving of a notice before the second year of the new list began, or at least before the first year of the new list began. It did not appear that the rating authority gave any other notices ex abundante cautela; so that it is conceded now that if they were premature in serving this notice, they will not be able to bring in the limitation which such a notice might operate to effect until April, 1961, thereby suffering a substantial loss for the borough. WYNN-PARRY, J., came to the conclusion that the notice was invalid.

The real force, I think, of the argument of counsel for the rating authority lay in the use of the three words " at any time "; for, he submitted, " at any time " means " at any time ". This Act came into operation on July 27, 1955. His submission is that at any time after the Act was part of the law of the land such a notice may be given; and that his notice is within the terms of the Act, and should take effect accordingly. I cannot, for my part, accept that argument. A first reading of this sub-section to my mind produces the effect for which counsel for the ratepayers contends. I would read it, as a matter of first impression, as meaning that when year two has begun, then at any time, i.e., at any time thereafter, a rating authority may serve such a notice. The argument has subjected the sub-section to a closer analysis than a mere reliance on first impression. None the less, the closest analysis has not served (in my case) to disturb the first impression which the words made on my mind. It seems to me that the most formidable answer to the argument of counsel for the rating authority lies in the express reference to " para. (b) of the last preceding sub-section "; for if the words " has effect " should be taken as meaning no more or no less than " is operative in law ", then there would be no point in making specific reference to para. (b): the whole section was in operation from July 27, 1955. In other words, it seems to me that, on a fair reading, and after, indeed, a close scrutiny of the language, these words " Where para. (b) of the last preceding sub-section has effect in the case of a hereditament " operate to introduce, as Wynn-Parry, J., said ([1957] 2 All E.R. at p. 396):

> " . . . a condition, namely, that the particular case must fulfil the conditions of para. (b) of sub-s. (2) before the notice contemplated . . . can be given . . ."

I entirely agree with that; and I think that that view of it is reinforced by the general character of the section, which counsel for the ratepayers expressed as contemplating a series of quite definite phases—the first year of the new list, the second and later years of the new list, and then, once the latter period had begun and that phase had been entered into, the possibility of limitations imposed by notice on the part of the local authority. If that is right (as I think it is), if that is the real meaning of these words " Where para. (b) of the last preceding sub-section has effect ", then the introduction of the word " thereafter " into the subsequent language after the words " at any time " is not involved: the sub-section means what it says, that, given the condition, then at any time (i.e., without any limit as to time) the rating authority may give a notice. The words " has effect ", in such a context, therefore, mean " has practical effect."

Counsel for the rating authority relied particularly on s. 8 (5), which provides:

> " The preceding provisions of this section, and the provisions of Sch. 5 to this Act, shall have effect, with the necessary modifications, in relation to rates charged for a rate period forming part of the first year of the new list, or of any subsequent year, as they have effect in relation to rates charged for the first year of the new list or for any subsequent year, as the case may be."

I cannot (with all respect to him) derive the significance which counsel seeks from that sub-section. It is surely only asserting, in language appropriate for the purpose, that if, in consequence of the operation of the provisions of Sch. 5, there is a change in the rates during a given year, be it the first year or a subsequent year, then the various preceding provisions of the section are to operate and " have effect " as regards the relevant part of the year as they otherwise would as regards the whole year. That does not seem to me to throw any real light on the way in which these words are used in sub-s. (3); and I think that they are there used (as I interpret them) in a way in which it is common for such words to be used.

If I elaborate the matter further, I should, I think, merely be guilty of repetition. I am content to leave it thus, stating my entire concurrence with the view expressed by Wynn-Parry, J. I must, however, add one qualification or reservation. So far as this case is concerned, the facts being as I have stated them, it suffices to say that, in my judgment, " has effect " cannot be given the meaning " operative in law "; so that the notice which was here given on Mar. 21, 1956, was a bad notice. A view has been intimated, which counsel for the ratepayers was prepared to support as an alternative ground of appeal, that at any rate an effective notice under sub-s. (3) could not be given before the first year of the new list had begun. After the first year of the new list had begun, that is to say, after para. (a) of sub-s. (2) had come into practical effect, it then followed that para. (b) would ensue in effect unless the organisation ceased to exist or altered its character, or some supervening event of that sort occurred. So it might be said that, although para. (b) was not in effective operation in this case before Apr. 1, 1957, at any rate after Apr. 1, 1956, its future operation could be forecast with reasonable certainty. In the view that I take, it is unnecessary to express any opinion on that point; and I, therefore, desire to leave open for future argument (if it should ever arise) the question whether an effective notice under sub-s. (3) might be given during the first year of the new list. My present inclination, I confess, is against that view; but I express no final conclusion on it. So far as this case is concerned it suffices to say that this notice, given, as it was, on Mar. 21, 1956, was premature and invalid. I therefore would dismiss the appeal.

ROMER, L.J.: I agree that, notwithstanding our decision in this case, as a matter of theory at least it would be open to a rating authority in some other case to submit and contend that a notice, given during the first year of the new list was a valid and effective notice, because the point is not before us. Subject to that, and on the main point which has been argued before us, I agree so wholly with the judgment of Wynn-Parry, J., and with the reasoning and conclusions that Lord Evershed, M.R., has expressed that there is nothing I wish to add.

ORMEROD, L.J.: I agree also.

Appeal dismissed.

Solicitors: *Town clerk*, St. Pancras Borough Council (for the rating authority); *Slaughter & May* (for the ratepayers).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

BERRY *v.* ST. MARYLEBONE CORPORATION.

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Ormerod, L.JJ.), November 7, 8, 11, 26, 1957.]

Rates—Limitation of rates chargeable—Organisation concerned with the advancement of religion, education or social welfare—Theosophical Society in England—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 Eliz. 2 c. 9), s. 8 (1) (a).

Evidence—Interpretation of document—Constitution of a society—Meaning attached to objects by members—Activities of the society—Admissibility—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 Eliz. 2 c. 9), s. 8 (1) (a).

One of several main objects of the Theosophical Society in England, which was a component national society of the General Council of the Theosophical Society was "(i) To form a nucleus of the universal brotherhood of humanity, without distinction of race, creed, sex, caste or colour". By the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, a limit was placed on the amount of rates leviable in relation to hereditaments occupied for the purposes of an organisation whose main objects "are . . . concerned with the advancement of religion, education or social welfare" (s. 8 (1) (a))*. The society was not established or conducted for profit; object (i) of the society was a separate object and in law was not charitable (see *Re Macaulay's Estate*, [1943] Ch. 435, n., p. 679, letter I, and p. 680, letter E, post).

Held: the society was not an organisation to which s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, applied for the following reasons—

(a) in order that s. 8 (1) (a) should apply the society must show that its main objects were concerned exclusively with one or other or all of the purposes specified in s. 8 (1) (a), though it was not necessary for the society to prove that its objects when carried into effect did achieve those purposes (see p. 680, letters F and G, post; dictum of COHEN, J., in *Re Price*, [1943] 2 All E.R. at p. 510, letter C, applied), and

(b) object (i) of the society was not concerned with the advancement of religion or of education and, further, was not concerned with the advancement of social welfare, since it was so wide that many activities might lie within it which did not promote the welfare of the community in a social sense (see p. 684, letters E and F, post); *United Grand Lodge of Ancient Free and Accepted Masons of England* v. *Holborn Borough Council*, ante, p. 281, applied).

Per CURIAM: (i) when an organisation has a written constitution the court should normally resort to that alone in order to ascertain its objects for the purpose of s. 8 (1) (see p. 680, letter I, post); thus, though the court would take note of evidence of what theosophy was, evidence of how members of the society explained the meaning of its objects was not admissible.

Dictum of LORD BUCKMASTER in *Re Macaulay's Estate* ([1943] Ch. at p. 437) applied.

(ii) if the written constitution of an organisation specifies several objects, evidence of its activities may be relevant to show what its main objects are, but not to construe, or to limit the construction of, the language of the organisation's constitution (see p. 682, letters C and D, post).

Chartered Insurance Institute v. *Corporation of London* ([1957] 2 All E.R. 638) considered.

Decision of WYNN-PARRY, J. ([1957] 1 All E.R. 681) affirmed.

[For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, see 35 HALSBURY'S STATUTES (2nd Edn.) 394.]

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* The terms of s. 8 (1) (a), so far as relevant, are printed at p. 679, letter D, post.

Cases referred to: A

(1) *Re Macaulay's Estate, Macaulay* v. *O'Donnell,* [1943] Ch. 435, n.; 8 Digest (Repl.) 438, *1287.*

(2) *Re Price, Midland Bank Executor & Trustee Co., Ltd.* v. *Harwood,* [1943] 2 All E.R. 505; [1943] Ch. 422; 112 L.J.Ch. 273; 169 L.T. 121; 8 Digest (Repl.) 328, *112.*

(3) *Thornton* v. *Howe,* (1862), 31 Beav. 14; 31 L.J.Ch. 767; 6 L.T. 525; B 26 J.P. 774; 54 E.R. 1042; 8 Digest (Repl.) 335, *161.*

(4) *Chartered Insurance Institute* v. *Corporation of London,* [1957] 2 All E.R. 638.

(5) *United Grand Lodge of Ancient Free and Accepted Masons of England* v. *Holborn Borough Council,* ante, p. 281.

(6) *National Deposit Friendly Society (Trustees)* v. *Skegness Urban District* C *Council,* ante, p. 199.

Appeal.

This was an appeal by the plaintiff, Alice Lilian Berry, suing on behalf of the Theosophical Society in England, from a decision of WYNN-PARRY, J., given on Feb. 22, 1957, and reported [1957] 1 All E.R. 681, that the society D was not an organisation to which s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, applied, viz., an organisation which was not established or conducted for profit and whose main objects were charitable or were otherwise concerned with the advancement of religion, education or social welfare.

E

G. G. Honeyman, Q.C., and *D. Taverne* for the plaintiff.
Geoffrey Cross, Q.C., and *J. L. Arnold* for the corporation.

Cur. adv. vult.

Nov. 26. **ROMER, L.J.**, read the following judgment of the court: This is an appeal from an order of WYNN-PARRY, J., in proceedings brought by the plaintiff, Mrs. Alice Lilian Berry, suing on behalf of the Theosophical Society in F England (hereinafter referred to as "the society"), in which she sought a declaration that, on the true construction of s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, the society is an organisation which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare. Had the application succeeded, the society would have become G entitled to the rating relief which is provided by the section. By the order of the learned judge, however, it was declared that the society is not an organisation falling within the section, and the plaintiff now appeals from that order.

The application was supported by an affidavit sworn by the plaintiff, who is the general secretary of the society and has been a member thereof since 1911. By that affidavit it is stated that the society is a component national society of H the General Council of the Theosophical Society ("the international society"). The affidavit further states as follows in para. 2 and para. 3:

> "2. The international society . . . was founded in New York in 1875 and was incorporated in India in 1905 under Act 21 of 1860 of the Governor-General of India entitled 'An Act for the Registration of Literary, Scientific I and Charitable Societies, 1860'. The headquarters of the International Society are at Adyar, Madras, India. The objects of the international society as set out in its memorandum of association are as follows: '(i) To form a nucleus of the universal brotherhood of humanity, without distinction of race, creed, sex, caste or colour. (ii) To encourage the study of comparative religion, philosophy and science. (iii) To investigate unexplained laws of nature and the powers latent in man'; and ancillary objects including the maintenance of libraries.

> A " 3. The English society . . . is an unincorporated society. It was formed in 1888 and has as its object the promotion of the objects of the international society with special reference to England. It is the occupier of the premises at 50, Gloucester Place, London, W.1. The property of the society is held on trust for its members by the English Theosophical Trust, Ltd. . . . which is a limited company incorporated under the Companies Acts of 1908 and B 1913. The chief sources of income of the society are subscriptions, donations and legacies. The society and the international society are non-profit making organisations and are run almost entirely by voluntary work. The expenditure of the society is confined to the promotion of the objects of the international society as set out in para. 2 hereof."

C The remainder of the plaintiff's affidavit deals, as hereinafter appears, with an explanation of theosophy and of what theosophists believe, the meaning which they attribute to their three main objects, and with the past and present activities of the society.

Section 8 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, provides as follows:

> D " This section applies to the following hereditaments, that is to say—(a) any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare; (b) any hereditament held upon trust for use as an almshouse; (c) any hereditament consisting E of a playing field (that is to say, land used mainly or exclusively for the purposes of open-air games or of open-air athletic sports) occupied for the purposes of a club, society or other organisation which is not established or conducted for profit and does not (except on special occasions) make any charge for the admission of spectators to the playing field . . ."

F Then that is followed by a proviso, which is immaterial to the present case. The learned judge held that it was clear that the society was not established or conducted for profit and that its main objects were the three objects stated by the plaintiff in her affidavit. His decision that the society is not an organisation within s. 8 of the Act was founded on the view that the first of its objects is G not charitable and is not " otherwise concerned with the advancement of religion, education or social welfare ".

The three main objects of the society came up for consideration by the House of Lords in 1933 in *Re Macaulay's Estate, Macaulay* v. *O'Donnell* (1) ([1943] Ch. 435, n.). Under the will of a testatrix her residuary estate was given to the Folkestone Lodge of the society for purposes which, as the House held, H involved a perpetuity; and the further question then arose whether the gift was saved from failure on the grounds that the objects of the society were charitable. The speeches of LORD BUCKMASTER and LORD TOMLIN are printed as a note to *Re Price* (2) (see [1943] Ch. at pp. 436-438). The case had come before CLAUSON, J., at first instance and a part of his judgment was referred to in the judgment of COHEN, J., in *Re Price, Midland Bank Executor & Trustee Co., Ltd.* I v. *Harwood* (2) ([1943] 2 All E.R. 505). COHEN, J., expressed the view (ibid., at p. 511) that, in the opinion of CLAUSON, J., the second and third objects of the society were valid and charitable purposes and that the observations of LORD TOMLIN in the House of Lords indicated that he did not dissent from this view. Both LORD BUCKMASTER and LORD TOMLIN were clearly of the opinion that the first object of the society was not charitable and that, as it was separate from and independent of the other two objects, the gift was invalid. LORD TOMLIN said ([1943] Ch. at p. 438):

> " Whatever may be said of the objects indicated in cll. (b) and (c)* the object covered by cl. (a)† read by itself cannot in my opinion be regarded as charitable."

Then, after referring to an affidavit which had been filed on behalf of the society explaining the meaning of the word " nucleus " in the expression " to form a nucleus of the universal brotherhood of humanity ", LORD TOMLIN proceeded (ibid.):

> " I see no reason to think that this statement (though its admissibility as evidence is open to question) is not a fair and accurate statement of the purpose of the clause and the clause so regarded discloses in my opinion no charitable objects at all. But it is said that the three clauses should be read together, and so read should be construed so as to confine the object of cl. (a) to the formation of a body devoted exclusively to carrying out the objects indicated in cll. (b) and (c) respectively. I do not think the clauses can be so read. Each clause, in my opinion, expresses a distinct and independent object."

It may well be, as COHEN, J., said in *Re Price* (2) ([1943] 2 All E.R. at p. 511) that the opinion of CLAUSON, J., that the second and third objects were charitable was undisturbed by anything which fell from LORD TOMLIN. The second object is clearly charitable, but it appears to us that it is far from clear that the third object is also charitable, and counsel for the rating authority was not prepared to concede that it was. Be that as it may (and we express no opinion in this judgment as to the third object in relation to s. 8, for we heard no argument on it), the decision of the House of Lords in *Re Macaulay's Estate* (1) with regard to the first object of the society precludes it from contending that it is " an organisation . . . whose main objects are charitable ": nor did counsel for the plaintiff so contend before us. Accordingly, the society must rely on other grounds in order to bring itself within s. 8 of the Act, and the way in which it seeks to do so is by contending that its first main object is either concerned with the advancement of religion, or of education, or of social welfare, or is concerned with the advancement of all three. In order to succeed on any part of this argument, it is necessary, in our judgment, for the society to establish that (subject only to the principle de minimis) its main objects are exclusively concerned with the advancement of these three matters or with one or more of them; for, although an organisation's subsidiary objects may be concerned with something else, s. 8 does not apply, in our opinion, unless it be shown that its main objects are exclusively concerned with one or other of the specified purposes, or with all of them, as the case may be. On the other hand, the organisation need not, in our judgment, prove that its objects, when carried into effect, do, in fact, advance religion, etc., for it is sufficient to show that, being directed to that end, they may have that result: see *Re Price* (2) ([1943] 2 All E.R. at p. 510), following *Thornton* v. *Howe* (3) ((1862), 31 Beav. 14).

Before considering the society's arguments in further detail, it would be convenient at this point to examine the question of the relevance and admissibility of paras. 4 et seq. of the plaintiff's affidavit. These paragraphs are, in part, devoted to an explanation of what theosophy is, and of the meaning which theosophists attribute to the three main objects, and, in part, to a survey of what the international society and the English society have actually done. In our opinion, when an organisation or body has a written constitution, it is to that and to that alone to which the court should normally resort in order to ascertain its objects for the purpose of s. 8 of the Act; and, as LORD BUCKMASTER pointed out in *Re Macaulay's Estate* (1) ([1943] Ch. at p. 437), unless an English word or phrase has, in relation to the organisation, a special meaning, evidence as to its meaning is not properly admissible. The House of Lords did not formally reject the affidavit which had been filed in *Re Macaulay's Estate* (1) explaining the word " nucleus " in the society's first object and we are willing to take note of what theosophy is and what theosophists believe, as stated by the plaintiff in her affidavit. It would, however, be going too far, in our opinion, to accept as admissible (in so far as it is directed to the question of construction) evidence of how theosophists explain the meaning of their objects. (Compare, for example, para. 5 of the affidavit, hereinafter mentioned.) The interpretation of the objects is a matter for the court and not for the members of the society.

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* Objects (ii) and (iii), see p. 678, letter I, ante.

† Object (i); see p. 678, letter I, ante.

There remains the plaintiff's account of the activities in which the society and its parent body have been engaged. Counsel for the plaintiff submitted before us that it is legitimate to look, not only to the language in which the society's main object is framed, but also to what the society has actually done; and, if, as he contended, the whole of its proved activities are confined to those specified in s. 8, its objects also ought to be regarded as so confined. He relied, in support of this suggestion, on the judgment of DEVLIN, J., in *Chartered Insurance Institute* v. *Corporation of London* (4) ([1957] 2 All E.R. 638). In that case the institute claimed the benefit of s. 8 of the Act in respect of its occupation of certain premises on the ground that its main objects were concerned with the advancement of education. The Divisional Court (LORD GODDARD, C.J., BYRNE and DEVLIN, JJ.), held that education was not the main object of the institute and that, accordingly, the institute was not entitled to relief; but the learned judges followed somewhat different routes in arriving at that conclusion. The objects and purposes of the institute were set out in para. 2 of its charter and amounted to a considerable number. LORD GODDARD, C.J., in the course of his judgment said ([1957] 2 All E.R. at p. 640):

> " To my mind, and the ground on which I propose to base my judgment, the question is one of interpretation of the charter. We have to look at the charter to find the main objects because the institute is a chartered body with a charter granted by the Sovereign, and its objects and scope are set out."

He then proceeded to consider several of the purposes specified in the charter and to examine whether each one was concerned, and, if so, to what extent, with the advancement of education. Having done so, LORD GODDARD, C.J., summarised the result by saying (ibid., at p. 642):

> " The main object of this institution is to benefit the profession of insurance generally . . . The object of the institution is generally to raise the status and dignity of the profession."

That, in the view of LORD GODDARD, C.J., and notwithstanding the teaching and examinations which were involved, did not amount to education for the purposes of s. 8. BYRNE, J., agreed with LORD GODDARD, C.J., saying (ibid.) that on an examination of the charter it appeared to him to be plain that the main objects of the institute were more concerned with the advancement of members of the profession or occupation of insurance. DEVLIN, J., said (ibid.):

> " I have come to the same conclusion, but by a slightly different route, in which I place rather less reliance on the terms of the charter and more on the findings of fact in the Case. I agree, of course, that since what we have to ascertain under the section is whether this is a hereditament that is occupied for the purposes of an organisation whose main object is concerned with the advancement of education, the natural place to look in the first instance in order to see what are the objects of the institution is the charter. But in considering what is the main object I do not think that one can necessarily, as it were, count the different objects that are set out in the charter and see how many point to the advancement of education and how

> many point to such extraneous matters as disciplinary powers and the assistance of necessitous members, and so on. One must have regard to the way in which those objects have actually been achieved or attempted, and that is to be ascertained from the evidence that is set out in the Case." A

The learned judge then observed (ibid., at p. 643) that it was stated in the Case that some eighty per cent. of the work of the institute was devoted to tuition and examination activities rather than to the other matters which were set out in the later paragraphs of the charter; but he agreed with LORD GODDARD, C.J., and BYRNE, J., in thinking that that was not education of the kind which was envisaged by s. 8. B

We do not think that the judgment of DEVLIN, J., at all assists the contention of counsel for the plaintiff that the interpretation of the society's objects can be assisted by resort to the operations in which the society has indulged. In our opinion, DEVLIN, J., was saying no more than that, when an organisation has several objects specified in its written constitution, as was the case with the Chartered Insurance Institute, its activities are relevant to an inquiry as to what should, for the purposes of s. 8, be regarded as its main objects. We do not think that the learned judge was intending to go further than that, and, if such was his view, we cannot see that it is open to any criticism. That, however, is a very different thing from saying that, where there is no doubt what the main objects of a body are (and there is no doubt in the present case), evidence of what its activities have been may be received either in order to construe the language by which the objects are described or to limit the proper construction of the language by reference to the activities. In our judgment, no such evidence is admissible for either of those purposes. C D E

Having regard, then, to the language of the first of the society's objects, and not disregarding the plaintiff's explanation of what theosophy is and what theosophists believe, the question arises whether that object is, in whole or in part, concerned with the advancement of religion. That it is not wholly so concerned would seem to follow from the decision of the House of Lords in *Re Macaulay's Estate* (1); for a purpose which is solely concerned with the advancement of religion could hardly fail to be charitable, which the House held that object (i) was not. If it be objected that the words " or . . . otherwise " in s. 8 show that some private aspect of religion was in contemplation, we agree with the learned judge in thinking that no question of any such private element is shown in the present case. Is then the object concerned in part with the advancement of religion ? So far as material to this question, object (i) reads: " To form a nucleus of the universal brotherhood of humanity, without distinction of . . . creed . . .". In para. 4 of her affidavit the plaintiff says: F G

> " Theosophy is the study of the truths which form the basis of all religions and which cannot be claimed as the exclusive possession of any one religion. Theosophists believe that the divine life of God is the source of, is present in, and progressively manifests itself in, all the kingdoms of nature and the supernatural kingdoms. Theosophy as a religion teaches the Fatherhood of God and the recognition of the corresponding brotherhood of humanity; as a philosophy it teaches how the divine life of God progressively manifests itself; and as a science it teaches how this process occurs, the laws which govern it and how human beings can hasten it." H I

In *United Grand Lodge of Ancient Free and Accepted Masons of England* v. *Holborn Borough Council* (5) (ante, p. 281), DONOVAN, J., in delivering the judgment of the Divisional Court, said (ante, at p. 285):

> " To advance religion means to promote it, to spread its message ever wider among mankind; to take some positive steps to sustain and increase religious belief; and these things are done in a variety of ways which may be comprehensively described as pastoral and missionary. There is nothing

> comparable to that in Masonry . . . There is no religious instruction, no programme for the persuasion of unbelievers, no religious supervision to see that its members remain active and constant in the various religions they may profess, no holding of religious services, no pastoral or missionary work of any kind."

What the Divisional Court said of Masonry can substantially, if not equally, be said, so far as we can see, of theosophy. But, further than that, the teaching of the Fatherhood of God and the recognition of the corresponding brotherhood of humanity without distinction of creed appears to us to be, at best, the teaching of a doctrine which is of a philosophical or metaphysical conception rather than the advancement of religion. If the society is concerned in the advancement of religion, it may well be asked, "What religion does the society advance and how does it advance it?" We can find no satisfactory answer to this question in the language of object (i) or in any of the relevant evidence. In our opinion, it cannot be said that this object is in any way concerned with the advancement of religion.

Nor can we find that the object is in any way concerned with the advancement of education. In the course of his judgment in *Chartered Insurance Institute* v. *Corporation of London* (4), DEVLIN, J., said:

> "I think that the advancement of education means the advancement of education for its own sake in order that the mind may be trained. It may be that it is unnecessary that that should be general education—I accept for the purposes of the present case that education in a particular subject is sufficient—but the main object must be the advancement of education in the sense of the training of the mind."

We agree with those observations of the learned judge. The only teaching which, on the material before us, is involved in the first of the society's objects is the teaching of the theosophical doctrine itself; and that cannot, in our judgment, be regarded as education in the sense to which DEVLIN, J., referred.

If, then, the society is unable to show that its first object is concerned with the advancement of religion or education, it can only succeed in this appeal if it establishes that its first object is wholly concerned with the advancement of social welfare. This aspect of s. 8 was considered by this court in *National Deposit Friendly Society* (*Trustees*) v. *Skegness Urban District Council* (6) (ante, p. 199). The facts of that case had little in common with those in the present case and it is unnecessary therefore to state them. Certain points do, however, emerge from the judgment of the court. (i) Prima facie, the expression " social welfare " means the well-being (whether in the physical, mental or material sense) of individuals as members of society. (ii) The provision of benefits which tend directly to improve the health or conditions of life of individuals comes prima facie within the expression " social welfare ". (iii) The expression does not necessarily involve the presence of an eleemosynary element. (iv) In order to qualify under this part of the section, an organisation must have as its object the advancement of social welfare as an end in itself or for its own sake; and, although " concerned " is a wide word, it cannot be read as bringing in as an object something which is incidental. (v) The persons to be benefited and the source of the benefits are pertinent considerations. (vi) Inasmuch as the provision in question is an exemption from rates at the expense of the general body of ratepayers, it would be right, in a doubtful case, to give the words " or otherwise concerned with the advancement of . . . social welfare " a restricted meaning. It is quite clear that the court was not attempting an exhaustive or precise definition of these words. It was indicating in a general way what, in its view, they mean and prescribing tests which might usefully be applied to the facts of any given case. The reference in the judgment (ante, at p. 201) to welfare denoting a state of "being well, whether in the physical, mental or material sense " was not intended necessarily to exclude the idea of well-being in a spiritual or emotional sense, for example, happiness or ethical behaviour. Nor did the court, in our judgment, when referring (ante, at p. 202) to " the provision of benefits which tends directly to improve the health or conditions of life of individuals " mean that the provision of benefits which tended indirectly to produce those results cannot qualify under the section; for example, it might well be that an organisation the main object of which was concerned with the free training of girls who desired to take up nursing or midwifery as a profession would qualify notwithstanding that there was no direct benefit to society during their period of training. We venture to make these observations because a somewhat too rigid approach to the judgment in *National Deposit Friendly Society* (*Trustees*) v. *Skegness Urban District Council* (6) seemed to be manifested in some of the arguments which were addressed to us.

Turning now to object (i) of the Theosophical Society, one is struck not only by its width, but also by its vagueness and uncertainty, even when read in the light of the plaintiff's affidavit. In order to enable the society to succeed, it would, in effect, be necessary to construe the relevant words in s. 8 (1) (a) as including any non-charitable body which benefits the community, or a part of it, in any way, and it is clear, both from the language of the section itself and from the judgment of this court to which we have referred, that the words cannot be so construed. The implementation of the belief (referred to in para. 5 of the plaintiff's affidvait) " in working for the diminution and final abolition of all intolerance and discrimination in relation to race, creed, sex, social class and colour " is clearly within the scope of the society's first object. Equally clearly, some at least of those activities are far removed from any conception of " social welfare " that can reasonably or legitimately be entertained. It is not enough for the society to establish that in some, or even in many, ways certain members of the community may be benefited, directly or indirectly, by the practice and propagation of its ideology. Even assuming that that is so (and we express no opinion about it, one way or the other), the scope of the society's first object is so wide that many activities lie within it which do not promote the welfare of the community in a social sense at all. In dealing with this part of the case, Wynn-Parry, J., said ([1957] 1 All E.R. at p. 684) that object (i)

> " . . . would justify operations which could not by any stretch of the imagination be considered as within the phrase ' social welfare ', however wide a construction were reasonably placed on that phrase."

In that view we respectfully and entirely concur.

The conclusion, accordingly, at which we have arrived is that at least one of the main objects of the society is neither charitable nor otherwise concerned with the advancement of religion, education or social welfare, for it is concerned also with many other matters as well. From this it follows that the society does not bring itself within s. 8 of the Act and that the plaintiff's appeal must, therefore, be dismissed.

Appeal dismissed.

Solicitors: *Gibson & Weldon*, agents for *Berry & Berry*, Tunbridge Wells (for the plaintiff); *Sharpe, Pritchard & Co.* (for the corporation).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

GENERAL NURSING COUNCIL FOR ENGLAND AND WALES *v.* ST. MARYLEBONE CORPORATION.

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Ormerod, L.JJ.), November 11, 26, 1957.]

Rates—Limitation of rates chargeable—Organisation concerned with advancement of social welfare—General Nursing Council for England and Wales—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 *Eliz.* 2 *c.* 9), *s.* 8 (1) (*a*).

The General Nursing Council for England and Wales, originally formed under the repealed Nurses Registration Act, 1919, subsisted under and for objects declared in the Nurses Act, 1957. The functions of the council were to maintain a register of nurses, together with a roll of assistant nurses; to regulate the conditions of admission to and removal from the register and the roll, and, in connexion therewith, to exercise supervisory and directing powers in regard to training and examination, and to exercise other ancillary powers. The Act of 1957 also provided penalties for the false assumption of the title of registered or enrolled nurse, and imposed restrictions on the use of the titles of nurse or assistant nurse. On the question whether the council was an organisation " whose main objects . . . were . . . concerned with the advancement of . . . social welfare " within s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955,

Held: the council was not an organisation whose main objects were " concerned with the advancement of . . . social welfare " within s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, for the following reasons—

(a) in order to satisfy that description the main objects must be directed to the advancement of " social welfare " (in the sense in which that phrase was used in the context of s. 8 (1) (a)), but it was not enough merely that some part of the work of nurses should properly be describable as social welfare work; and

(b) the main objects of the council were two inseparable achievements, viz., the enhancement of the status of nurses and the benefit and protection of the sick; of these the former was not merely ancillary to the latter and the main objects were not, therefore, really directed to the advancement of social welfare.

General Nursing Council for Scotland v. *Inland Revenue Comrs.* (1929 S.C. 664) applied.

Per CURIAM: in the context of s. 8 (1) (a) the phrase " social welfare " involves at any rate the conception of what used to be called " good works " . . . the advancement of social welfare ought not to be equated with the protection generally of the well-being . . . of society or sections of society (see p. 691, letters G and H, post).

National Deposit Friendly Society (*Trustees*) v. *Skegness Urban District Council* (ante, p. 199) considered.

Decision of DANCKWERTS, J. ([1957] 2 All E.R. 791) reversed.

[For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, see 35 HALSBURY'S STATUTES (2nd Edn.) 394.]

Cases referred to:

(1) *General Medical Council* v. *Inland Revenue Comrs., English Branch Council of General Medical Council* v. *Inland Revenue Comrs.*, (1928), 97 L.J.K.B. 578; 139 L.T. 225; 13 Tax Cas. 819; Digest Supp.

(2) *General Nursing Council for Scotland* v. *Inland Revenue Comrs.*, 1929 S.C. 664; 14 Tax Cas. 645; Digest Supp.

(3) *National Deposit Friendly Society (Trustees)* v. *Skegness Urban District Council*, ante, p. 199.
(4) *Inland Revenue Comrs.* v. *Baddeley*, [1955] 1 All E.R. 525; [1955] A.C. 572; 35 Tax Cas. 661, 694; 3rd Digest Supp.

Appeal.

This was an appeal by the defendant, St. Marylebone Corporation, from a decision of DANCKWERTS, J., given on June 27, 1957, and reported [1957] 2 All E.R. 791, that the plaintiffs were such an organisation as was mentioned in s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, because their main objects were concerned with the advancement of social welfare.

Geoffrey Cross, Q.C., and *J. L. Arnold* for the defendant, the rating authority.
G. D. Squibb, Q.C., and *W. L. Roots* for the plaintiffs, the ratepayers.

Cur. adv. vult.

Nov. 26. **LORD EVERSHED, M.R.**, read the following judgment of the court: In this case (which, like the immediately preceding case*, arises on an application by originating summons to the Chancery Division of the High Court) the General Nursing Council for England and Wales seek and have obtained a declaration that they are an organisation such as is mentioned in s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, and are accordingly entitled to the benefit of that section in respect of the hereditament occupied by them for the purposes of their statutory functions at Nos. 23 to 25, Portland Place in London. In this case, as in the last, it is not in doubt that the council are an organisation not established or conducted for profit. But, having regard to the decision of this court in *General Medical Council* v. *Inland Revenue Comrs.*, *English Branch Council of General Medical Council* v. *Inland Revenue Comrs.* (1) ((1928), 97 L.J.K.B. 578) and to the decision of the Scottish Court of Session in *General Nursing Council for Scotland* v. *Inland Revenue Comrs.* (2) (1929 S.C. 664), it has not been contended before us that the council can be regarded (at any rate in this court) as an organisation whose main objects are charitable, or as an organisation whose main objects are otherwise concerned with the advancement of education. The sole question is whether the council are, within the meaning of the section, an organisation whose main objects, not being charitable, are "concerned with the advancement of . . . social welfare". DANCKWERTS, J., came to the conclusion that they were. He said ([1957] 2 All E.R. at p. 795):

> "They [the council] were not established for the purpose of raising the professional status of the nurses, but for the purpose of creating a system of registration so as to prevent incompetent nurses being able to victimise the public, and for making sure that the public should receive the services only of competent nurses. That seems to me to be the establishment of a body for the purpose of benefiting the public, and, therefore, for a purpose of social welfare."

Although the council were first established by the Nurses Registration Act, 1919, it was agreed before us, as before DANCKWERTS, J., that the Nurses Act, 1957 (which, inter alia, repealed and re-enacted the earlier statute) could be taken as accurately specifying and containing the purposes and functions laid by Parliament on the council. From this source, therefore, must be discovered (with the guidance to be obtained from the two cases already mentioned, *General Medical Council* v. *Inland Revenue Comrs.* (1) and *General Nursing Council for Scotland* v. *Inland Revenue Comrs.* (2)), the answer to the first essential question: What are the "main objects" of the council? DANCKWERTS, J., has summarised in his judgment all the provisions of the Act of 1957, and we do not

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* *Berry* v. *St. Marylebone Corpn.* (ante, p. 677).

A need to repeat them in detail. It is, in our judgment, sufficient and sufficiently accurate to state that the purposes and functions of the council were and are to maintain a register of nurses, together with a roll of assistant nurses; to regulate accordingly the conditions of admission to and removal from the register and the roll, and, in connexion therewith, to exercise supervisory and directing powers in regard to training and examinations; and to exercise such other powers and B duties as are ancillary to and consequent on the foregoing. The income of the council appears to be derived, in part, from fees which the council are authorised to charge on applications for examination and registration or enrolment and the like, and, as to the rest, from moneys directly or indirectly provided by Parliament. Our attention was not, during the argument, directed to any figures showing the actual income or expenditure in any year of the council, C from which we assume that those figures do not assist towards a solution of the problem before the court. It should be added that, by the terms of the Act, only those persons whose names are on the council's register are entitled to call themselves " nurses " or to wear the appropriate and distinctive uniform of nurses.

In *General Medical Council* v. *Inland Revenue Comrs.* (1) it was, of course, D necessary for the General Medical Council, in order to succeed, to show that they were established " for charitable purposes only "; and that (in the view of this court) in spite of the educational and benevolent character of many of their purposes, they could not succeed in doing. The judgment of LORD HANWORTH, M.R., was, we think, less positive in this respect, although there is no doubt that both SARGANT, L.J., and LAWRENCE, L.J., were clearly of opinion that the E real scheme and purpose of the relevant legislation

> " is to regulate the profession of medical men, who in consequence have certain privileges conferred upon them by the legislation, and that it is in the first instance as a professional measure that the legislation is to be regarded."

F See per SARGANT, L.J. (97 L.J.K.B. at p. 587). Thus, in the view of the majority (at any rate) of the court, the public benefit and advantage which unquestionably resulted from the regulation of the medical profession should be regarded as of secondary significance.

When the case of the General Nursing Council for Scotland came before the Court of Session, there is no doubt that the learned judges were more sympathetic G to that body than had been the English Court of Appeal to the General Medical Council; and it was and is a point of distinction between the Medical Council, on the one hand, and the two Nursing Councils, on the other, that in the former case material benefits are conferred by registration exceeding anything to be found in the cases of the Nursing Councils—particularly the provision that only registered doctors can sue for and recover their fees. Nevertheless, the Inner H House concluded in the end that the case before them could not be satisfactorily distinguished from *General Medical Council* v. *Inland Revenue Comrs.* (1). In the course of his leading judgment, LORD SANDS said (1929 S.C. at p. 669):

> " The sole purpose of the council is to form and maintain a register for qualified nurses, and its chief work is dealing with applications for admission to the register."

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Then, after considering the nature of this " chief work ", LORD SANDS concluded that, if it constituted the entire scope of the council's operations, it would be educational and, therefore, charitable. He went on to say (ibid.):

> " Has this council any other purposes? I take it that it is regarded as being in the interest of the sick . . . that there should be in this country a body of nurses of undoubted efficiency, and of full and adequate training as attested by a responsible body. The system is designed to protect the public, and

> to raise the standard of nursing generally in the interests of the community and in particular of the sick." A

LORD SANDS then proceeded to consider whether there was still some other purpose which had the result of disabling the council from making good their claim to establishment for charitable purposes *only*, and in the passage which is recited and relied on by DANCKWERTS, J. ([1957] 2 All E.R. at p. 795), but which we do not here repeat, LORD SANDS concluded (1929 S.C. at p. 670) that B the professional cachet which registration confers on the nurses ought not, in his view, to have the effect of requiring the Act by which the council were established to be interpreted as one designed in the professional interest of the nurses and not as one established in the general public interest. Nevertheless, in the end, LORD SANDS found it impossible—whatever might have been his view had the question been entirely novel—to distinguish the case from *General* C *Medical Council* v. *Inland Revenue Comrs.* (1). He said (1929 S.C. at p. 670):

> "No doubt in that case the professional benefits were greater and of a somewhat different quality, but I do not think that this can affect the matter, so long as the professional benefits, as in the present case, are not intangible." D

To the same effect were the judgments of LORD BLACKBURN and LORD MORISON; and, although the Lord President, LORD CLYDE, would clearly, for his own part, have distinguished the case from *General Medical Council* v. *Inland Revenue Comrs.* (1), in the end he did not dissent from his brethren. We add one citation from the judgment of LORD MORISON (1929 S.C. at p. 676):

> "In my view, the reasoning in these decisions [*General Medical Council* E v. *Inland Revenue Comrs.* (1) and one other] applies to the present case. The statute here is not described as an Act for the education of nurses . . . In establishing the register the purpose of the statute is to secure that the vocation of nurse shall be regulated. It enables nurses to obtain a definite qualification, if their abilities and training equip them sufficiently to attain a definite standard." F

It is not perhaps entirely easy to say how far the learned judges of the Court of Session intended to go in finally deciding, as they did, that *General Nursing Council for Scotland* v. *Inland Revenue Comrs.* (2) could not be distinguished from *General Medical Council* v. *Inland Revenue Comrs.* (1). In view of the opinions which they appear to have entertained, it is difficult to suppose that they intended to hold that the whole scheme of the nursing legislation was to regulate the pro- G fession of nurses and that (as SARGANT, L.J., said in the earlier case (97 L.J.K.B. at p. 587)):

> ". . . it is in the first instance as a professional measure that the legislation is to be regarded."

It was, we think, not necessary for the Scottish court to go so far. We think it is H sufficient, but also necessary, to say that the decision of that court depended on the view to which they felt in the end compelled, that the professional purposes of the legislation, and the professional benefits for nurses in the way of enhanced status and prestige which the legislation was designed to confer, could not be regarded as merely ancillary to the benefit intended to be provided for the public or for a section of it, namely, the sick. It has not been suggested that there is any I difference as regards main objects between the General Nursing Council for England and Wales and the General Nursing Council for Scotland: each is a counterpart of the other. It follows, therefore, in our judgment, that we ought to treat the conclusion of the Scottish Court of Session as strongly guiding, if not governing, our own conclusion. We add, indeed, that for our part we respectfully do not think that it would be possible to take, for present purposes, a view more favourable to the Nursing Council than that formed by the Scottish judges. In the result, it seems to us that the view which DANCKWERTS, J., formed as to the main objects of the council ought not to be supported if by his language, cited previously*, he intended to infer that what we may call the professional aspect of the legislation was of merely secondary or ancillary significance.

In truth, however, it may not be useful or even possible to try to give a primacy to the one purpose rather than to the other; and all the more, perhaps, should the attempt be abandoned in the present case, where the statute speaks of " main objects " in the plural. As observed in the Scottish court, the chief duty and function of the council is the formation and maintenance of the register of nurses. The results were and were intended to be, on the one hand, the enhancement of the qualities and status of nurses and, on the other, the benefit and protection of the public, particularly of the sick. The two achievements are essentially inseparable. The public are benefited because the nursing profession is improved and its status enhanced. The profession of nursing is improved in quality and prestige because and to the extent that the public are benefited and safeguarded.

If, then, the main objects of the council cannot be confined to securing or promoting the benefit of the public or the ailing section of the public, can it be said that those main objects are " concerned with the advancement of . . . social welfare "? We attach, in the circumstances of the present case, particular importance to the words " concerned with "; and we agree with counsel for the rating authority that it is not sufficient if the main objects are somehow or other related to, in some sense connected or " mixed up with ", the advancement of social welfare. In our judgment, the advancement of social welfare (in this case) or of religion or education or of all or some of those activities (in other cases) must be " the concern of " the main objects; in other words, it must in the present case be established that the main objects, which we have, we hope, sufficiently now defined, are directed to the advancement of social welfare. Unless the words are so interpreted, the whole phrase in s. 8 (1) (a) of the Act of 1955 is given, as it seems to us, a scope so vague and embracing that every non-profit making activity, some aspect of which could be said to tend to the promotion of social welfare, would be brought within the section—a result which, in our judgment, Parliament cannot have contemplated. If we are right so far, then, applying as best we can the tests of common sense and of the common usage of our language, but without any attempt at defining the term " social welfare ", we would answer in the negative the question: Are the main objects of the council directed to the advancement of social welfare ? In the first place, we cannot, with all respect to DANCKWERTS, J., agree that every organisation " established for the purpose of benefiting the public " should be treated as one the main objects of which are concerned with the advancement of social welfare: on the ground that, since " welfare " is synonymous with well-being, therefore social welfare and public benefit must mean and are the same thing. On this view, it would seem to follow that every statutory or other scheme for regulating any professional body would prima facie qualify within the section. As SARGANT, L.J., observed† in *General Medical Council* v. *Inland Revenue Comrs.* (1), the proper regulation of the professions of the law or of any other scientific profession must indubitably be for the public benefit, since those sections of the public who required the assistance of lawyers or, for example, accountants would thereby be safeguarded and assisted. Moreover, so wide a significance attributed to the words " social welfare " would make the earlier reference to the advancement of education wholly otiose. Further, such a view appears to us inconsistent with the reasoning of this court as expressed in the judgment of PARKER, L.J., in *National Deposit Friendly Society* (*Trustees*) v. *Skegness Urban District Council* (3) (ante, p. 199), and with the restriction which, according to that judgment (ante, at p. 202), has to be applied to the wide and vague meaning which the phrase " social welfare " might otherwise bear.

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* See p. 686, letter G, ante.

† See 13 Tax Cas. 819 at p. 849.

It was contended, however, that, whatever be the intended scope and limits of " social welfare ", provision for the health of individual members of the community is, undoubtedly, comprehended among the characteristics and obligations of what is called the welfare state; that the provision of competent nurses is an essential part of every health service; and, accordingly, that the council's concern with the nursing profession is sufficient qualification within the meaning of the section. Although the argument is both formidable and attractive, it is not, in our judgment, sufficient. The answer to it is, in our view, provided by the conclusion which we have already expressed that it is not enough that the objects of the organisation are in some degree related to the advancement of social welfare: they must in a real sense be directed to it. It is, no doubt, perfectly true that some part, at least, of the work of some nurses is properly described as social welfare work, however that phrase be defined; but it must equally be true, in our judgment, that other parts of nurses' work could not fairly be so described. A nurse engaged by a private person of means, to live in his or her house and tend to his or her medical requirements, could not, in our view, be sensibly referred to as performing work of social welfare. The link can, no doubt, be seen; but it is, in our judgment, too remote.

An argument was presented to us on the authority of *Inland Revenue Comrs.* v. *Baddeley* (4) ([1955] 1 All E.R. 525), a decision of the House of Lords. The question in that case largely turned on the construction of the words " religious " (or " moral ") " social and physical well-being ". This court had felt able to give to this phrase a restricted sense sufficient to make the objects of the trust charitable; but the House rejected that view. Viscount Simonds said ([1955] 1 All E.R. at p. 530):

> ". . . I do not think it would be possible to use language more comprehensive and more vague. I must dissent from the suggestion that a narrow meaning must be ascribed to the word ' social '. On the contrary, I find in its use confirmation of the impression that the whole provision makes on me, that its purpose is to establish what is well enough called a community centre . . . "

To the like effect was the speech of Lord Tucker, who observed (ibid., at p. 547) that the phrase, " the promotion of social well-being,"

> ". . . would appear to cover many of the activities of the so-called ' welfare state ', and to include material benefits and advantages which have little or no relation to social ethics or good citizenship, concepts which are themselves not easily definable."

So in the present case it was said that, since " welfare " meant no more and no less than " well-being ", social welfare was a phrase so comprehensive as to include (at least) the intended and inevitable results and achievements of the Nursing Council.

Our answer to this argument is, first, that the phrase with which we are here concerned is, after all, " social *welfare* " and not " social *well-being* ". That, of itself, no doubt, does not take the matter very far, particularly in view of the speeches in *Inland Revenue Comrs.* v. *Baddeley* (4) and of the conclusion of this court in *National Deposit Friendly Society (Trustees)* v. *Skegness Urban District Council* (3) that the words " welfare " and " well-being " prima facie mean the same thing. But the phrase " social welfare " in s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, appears in a context: a context in which it is preceded by the words, among others, " advancement of . . . education "; and those words, for reasons which we have already given, must, we think, limit inevitably, and give some degree of precision to, what might otherwise be merely vague and all-comprehending. Then, further, the phrase " social welfare " has, in our judgment, now acquired a meaning which, however difficult of definition, has at least something in it of the characteristics of a term of art. In such a sense it is used, for example, in the

A Miners' Welfare Act, 1952*; and the phrase which we are concerned to construe
is repeated in s. 12 (7) (b) of the Copyright Act, 1956. In so repeating it, Parliament
must, at least, have assumed a certain precision of meaning, even if it has
not seen fit to offer any clues for the guidance of the judges.

In *National Deposit Friendly Society* (*Trustees*) v. *Skegness Urban District*
Council (3), this court forebore from attempting a definition, and we do not
B propose to neglect that example. The most that the court can do—as the court
did in *National Deposit Friendly Society* v. *Skegness Urban District Council* (3)—
is to say whether in its judgment a particular case does or does not come within
the section, and in so doing so apply, as best it can, the ordinary standards of
common sense and language. So far as is necessary or relevant to the performance
of that duty, the court may say that certain characteristics are or are not to be
C discerned in the conception of social welfare. In the judgment of the court
in the preceding case†, reference was made to certain points which emerge from
this court's judgment in *National Deposit Friendly Society* v. *Skegness Urban*
District Council (3), including the necessity of imposing some limitation on what
otherwise might be the extreme vagueness of the language used by Parliament.
One ground for such limitation was the circumstance that the relevant provision
D in the Act confers an exemption from rates at the expense of the general body of
ratepayers. Additional grounds may be found in the following passage from the
judgment (ante, at p. 203):

> "It is, we think, in considering this question that the persons to be
> benefited and the source of the benefits become pertinent considerations.
> Where the benefits are confined to the members, and where these benefits
> E are derived entirely from their own contributions, it may well be difficult
> to say that the object is the advancement of social welfare for its own sake
> even though the benefits themselves may advance the well-being of the
> individual members. It is true that the question is whether the object is one
> 'concerned' with the advancement of social welfare, but though 'concerned'
> is a wide word, we do not think that it can be read as bringing in as an object
> F something which is incidental."

We have tried to apply such considerations to the solution of the case of the
Nursing Council; and, so applying them, have come to the conclusion that their
main objects are not shown to be "concerned with the advancement of . . .
social welfare". We have, we hope, in the course of this judgment, at least
G indicated with sufficient clearness, even if without much precision, why we think
so. In such a case, as LORD RADCLIFFE observed in a wholly different context,
the law cannot be set at rest by any neat combination of words. But, if we can
add anything to illustrate the limitation which, we think, should in this context
be put on social welfare, it would be that the phrase involves at any rate the
conception of what used to be called "good works": the notion of things that,
H as a matter of social obligation, ought to be done for the benefit of those in the
community whose living conditions in those respects are inadequate. We suggest
this, not by way of definition, but only as an indication why, in our judgment,
the advancement of social welfare ought not to be equated with the promotion,
generally, of the well-being, in every sense and of every kind, of society or sections
of society; why, therefore, everything which can be shown to tend to the public
I advantage cannot, for the purposes of the section, be treated as concerned with
the advancement of social welfare; and why, more particularly, the General
Nursing Council cannot succeed in bringing themselves within s. 8 of the Rating
and Valuation (Miscellaneous Provisions) Act, 1955. In our judgment, the appeal
should be allowed. *Appeal allowed.*

Solicitors: *Sharpe, Pritchard & Co.* (for the rating authority); *Pontifex,*
Pitt & Co. (for the ratepayers).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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* See p. 694, letter A, post.

† *Berry* v. *St. Marylebone Corpn.* (ante, at p. 683, letters G to I).

DERBYSHIRE MINERS' WELFARE COMMITTEE *v.* SKEGNESS URBAN DISTRICT COUNCIL.

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Ormerod, L.JJ.), November 13, 14, 26, 1957.]

Rates—Limitation of rates chargeable—Holiday camp for Derbyshire miners, their dependants and invitees—Camp established from compulsory contributions levied under statute—Accommodation and board at camp provided at cost—All Derbyshire miners employed by National Coal Board—Whether camp concerned with the advancement of " social welfare "—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *&* 5 *Eliz.* 2 *c.* 9), *s.* 8 (1).

The ratepayers were the trustees of a holiday camp and ancillary premises, which they occupied for the purpose of providing " a holiday centre and a recreation or pleasure ground for the benefit of workers in or about coal mines employed by collieries in the Derbyshire district ", including the workers' dependants and guests. The camp was established under a fund raised by compulsory contributions levied under statute. The ratepayers were responsible for maintenance and operational expenses in connexion with the camp, but received grants to cover capital expenditure from a social welfare organisation set up under statute. The ratepayers paid less than a rackrent for the premises, and they neither sought to nor did make a profit or loss on their operations. The employees of collieries benefiting under the trust were all now employed by the National Coal Board. On the question whether the ratepayers were an organisation whose main objects were " concerned with the advancement of . . . social welfare " so as to be entitled to limitation of rates under s. 8 (1) (a)*, (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955,

Held: the ratepayers were an organisation concerned with the advancement of social welfare within s. 8 (1) (a) because (i) the object of providing this holiday camp, which was run at cost, was social welfare and the benefits which it provided " advanced " social welfare, since the lot of those who were entitled to take advantage of the camp was improved, and (ii) the coal miners of Derbyshire constituted a sufficiently large and important section of the community to fulfil the requirement implicit in the adjective " social " in the phrase " social welfare " in s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

Oppenheim v. *Tobacco Securities Trust Co., Ltd.* ([1951] 1 All E.R. 31) and *National Deposit Friendly Society* (*Trustees*) v. *Skegness Urban District Council* (ante, p. 199) distinguished.

Decision of the DIVISIONAL COURT ([1957] 2 All E.R. 405) affirmed.

[For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, see 35 HALSBURY'S STATUTES (2nd Edn.) 394.

For the Mining Industry Act, 1920, s. 20, see 16 HALSBURY'S STATUTES (2nd Edn.) 187; for the Mining Industry Act, 1926, s. 14, see ibid., 205.

For the Miners' Welfare Act, 1952, s. 2, s. 12, s. 13, s. 16, see 32 HALSBURY'S STATUTES (2nd Edn.) 570, 578, 579.]

Cases referred to:

(1) *National Deposit Friendly Society* (*Trustees*) v. *Skegness Urban District Council*, ante, p. 199.

(2) *Oppenheim* v. *Tobacco Securities Trust Co., Ltd.*, [1951] 1 All E.R. 31; [1951] A.C. 297; 2nd Digest Supp.

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* The relevant terms of s. 8 (1) are printed at p. 679, letter D, ante.

Appeal.

This was an appeal by the local authority, the Skegness Urban District Council, from a decision of the Divisional Court dated May 9, 1957, and reported [1957] 2 All E.R. 405.

The Divisional Court allowed the appeal of the ratepayers by way of Case Stated in respect of an adjudication of the Lincoln (Parts of Lindsey) Quarter Sessions, and held that the ratepayers were an organisation concerned with the advancement of social welfare and, therefore, entitled to the relief provided by s. 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The local authority now appealed to the Court of Appeal. The facts as stated in the Case are set out in [1957] 2 All E.R. at p. 406.

Sir Arthur Comyns Carr, Q.C., C. E. Scholefield and *J. D. James* for the appellants, the local authority.

Geoffrey Cross, Q.C., and *J. Malcolm Milne* for the respondents, the ratepayers.

Cur. adv. vult.

Nov. 26. **LORD EVERSHED, M.R.:** I will ask ORMEROD, L.J., to read the judgment of the court.

ORMEROD, L.J.: This is an appeal by the Skegness Urban District Council from a decision of the Divisional Court of May 9, 1957, allowing the appeal of the Derbyshire Miners' Welfare Committee by way of Case Stated from Lincoln (Parts of Lindsey) Quarter Sessions. The Divisional Court held that the respondents were entitled to relief under s. 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

It is necessary in the first place to set out shortly the various statutory instruments and their provisions by reason of which the respondent committee came into existence and carried out its various objects. Section 20 of the Mining Industry Act, 1920, provided for the setting up of a compulsory levy on every ton of coal mined. This was payable by the mining owners and provision was made for setting up a national committee with the necessary branch committees to administer the fund for the benefit of miners in general. By the Mining Industry Act, 1926, s. 14, provision was made for a further levy, this time on the royalty owners, to be applied for similar purposes. It is to be noted that there was never any voluntary contribution to the fund. In 1938* the royalties were nationalised and a commission was established to administer them, which commission remained liable to pay the royalty levy. In 1947† the colliery undertakings were nationalised, and the royalties were handed over to the National Coal Board, which became liable to pay the 1920 levy and the royalty levy. In 1952 the Miners' Welfare Act, 1952, was passed, s. 2 of which provided that the miners' welfare fund constituted under s. 20 of the Mining Industry Act, 1920, should be wound up and the assets transferred as to "colliery welfare property" to the National Coal Board and as to other properties to the Social Welfare Organisation, which was defined by s. 12 to mean the

> "Coal Industry Social Welfare Organisation incorporated under the Companies Act, 1948."

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* The nationalisation of the royalties was effected by the acquisition of the fee simple in coal by the Coal Commission pursuant to the Coal Act, 1938, s. 3; 16 HALSBURY'S STATUTES (2nd Edn.) 224. The vesting date was July 1, 1942, but the notional sale to the commission took effect on Jan. 1, 1939 (ibid., s. 3 (2)).

† This nationalisation was effected by the Coal Industry Nationalisation Act, 1946. The assets vested on the primary vesting date, Jan. 1, 1947, appointed by the Coal Industry Nationalisation (Primary Vesting Date) Order, 1946 (S.R. & O. 1946 No. 1986), for the purpose in this respect of s. 5 (1) of the Coal Industry Nationalisation Act, 1946; 16 HALSBURY'S STATUTES (2nd Edn.) 283.

Section 13 of the Act of 1952 provided that the board should from time to time pay to the Social Welfare Organisation sums necessary to meet the estimated costs of social welfare activities, which were defined by s. 16 as meaning

> " activities concerned with the maintenance or improvement of the health, social well-being, recreation or conditions of living of—(a) persons employed in or about coal mines . . . (c) dependants of any such persons . . ."

By a lease dated Dec. 6, 1940, made between the trustees on behalf of the Derbyshire District Miners' Welfare Committee of the one part and the trustees of the Derbyshire District Miners' Holiday Centre of the other part, the lessors demised to the lessees, the present respondents, a piece of land, together with the buildings thereon, at Seathorne, Skegness, for a term of twenty-one years at a yearly rent of £200. The lease contained a recital that the miners' welfare committee had, on the recommendation of the district committee, allocated the sum of £35,000 for the provision of a holiday centre for the use and benefit of workers in or about coal mines, particularly those resident in the Derbyshire district, and that the lessees had been appointed to administer the fund in accordance with the trusts declared in the lease. Clause 6 of the lease provided, inter alia, that the lessees should permit the demised premises to be used as a holiday centre and recreation and pleasure ground for the benefit of workers in or about coal mines employed in the Derbyshire district, including their dependants and invitees. Clause 9 provided that they should assess the payments from persons using the accommodation, facilities and benefits at a figure estimated to produce such a surplus on the running costs as would provide a sufficient reserve for depreciation of the trust property and for the cost of necessary repairs and renewals. It is to be noted that the trust created by the lease was the subject of an order made by the Charity Commission on Feb. 20, 1950. Doubts have been raised as to the validity of this order and it was agreed by counsel on both sides that, for the purposes of this appeal, the powers vested in the respondents were those contained in the lease.

According to the Case Stated, after finding that the respondents had at all material times occupied the hereditament for the purpose of a holiday centre for the use of workers in and about coal mines in Derbyshire (exclusive of South Derbyshire) and setting out a description of the premises comprising the hereditament, quarter sessions found that the camp was provided by the Social Welfare Organisation and was being run by the respondents, who sought to make neither a profit nor a loss in their operations. The Case further set out as follows:

> " (viii). That the only persons attending the holiday centre were workers in or about coal mines in the district of Derbyshire (excluding South Derbyshire), their wives and children, but that, if all the vacancies were not filled by these persons, they were filled by applicants from other coal fields. (ix) That generally there were no vacancies left to be filled by applicants from other coal fields. (x) That a charge varying from £5 15s. for an adult to £1 10s. for a small child was made for a week's holiday accommodation and full board, which charge included the return rail or omnibus fare from the visitor's home to Skegness (xi) That drinks and other refreshments were sold to persons staying at the holiday centre, alcoholic drinks being acquired by such persons as members of a club and in the winter by local residents who became members of the club. A substantial profit was made out of the supply of drink, but the charge for accommodation was so fixed that, taking all the operations together, the trustees made neither a profit nor a loss."

Quarter sessions were of opinion (a) that the provision of the holiday home for North Derbyshire miners was not a charitable object in the absence of the element of poverty or ill health, and (b) the purposes of the trust

> " were not otherwise concerned with the advancement of social welfare, because social welfare connotes a benefit to the community and not a benefit

A
> to an individual or to a particular class of work-people employed by one employer."

They were consequently of the opinion that the occupiers were not entitled to relief under s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, and dismissed the appeal. This decision was reversed by the Divisional Court.
B
It was not contended that the object was a charitable one.

It would appear that the questions to be answered in this appeal are: (i) Is the object of providing a holiday camp of this nature one which can be said to be "concerned with the advancement of social welfare ?" and (ii) If so, is the class of persons entitled to benefit under the scheme sufficiently wide to bring it within the provisions of the section ? It has not been contended that the provision of the
C
camp is other than the main object of the scheme or that the trust was established or conducted for profit. Unless, therefore, either of these questions can be answered in the negative, this appeal must fail. Counsel for the appellants puts his case in three ways. He says in the first place that the provision of the camp cannot be regarded as social welfare, because (a) the funds, so far as they are not provided by the beneficiaries themselves, are provided by a statutory levy and
D
not by voluntary contributions, and (b) the carrying on of the camp is a business of which the outgoings are to an overwhelming extent paid by the beneficiaries themselves. As to (a), it is, of course, true that the sum of £35,000, which was originally provided for the establishment of the camp, and, as far as the evidence shows, is the only sum which has been provided, came from the miners' welfare fund, which was raised by means of a compulsory levy. It is difficult to
E
see why this should make any difference. The matter to be considered is the purpose for which the funds were provided. If they were provided for a purpose which can properly be described as the advancement of social welfare, then we fail to see why it should matter whether they were provided voluntarily or under some statutory or other compulsion. The appellants sought to derive some support for their contention from the judgment of PARKER, L.J., in *National*
F
Deposit Friendly Society (*Trustees*) v. *Skegness Urban District Council* (1) (ante, p. 199), where he says (ante, at p. 203):

> "It is, we think, in considering this question [the restriction of the meaning of social welfare in its widest sense] that the persons to be benefited and the source of the benefits become pertinent considerations."

G
But the next sentence in the judgment,

> "Where the benefits are confined to the members, and where these benefits are derived entirely from their own contributions . . ."

shows clearly why the source of the benefits had there become a pertinent consideration.

H
With regard to (b), the appellants again relied on the decision in the *National Deposit* case (1). It was argued that to an overwhelming degree the expenses of the camp were paid by those who enjoyed its benefits. Apart from the services rendered by the trustees, and in the absence of evidence to the contrary, it is to be presumed that they were given without payment, the only benefit from the welfare fund was derived from the fact that the rent was only £200 per annum.
I
How much this was below an economic rent of the premises was indicated by the assessment of the rateable value of the hereditaments at £3,800. No figures showing the cost of running the camp were produced either to us or to the Divisional Court, but it was argued that the advantage derived from the reduced rent when related to the total outgoings was too small to be a relevant consideration. In those circumstances, it was submitted that the case could not be distinguished from the *National Deposit* case (1), a case of a friendly society supported entirely by the contributions of its members who received benefits on the happening of

various contingencies calculated according to the amounts of their respective contributions. The distinction between the two cases is, in our judgment, clear. On the one hand, there is a friendly society carrying on what is in effect the business of a mutual insurance company. On the other hand, there is a committee carrying on a holiday camp on premises which have been provided otherwise than by those entitled to benefit at a cost of £35,000 so that holidays may be enjoyed at a cost not greater than that of running the camp and providing for the upkeep. It can hardly be denied that a holiday camp such as this tends to promote the happiness and general well-being of those entitled to make use of it, and it is unnecessary to attempt any precise definition in order to come to the conclusion that the object of providing this camp is one concerned with " social welfare ". Some support for this view, although not necessarily conclusive, is given by the definition of " social welfare activities " contained in s. 16 of the Miners' Welfare Act, 1952, to which reference has already been made.

The appellants' second submission was that, even if the provision of the holiday camp was to be regarded as concerned with social welfare, the object of providing it could not be regarded as the " advancement of social welfare ". Counsel for the appellants based his argument on the analogy that the co-operative butcher " provided " meat, but did not in any way " advance " it, as might a body concerned with agricultural research, and that " advancement " as used in this section must connote an element of propaganda or some similar element rather than the mere provision of benefits. It may well be that the provision of food or other commodities by a tradesman may not come within the meaning of advancement, but the provision of an amenity such as this one is on a very different footing and this holiday camp by its very existence can be said to " advance " social welfare by improving the lot of those persons entitled to take advantage of it. As we see it, therefore, the first question must be answered in the affirmative. The provision of a holiday camp of this nature is one which can be said to be " concerned with the advancement of social welfare ".

The second question (that is, whether the class of persons entitled to benefit is wide enough to bring the object within the section) was the subject of the appellants' third submission. According to the Case Stated, the opinion of quarter sessions was that it was not so wide, because, to quote from the findings in the Case,

> " social welfare connotes a benefit to the community and not a benefit to an individual or to a particular class of work-people employed by one employer."

It would appear that the opinion of quarter sessions on this question was based on the rule in *Oppenheim* v. *Tobacco Securities Trust Co., Ltd.* (2) ([1951] 1 All E.R. 31), where it was held that a settlement directing trustees to apply certain income " in providing for . . . the education of children of employees or former employees of " a British limited company " or any of its subsidiary or allied companies " did not satisfy the test of public benefit requisite to establish it as charitable, even though the employees so indicated numbered over a hundred thousand, the nexus between the persons in the group being employment by particular employers. It is to be noted that the question then being decided was whether the trust was charitable, a consideration which does not arise in the present case, and Lord Simonds in his speech (ibid., at p. 35) leaves open a case such as this, where the persons entitled to benefit are employees in a nationalised industry.

If the view taken by quarter sessions is correct, it would mean that no scheme for the benefit of miners which would otherwise be for the advancement of social welfare could come within the section, even though the persons entitled to

A benefit constituted the whole of the persons employed in the mining industry. We cannot accept that view as the correct one. Each case must be decided on its own facts, the question being whether the persons to be benefited form a sufficiently substantial part of the community, measured by common-sense standards, to fulfil the implication of the word " social " as used in the section. DONOVAN, J., in his judgment in the Divisional Court, said ([1957] 2 All E.R. at B p. 411):

> " For my part, I think that the coal miners of Derbyshire, their dependants and their invitees, if they are the only beneficiaries of this scheme, do constitute a sufficiently large and important section of the community for the present purpose."

C We agree with the view there expressed.

It was argued on behalf of the respondents that the question was one of fact, and that the finding of quarter sessions was in their favour. Reference has already been made to the words used by quarter sessions in coming to their decision on this part of the case. It is true that they found that

> " to confer a benefit on some of the servants of the National Coal Board D by the provision of a summer holiday at cost is not sufficiently wide to constitute the advancement of social welfare."

That finding must be read with the preceding sentence where the opinion was expressed that " social welfare " connotes a benefit to the community and not to an individual or a particular class of work-people employed by one employer. For the reasons already given, this does not appear to be the correct E approach to the question and, if this paragraph of the opinion does contain a finding of fact, then, in our view, it is based on a misdirection. We would, therefore, answer the second question in the affirmative and hold that the class of persons entitled to benefit is sufficiently wide to entitle the respondents to relief under the section, and it follows that this appeal should be dismissed.

F *Appeal dismissed. Leave to appeal to the House of Lords granted.*

Solicitors: *Wrentmore & Son*, agents for *Town clerk*, Skegness (for the local authority); *Lawrence C. Jenkins*, Nottingham (for the ratepayers).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

G

PRACTICE DIRECTION.

Patent—Practice and procedure—Infringement action—Amendment of specification—Advertisement of intention to apply for leave to amend—Identification of pending proceedings—Patents Act, 1949 (12, 13 & 14 *Geo.* 6 *c.* 87), *s.* 30—*R.S.C., Ord.* 53A, *r.* 19 (*a*). H

Patent—Practice and procedure—Revocation action—Amendment of specification—Advertisement of intention to apply for leave to amend—Identification of pending proceedings—Patents Act, 1949 (12, 13 & 14 *Geo.* 6 *c.* 87), *s.* 30 —*R.S.C., Ord.* 53A, *r.* 19 (*a*).

I In proceedings under s. 30 of the Patents Act, 1949, the " suitable advertisement " required by R.S.C., Ord. 53A, r. 19 (a), must include identification of the pending proceedings in which leave to amend is proposed to be applied for.

By direction of LLOYD-JACOB, J.

W. S. JONES,
Chief Registrar, Chancery Division.

Dec. 9, 1957.

NEWMAN *v.* NEWMAN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Stevenson, J.), November 6, 7, 1957.]

Magistrates—Husband and wife—Maintenance order—Discharge—Adultery—"Fresh" evidence—Husband unaware of wife's adultery at date of maintenance order—Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 39), *s.* 7.

Where a husband against whom an order has been made under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, discovers subsequently (after the time for appeal has elapsed) that the wife had committed adultery before the date of the order, he can apply to the justices under s. 7 of the Act of 1895 to discharge the order on the ground that the adultery constitutes "fresh evidence"; or, semble, he can apply to the Divisional Court for leave to appeal out of time against the order.

In 1952 the wife obtained an order for maintenance, on the ground of wilful neglect, under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949. In 1957 the husband discovered that the wife had committed adultery in 1942. He applied to the justices under s. 7 of the Act of 1895 to discharge the order of 1952. The wife conceded that her adultery in 1942 was not, and could not by reasonable diligence have been, known to the husband in 1952, but the justices refused to discharge the order, giving as one reason that they were not satisfied that the husband had established that he was unaware of the wife's adultery before the order of 1952 was made and that no "fresh evidence" had been adduced to substantiate that. The husband appealed.

Held: the order of 1952 would be discharged because—

(i) the wife's adultery in 1942 having regard to the husband's ignorance of it, constituted "fresh evidence" within the first part of s. 7 of the Act of 1895, and

(ii) though the justices had under that part of that section a discretion, yet, if they had known of the wife's adultery, they would have had no jurisdiction (in consequence of s. 6 of the Act of 1895) to make the order of 1952, and, in view of the wife's admission that the husband was then unaware of her adultery, the justices' reason showed that in any exercise of discretion under s. 7 of the Act of 1895 they were in error on a vital point.

Weightman v. *Weightman* ((1906), 94 L.T. 620) followed.

Appeal allowed.

[As to "fresh evidence", see 12 HALSBURY'S LAWS (3rd Edn.) 492, para. 1091, note (j); and for cases on the subject, see 27 DIGEST (Repl.) 727, *6940*, *6941*.

For the Summary Jurisdiction (Married Women) Act, 1895, s. 6, s. 7, see 11 HALSBURY'S STATUTES (2nd Edn.) 852.]

Cases referred to:

(1) *Weightman* v. *Weightman*, (1906), 94 L.T. 620; 70 J.P. 120; 27 Digest (Repl.) 727, *6941*.

(2) *Johnson* v. *Johnson*, [1900] P. 19; 69 L.J.P. 13; 81 L.T. 791; 64 J.P. 72; 27 Digest (Repl.) 727, *6940*.

Appeal.

The husband appealed against an order of the Worthing justices dated June 21, 1957, whereby they refused to discharge an order made in the wife's favour on Dec. 15, 1952.

The parties were married in 1933 and there were two children born in 1934 and 1940 respectively. The husband was in the army from 1939 until he was demobilised in October, 1952. On that date the husband did not return to the matrimonial home. The wife then caused a summons to be issued against him on her complaint that he had wilfully neglected to provide reasonable maintenance for her and the younger child. On Dec. 15, 1952, the Worthing justices found the complaint proved, granted the custody of the child to the wife and ordered the husband to pay to the wife the sum of £2 a week as maintenance for her and 10s. a week as maintenance for the child. In February, 1956, the wife presented a petition for divorce on the ground of the husband's desertion, and prayed for the exercise of the court's discretion in respect of her own adultery. By his answer the husband denied desertion and cross-prayed for divorce on the ground of the wife's constructive desertion and adultery. The charge of adultery was based on an alleged admission by the wife. On Aug. 14, 1956, the wife filed her discretion statement. The suit came before Mr. Commissioner GALLOP, Q.C., on Feb. 22, 1957. The wife's discretion statement was put in evidence and disclosed that she had committed adultery on several occasions from September to December, 1942. The adultery charged by the husband in his answer was different from that admitted by the wife in her discretion statement. At the conclusion of the evidence the commissioner found that the husband had deserted the wife, dismissed the husband's charges of constructive desertion and adultery (having refused leave to amend the answer by adding a charge of adultery based on the facts disclosed in the wife's discretion statement) and granted the wife a decree nisi in the exercise of the court's discretion. By complaint dated Apr. 26, 1957, the husband applied to the Worthing justices to discharge the order of Dec. 15, 1952, on the ground that the wife's adultery in 1942 constituted " fresh evidence " within the meaning of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895. At the hearing before the justices on June 21, 1957, it was conceded on behalf of the wife that at the date of the order, i.e., Dec. 15, 1952, the husband did not know and could not by reasonable means have obtained knowledge of the wife's adultery in 1942, but it was contended that the justices should dismiss the husband's complaint in view of his own conduct. The justices dismissed the husband's complaint. They stated as their reasons:

> " (i) The court was not satisfied that the husband had established that he was unaware of his wife's adultery prior to Dec. 15, 1952, and no fresh evidence had been adduced to substantiate such a submission.
>
> " (ii) Having regard to the conduct of the husband since 1942, the court could not see its way clear to exercise its discretion in favour of the husband."

The husband now appealed and in the course of the argument LORD MERRIMAN, P., raised the question whether the husband had adopted the correct procedure in applying to the justices to discharge the order of Dec. 15, 1952, instead of applying to the Divisional Court for leave to appeal out of time against that order.

A. T. Hoolahan for the husband.
J. R. Macgregor for the wife.

LORD MERRIMAN, P.: The appeal is out of time, and the first question was whether we should give leave to extend the time for filing the notice of appeal. That was resisted, and we said that we would deal with it when we had heard something about the merits of the case. It is clear that in the main the fact that the appeal was out of time was due to the attempt of the husband to get a civil aid certificate, but that application failed because his means as assessed were too great. It is said, therefore, that there is no merit in the application for an extension of time, but I may say that it is almost invariably regarded as a good ground for extending the time that the delay has been due to the obtaining of a civil aid certificate. I do not agree that the fact that he failed to obtain a certificate disposes of this point, for this reason—he might have obtained a certificate, and even though the assessment of his contributions was so stiff as virtually to leave him to provide his own legal assistance, at least, on the assumption that he had obtained a certificate, it would have covered him for the costs.

At the least, he might have been given a "limited" certificate, and that would have covered him for the costs of providing the statement of the justices' reasons, the notes of evidence, and so forth for the consideration of the legal aid committee. If, on the other hand, he had not been able to obtain those necessary things within the twenty-one days allowed for giving notice of appeal, with such extension as is now granted by the revised rule (r. 73 (3) of the Matrimonial Causes Rules, 1957) that he must lodge those documents as soon as practicable, it would mean that he himself, in any event, might have to shoulder the whole of those costs, because they could not be covered retrospectively by a civil aid certificate. In my opinion, on the facts of the present case the perfectly legitimate attempt by the husband to obtain legal aid was responsible for the short delay which was involved in waiting until that question was decided before going on at his own expense; and we know that no prejudice was, in fact, occasioned to the wife, because her advisers were informed of the intention to appeal. It is a clear case, in my opinion, for granting the extension of time, and I propose that that be done.

Now I come to the merits of the case, which raise a very curious and interesting point. For this purpose it is necessary to give one or two salient dates. The marriage occurred in October, 1933, and two children were born, in 1934 and 1940 respectively. Sometime between September and December, 1942, the wife committed adultery, but that fact was, as is admitted, entirely unknown to the husband at the time, and, indeed, as is admitted, remained unknown until, in the wife's divorce suit, which was heard on Feb. 22, 1957, the petition in which had been filed in February, 1956, it first became known, through the discretion statement put in evidence by the wife at that hearing, that she had committed adultery in 1942. I would like to say this, to make it plain beyond a peradventure, that from first to last, both before the justices and in this court there has been the clearest and most frank and unequivocal admission by counsel for the wife that the husband neither knew of this adultery nor by reasonable diligence could have known of it until the fact was proved on Feb. 22, 1957, out of the mouth of the wife herself. The next date of importance is Dec. 15, 1952, when the wife obtained the order which the husband by his present complaint seeks to have set aside. He seeks to have it set aside under the first part of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, on the ground that he has shown cause on fresh evidence to the satisfaction of the court, which entitled the court at any time to discharge the order of Dec. 15, 1952, and the first question is whether he was entitled to proceed under s. 7 to that end.

At this point I ought to add that counsel for the husband has applied for, and, there being no opposition, has been granted, leave to add to his notice of motion an application to extend the time for appealing against the original order, with the implication that this court, if that application was granted, would then of its own motion set the order aside as having been obtained wrongly. It was obtained wrongly, because by the terms of s. 6 of the Act of 1895, the original Act in the code which gives justices jurisdiction in these matrimonial affairs, it is enacted:

> "No order shall be made under this Act on the application of a married woman if it shall be proved that such married woman has committed an act of adultery: Provided that the husband has not condoned, or connived at, or by his wilful neglect or misconduct conduced to such act of adultery."

It is now proved that the wife committed an act of adultery ten years before her complaint of wilful neglect to maintain which resulted in this order. It is expressly admitted that there was no question of condonation. Indeed, the husband knew nothing about it, as is admitted, and it was not suggested, in the very full trial that was held at Lewes before Mr. Commissioner Gallop, Q.C., in February, 1957, that there had been any question of connivance or conduct conducing to that act of adultery. In other words, as the facts now stand, it is plain that the justices, had they known of them, would have been bound to hold

A that they were without jurisdiction to make any order at all on the wife's complaint.

Then the question arises, how shall this be dealt with? Counsel for the husband has asked us to deal with it on the ground that this belated discovery of the adultery, albeit it is adultery which, unlike that under the second part of s. 7, was committed before the wife's complaint came up for hearing, enables the B court to regard it as fresh evidence, and for that proposition he relies on the decision in *Weightman* v. *Weightman* (1) ((1906), 94 L.T. 620), a court consisting of SIR GORELL BARNES, P., and BARGRAVE DEANE, J. I do not think that it is necessary to read the whole judgment, but only sufficient to show what they were deciding. SIR GORELL BARNES, P., in his judgment begins by saying (ibid., at p. 621):

C

> "In the present case there was a summons taken out on the ground that fresh evidence had been discovered."

After reading the material words of s. 7, he said (ibid.):

> "But it is necessary that magistrates should clearly understand what 'fresh evidence' means, though in my view there is no real doubt about it."

D

He had already referred to *Johnson* v. *Johnson* (2) ([1900] P. 19), in which LORD ST. HELIER had defined the meaning of the words "upon fresh evidence", and that decision is summarised by SIR GORELL BARNES in these words (94 L.T. at p. 621):

> "It was practically the same sort of evidence as that upon which a new E trial would, in the ordinary course, be granted; it must relate to something which has happened since the former hearing or trial [that does not arise in the present case] or it must be evidence which has come to the knowledge of the party applying since that hearing or trial, and which could not by reasonable means have come to his knowledge before that time."

F The present case is precisely covered by those words, and it was admitted in the court below and has been admitted here that the wife's adultery in 1942 was, for the purposes of this application in 1957, "fresh evidence" upon which an order for discharge might have been made, and I am fully prepared to follow the decision in *Weightman* v. *Weightman* (1). I see that it is cited in the up-to-date textbooks* as a valid decision which has never been questioned, and I see no reason G to question it now. On the contrary, I think that it is plainly right, and it decided, incidentally (and this has been decided in other cases, too), that because of the use of the words "fresh evidence at any time" the six months' bar imposed by the Summary Jurisdiction Act, 1848, s. 11†, on the hearing of any complaint which was over six months old did not apply, so that it is irrelevant that it was not until 1957, the earliest time at which, in fact, it could have been H used at all, that this attempt to raise the question of fresh evidence in relation to something which occurred as long ago as 1942, first occurred.

It is rightly submitted that the wording of the section to which I have already referred, raises a question of discretion. Unlike the case in respect of adultery after the making of the order, which is dealt with in the second part of the section, where the word "shall", which has been held to be mandatory, is used, the wording I of the first part of the section uses the word "may"—"A court . . . may on the application of the married woman or of her husband . . . upon fresh evidence . . . discharge any such order". It is said that we ought not to interfere with the discretion of the justices in a matter which is plainly discretionary after so long a lapse of time. Moreover, other reasons have been given, such as that even if this application succeeds it will not get the husband out of his difficulties, because it will still be open to the wife in the divorce suit to apply for maintenance. Speaking for myself, I am not impressed by that particular argument. I do not doubt that it will be open to the wife to persuade the court, if she can, that in spite of her adultery she ought to be allowed some maintenance, which may or may not equal, or exceed, or be less than that which the justices ordered. That is not our business at the present moment; but this, at any rate, is certain: that any such maintenance would operate only in futuro, whereas if an order of this sort were left undealt with, it might in certain circumstances, though I gather it would not in this particular case, leave a husband with arrears under the order hanging round his neck, with the penal consequences which that might involve. It does not seem to me to be a valid reason for leaving intact a magistrates' order which ought never to have been made, that some such order might be made in the Divorce Court with whatever consequences might result in the future.

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* 12 HALSBURY'S LAWS (3rd Edn.) 493, note (j); RAYDEN ON DIVORCE (7th Edn.) 611.

† The Summary Jurisdiction Act, 1848, s. 11 (14 HALSBURY'S STATUTES (2nd Edn.) 781), has been repealed and replaced by the Magistrates' Courts Act, 1952, s. 104 (32 HALSBURY'S STATUTES (2nd Edn.) 503).

To my mind, however, there is a more fundamental objection to leaving this order in effect simply on the ground that the justices have exercised their discretion. It is elementary that any discretion in the court must be exercised judicially, and if it is shown that in any vital matter the justices have gone wrong in dealing with the point, that in itself is a justification for interfering with the exercise of their discretion, and, in my opinion, that is the present case. Within three days of the decision, and in response to an oral request made on the date of the hearing to the justices to state the reason for their decision, the clerk to the justices gave reasons which are verbally identical, so far as I can judge, with those which are stated in the notes of the hearing and the reasons for the decision. The first reason reads:

> "The court was not satisfied that the husband had established that he was unaware of his wife's adultery prior to Dec. 15, 1952, and no fresh evidence had been adduced to substantiate such a submission."

That is flat in the face of the very clear admission made by counsel for the wife that those points were expressly admitted, as I have already said, and I repeat that it has really been common ground from first to last, that so far from the husband not having established that he was unaware of his wife's adultery prior to the date of the making of the order in question, it was expressly admitted that he first heard of it, and could not have heard of it earlier by any reasonable diligence, when the wife put in her discretion statement on Feb. 22, 1957, and, moreover, it has been expressly admitted and has been common ground throughout, that that discovery did amount to fresh evidence. The whole of the justices' reasons, in my opinion, is tainted by this extraordinary mistake.

That obviates the necessity of my going into the second reason that they give, that there were some letters read to show, I gather, that the husband had, as it is said, not been entirely free from matrimonial laxity from 1942 onwards in connexion with his friendship with ladies other than his wife. I do not gather that it is suggested that he had committed adultery, and, as I have already said, it was not suggested that his friendships with other people had amounted or, indeed, could amount to conduct conducing to the adultery in question. But my answer is that the justices have given a reason which, if valid, cuts at the root of this jurisdiction to make the order which was sought by the husband, because, unless there was fresh evidence they had no right to listen to the complaint at all. Having given a reason which is quite unsustainable, I do not think that it is necessary to go any further in considering whether they exercised their discretion rightly or wrongly.

I would like to add this, if I have not made it clear already, that if I did not think that this appeal could be supported on the authority of *Weightman* v. *Weightman* (1) I should have been prepared to give leave to appeal out of time against the original order, and, having done so, to set it aside on the merits, for precisely the same reasons as those which I have already given, which are

A covered by *Weightman* v. *Weightman* (1). In my opinion this appeal should be
allowed, and the original order set aside for the reasons stated.

STEVENSON, J.: I agree.

Appeal allowed.

Solicitors: *Dale Parkinson & Co.* (for the husband); *Vizard, Oldham, Crowder*
B *& Cash*, agents for *Parker & Bangor-Jones*, Worthing (for the wife).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

TAYLOR *v.* NATIONAL ASSISTANCE BOARD
C
AND OTHERS.

[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Tucker, Lord Cohen and Lord Keith of Avonholm), October 9, 10, December 4, 1957.]

Legal Aid—Assessment of resources—Exclusion of subject-matter of dispute—
Divorce—Application by wife for legal aid to defend petition, to cross-
petition and to claim maintenance—Alimony pending suit ordered subse-
D *quently—Whether alimony taken into account in computing wife's disposable*
income—Whether maintenance so taken into account where application is
to reduce the amount payable—Legal Aid and Advice Act, 1949 (12 *&* 13
Geo. 6 *c.* 51), *s.* 4 (3)*—Legal Aid* (*Assessment of Resources*) *Regulations,*
1950 (*S.I.* 1950 *No.* 1358), *reg.* 2.

On June 14, 1955, the appellant applied to the local legal aid committee
E for a civil aid certificate to defend existing proceedings for divorce, to
cross-petition and to claim maintenance. She had no capital assets. She
had issued notice of application for alimony pendente lite and on June 27,
1955, she obtained an order for alimony pendente lite at a yearly rate of
£450 less tax. On July 18, 1955, the National Assistance Board assessed her
" disposable income ", taking into consideration the amount of the alimony
F pendente lite. On the question whether the alimony should have been
excluded in computing the appellant's rate of income, as being " the subject-
matter of the dispute " within s. 4 (3) of the Legal Aid and Advice Act,
1949*, and reg. 2 of the Legal Aid (Assessment of Resources) Regulations,
1951†, by which the "value of the subject-matter of the dispute" was to be
excluded,

G **Held:** when the order for alimony pendente lite was made there was no
longer merely a claim for alimony; the amount of the alimony was income
of the appellant, was not subject-matter of the dispute, and was properly
included by the National Assistance Board in their computation of the
appellant's disposable income for the purposes of the Legal Aid (Assessment
of Resources) Regulations, 1950.

H *Thorogood* v. *Thorogood* ((1955), Oct. 19, The Times; see [1956] 2 All E.R.
at p. 460) distinguished.

Per VISCOUNT SIMONDS, LORD MORTON OF HENRYTON and LORD COHEN:
where the matter in dispute is whether the amount of alimony or main-
tenance payable by a wife under an order that is in operation should be
reduced, or whether the order should be discharged, the amount of the
I income is subject-matter of the dispute and should be excluded from the
computation of her rate of income (see p. 710, letters A and H, and p. 707,
letter G, post).

Thorogood v. *Thorogood* ((1955), Oct. 19, The Times; see [1956] 2 All E.R. at p. 460) approved.

Decision of the COURT OF APPEAL ([1957] 1 All E.R. 183) affirmed.

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* The terms of this enactment are set out at p. 708, letter D, post.

† The terms of this regulation are set out at p. 708, letter E, post.

[For the Legal Aid and Advice Act, 1949, s. 4 (3), see 18 HALSBURY'S STATUTES (2nd Edn.) 538. A

For the Legal Aid (Assessment of Resources) Regulations, 1950, reg. 2, see 5 HALSBURY'S STATUTORY INSTRUMENTS 195.]

Case referred to:

(1) *Thorogood* v. *Thorogood*, (Oct. 19, 1955), The Times. B

Appeal.

Appeal by Millicent Alexander Taylor from an order of the Court of Appeal (DENNING and HODSON, L.JJ., and ORMEROD, J.), dated Dec. 19, 1956, and reported [1957] 1 All E.R. 183, reversing an order of LORD MERRIMAN, P., dated May 14, 1956, and reported [1956] 2 All E.R. 455. The appellant, who had applied for a civil aid certificate in connexion with divorce proceedings instituted C against her by her husband, applied by originating summons under R.S.C., Ord. 54A, r. 1A, for the determination of the question whether, on the proper construction of the Legal Aid and Advice Act, 1949, s. 4, and the Legal Aid (Assessment of Resources) Regulations, 1950, made thereunder, the amount of alimony pending suit should be taken into account in assessing her disposable income, and for a declaration that it should not have been so taken into account D by the first respondents, the National Assistance Board. The second respondents were the Law Society. The facts appear in the opinion of VISCOUNT SIMONDS.

R. F. G. Ormrod and *Bruce Holroyd Pearce* for the appellant.

The Solicitor-General (*Sir Harry Hylton-Foster, Q.C.*) and *Rodger Winn* for the first respondents, the National Assistance Board. E

John Latey, Q.C., and *B. H. Anns* for the second respondents, the Law Society.

The House took time for consideration.

Dec. 4. The following opinions were read.

VISCOUNT SIMONDS: My Lords, in this case the appellant obtained F from the learned President (LORD MERRIMAN) of the Probate, Admiralty and Divorce Division a pronouncement and declaration that, in relation to an application made by her for a civil aid certificate to enable her to defend and to cross-petition in a suit for divorce brought by her husband, she was entitled not to have the amount of any sum ordered to be paid to her for alimony pendente lite included in the computation of her disposable income for the purposes of G her contribution to the said civil aid certifiate. From this decision the present respondents, the National Assistance Board and the Law Society, appealed to the Court of Appeal and that court, setting aside the learned President's order, held that the National Assistance Board, whom I will call the board, had rightly taken into account the alimony pendente lite to which she was entitled. Hence this appeal. H

The relevant facts appear to be these. On Mar. 10, 1955, the husband of the appellant presented a petition for divorce against her on the ground of cruelty. She thereupon applied to the appropriate committee of the Law Society for an emergency civil aid certificate under the Legal Aid and Advice Act, 1949, to enable her to defend the suit, to cross-petition for divorce on the ground of cruelty and to apply for alimony pendente lite. Such certificate was granted I on May 16, 1955. On May 19, 1955, the appellant accordingly issued a notice of application for alimony pendente lite and on June 27, 1955, an interim order was made in her favour for alimony pendente lite at the rate of £450 per annum less tax so long as she continued to occupy the former matrimonial home, to be increased to the rate of £650 per annum less tax when she vacated it. On June 14, 1955 (thirteen days before the interim order was made), the appellant made a formal application for a full civil aid certificate to enable her to defend the suit, to cross-petition for divorce and to claim maintenance for herself and the children of the marriage. On July 18, 1955, the board, in purported exercise of their duties under s. 4 of the said Act, assessed the appellant's " disposable income " at the sum of £410 per annum. For reasons immaterial to this appeal this sum was afterwards reduced to £370 per annum. It is common ground that the greater and the lesser sum alike were based on the inclusion in her resources of the alimony ordered to be paid to her pendente lite.

The question is whether this sum was rightly included. The appellant contends that it was not, and relies on s. 4 (3) of the Act which provides that the regulations to be made thereunder shall include provision for securing that " the resources of a person seeking or receiving legal aid shall be treated as not including the subject-matter of the dispute ", and on reg. 2 of the Legal Aid (Assessment of Resources) Regulations, 1950, which is in these terms:

> " In computing the rate of income or the amount of capital of the person concerned there shall be excluded the value of the subject-matter of the dispute in respect of which application has been made for a certificate."

This section and regulation must be interpreted in their context, and I think that it may first be recalled that the Act is

> " An Act to make legal aid and advice in England and Wales . . . more readily available for persons of small or moderate means . . ."

Who are " persons of small or moderate means "? Section 2 enacts that, subject to that Part of the Act, legal aid shall be available for any person whose disposable income does not exceed £420 a year with a provision as to capital which can be ignored, and further enacts, by sub-s. (2) (c), that a person receiving legal aid in connexion with any proceedings may be required to make a contribution to the legal aid fund in respect of the sums payable thereout on his account and, by sub-s. (2) (d), that any sums recovered by virtue of an order or agreement for costs made in his favour with respect to the legal proceedings shall be paid to the legal aid fund. Section 3 limits the contributions to be made by the legally assisted person and, by sub-s. (4), provides that, except so far as regulations otherwise provide, any sums remaining unpaid on account of a person's contribution to the legal aid fund in respect of any proceedings and, if the total contribution is less than the net liability of that fund on his account, a sum equal to the deficiency, shall be a first charge for the benefit of the legal aid fund on any property (wherever situate) which is recovered or preserved for him in the proceedings. Then comes s. 4, to sub-s. (3) of which I have already referred; the earlier sub-sections define a person's disposable income by reference to the rate of his income after making certain prescribed deductions and allowances, and provide for the making of regulations as to the manner in which the rate of a person's income is to be computed.

I need not at this stage refer to any other sections of the Act or to the general regulations made thereunder, but it is necessary to look at certain of the Legal Aid (Assessment of Resources) Regulations, 1950, which were made pursuant to s. 4 of the Act. By reg. 1 (2), " the period of computation " is defined to mean the period of twelve months next ensuing from the date of the application for a certificate or such other period of twelve months as in the particular circumstances of any case the board may consider to be appropriate. Regulation 2 provides that, in computing the rate of income of the person concerned, there shall be excluded the value of the subject-matter of the dispute in respect of which application has been made for a certificate; to this I have already referred. Regulation 7 provides for the determination of a person's disposable income in accordance with Sch. 1 to those regulations, and reg. 10 for the re-determination of such income if the circumstances of the person concerned have altered.

Applying these regulations, the board made the assessment and re-assessment of the appellant's disposable income to which I have already referred, and there is no doubt that they have acted correctly and directed her to make the proper contribution to the legal aid fund if the alimony pendente lite which was payable to her was rightly included in her resources. This is the single question in issue.

The proceedings have taken an unusual course. The learned President had, shortly before the present case was heard by him, presided in a Divisional Court in an unreported case of *Thorogood* v. *Thorogood* (1) ((1955), Oct. 19, The Times). That case (I take the facts as he has stated them ([1956] 2 All E.R. at p. 460)) was an appeal by the husband from the decision of certain justices on his complaint to reduce the amount of an order in favour of his wife from the maximum amount of £5 a week with the addition of the maximum sum of 30s. in respect of a child, of whom she had been given the custody. The ground of the complaint was that, since the date of the order, the husband's means had decreased. The justices had decided that there was no sufficient change to justify a revision of the order. The wife had been granted a civil aid certificate to resist the appeal, and her disposable income had been computed at £83 per annum. It was clear that this figure could not have been arrived at without taking into account the amount of the order, and on this the learned President is reported as saying,

> " I am sure, and I have verified my references, that legal aid committees are doing that which the Act of Parliament expressly forbids them to do, namely taking into account in assessing the income the actual subject of the litigation, namely the amount of the order; and that is utterly wrong."

In the present case, learned counsel for the board assured the learned President that they accepted the correctness of his decision in *Thorogood* v. *Thorogood* (1). They did so on the footing that, in that case, the single matter in dispute was whether the amount of the order should be reduced. But their concession appeared to involve also the general admission that the question of alimony could be part of the " subject-matter of the dispute " within the meaning of the relevant section and regulation. It was accordingly left to the President to decide only on the validity of a further argument which was presented to him to the effect that, the order for alimony pendente lite having been made before the assessment of the appellant's disposable income, the question of such alimony had, at the date of assessment, ceased to be part of the subject-matter of dispute and, accordingly, the value thereof could properly be taken into account in the computation. The learned President rejected this argument and made the declaration to which I have already referred. When the matter came before the Court of Appeal, the concession thus made was by leave of the court withdrawn, and counsel for the respondents urged as their primary argument that alimony could not, any more than damages claimed in an action, be " the subject-matter of the dispute ". They maintained also the argument in regard to this particular case which had been rejected by the learned President. The Court of Appeal were unanimous in upholding the respondents' primary argument and, I think, though it is not very clear, that they accepted the alternative argument also.

My Lords, I have found great difficulty in this case. It has been said, no doubt justly, by counsel for the appellant, who presented her case with great ability, that any conclusion to which we may come will lead to anomalies. But I must take leave to doubt whether any result could operate more unfairly than that a sum paid by a husband to his wife under a separation agreement, or even by way of voluntary allowance, should not, but that a sum paid to her as alimony pendente lite should, be excluded from the computation of her resources. And such a result may be thought to be not only unfair but absurd in its incidence, when it is remembered that the very same alimony would undoubtedly have to be included if she sought a certificate to enable her to defend a claim brought against her by a tradesman. In the present case, we are dealing with a modest sum which may well be thought to leave little margin for a contribution to legal expenses, but that is a consideration which would have equal weight whatever the action the wife sought to prosecute or defend. The inescapable fact is that, so long as she is in receipt of alimony of £450 per annum, even if she has no other income, she has resources which remove her from the class of persons from whom, under the Act, no contribution is exigible. These are considerations which cannot prevail if no other interpretation is permissible than that either a claim for alimony pendente lite or such alimony itself is, at the relevant date, part of the subject-matter of the dispute. But they must be given due weight if an alternative interpretation is open to the court.

My Lords, I have used the words "at the relevant date" and pointed to the alternative "a claim for alimony" or "such alimony itself" for this reason. The Act, as I have already stated, requires that the regulations to be made under it shall secure that the resources of a person seeking legal aid shall be treated as not including the subject-matter of the dispute; the regulation* which is intended to give effect to this requisition provides that, in computing the rate of income of the person concerned, there shall be excluded the *value* of the subject-matter in respect of which application has been made for a certificate. The regulation, by its reference to value, emphasises what is, in any event, clear, that only that can be either included or excluded to which a value can be attributed, and it appears to me impossible to regard a claim for alimony pendente lite as a resource on which a value can be put. But, at the date of the application, if that is the relevant date for determining what is the subject-matter of the dispute, there is nothing but a claim. There is nothing, therefore, to be excluded from the computation. Equally, no doubt, at the same date there is nothing to be included in the resources. So far I agree with the Court of Appeal. But, whether or not the subject-matter of the dispute is finally determined at the date of the application, there is no finality about the determination of disposable income. For reg. 10, to which I have referred, provides for reassessment when circumstances alter. It, therefore, becomes necessary to ask, when an interim order for alimony has been made, what are then the resources and disposable income of the person concerned? The answer to this question must be that they include the sum payable as alimony, and it must be added that this sum is not, and never has been, the subject-matter of dispute; there is, therefore, no ground for excluding it.

I come, therefore, to the same conclusion as the Court of Appeal in the present case, though I cannot wholly agree with their reasons. In particular, I think it right to say that, in my opinion, the case is clearly distinguishable from *Thorogood's* case (1). There the single matter of dispute in the proceedings was whether the amount of maintenance under an order already operative should be reduced, and I think that the learned President was right in saying that it must be excluded. Here, at the relevant date, that is the date of assessment or reassessment, the appellant was indisputably entitled to her alimony pendente lite, and I see no reason either in the language of the Act and relevant regulations, still less on a broad consideration of their purpose, why it should not be taken into consideration by the board in determining what contribution she ought to make.

I must allude to one further argument. It is provided by Legal Aid (General) Regulations, 1950, reg. 16† that, subject to the provisions of para. 8 thereof, all moneys payable to an assisted person (inter alia) by virtue of any agreement or order made in connexion with the action, cause or matter to which his certificate relates, whether such agreement be made before or after proceedings are actually begun, shall be paid to the solicitor of the assisted person and dealt with by him as therein provided, but para. 8 provides that the regulation shall not apply to (inter alia) payments made under certain sections of the Matrimonial Causes Act, 1950. The result of this is that, in the present case, the moneys payable to the appellant by way of alimony would be payable not to her solicitor

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* Regulation 2 of the Legal Aid (Assessment of Resources) Regulations, 1950.

† S.I. 1950 No. 1359, as amended by S.I. 1954 No. 166.

A but to her and would not be subject to the provisions of the regulation. But para. 8 was not in the original regulation; it was introduced at a later date*. It was urged, therefore, that the conclusion to which I have come would, but for its introduction, have led to the result that the same sum of alimony would have been both subject to the provisions of reg. 16 and liable to be included in her resources for the determination of her contribution, a result, it was said, which should be avoided, if a different interpretation could avoid it. B My Lords, I conceded at an early stage of this opinion that any interpretation might lead to anomalies, and it is possible that, if the regulation had not been amended, this might have been such an anomaly; but the possibility of an anomaly which has been removed cannot alter the clear conclusion to which I have come. Any other conclusion would, in my opinion, lead to far greater ones.

C The appeal should, in my opinion, be dismissed and I move your Lordships accordingly.

LORD MORTON OF HENRYTON: My Lords, s. 12 (1) of the Legal Aid and Advice Act, 1949, provides that:

> "The Lord Chancellor may make such regulations as appear to him necessary or desirable for giving effect to this Part of this Act or for preventing abuses thereof." D

Section 4 (3) of the same Act provides that:

> "The regulations shall include provision for securing that the resources of a person seeking or receiving legal aid shall be treated as not including the subject-matter of the dispute."

E The provision made by regulation to secure this result is reg. 2 of the Legal Aid (Assessment of Resources) Regulations, 1950, hereafter referred to as "the Resources Regulations", and is as follows:

> "In computing the rate of income or the amount of capital of the person concerned there shall be excluded the value of the subject-matter of the dispute in respect of which application has been made for a certificate." F

The facts giving rise to this appeal have already been stated, and I need only refer again to para. 8 of the appellant's application for a civil aid certificate on June 14, 1955. Thereby she applied for a civil aid certificate to defend the proceedings for divorce brought against her by her husband and (inter alia) "to claim maintenance from my husband for myself and my children". Before the appellant made this application, she had applied for and obtained an emergency G civil aid certificate, and had applied for alimony pending suit; and, shortly after the date of the application, on June 27, 1955, Mr. Registrar FORBES made an interim order against the husband for alimony at the rate of £450 per annum less tax so long as the appellant occupied the matrimonial home and thereafter at the rate of £650 per annum less tax. After that order had been made the National Assistance Board (hereinafter called "the board") embarked on the H task of computing "the rate of income" of the appellant (who had no capital) under reg. 2 of the Resources Regulations, and the question for determination on this appeal is whether, in carrying out this computation, the board should have excluded the value of the alimony ordered on June 27, 1955, on the ground that this alimony was

> "the subject-matter of the dispute in respect of which application has been made for a certificate." I

I say "this alimony" and not "the *claim* for alimony" because it was only the alimony which was a "resource" of the appellant within s. 4 (3) of the Act, and it was only the alimony which could possibly come into the computation of the appellant's rate of income. Whether or not a mere claim for alimony can ever

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* As from Mar. 1, 1954, by the Legal Aid (General) (Amendment No. 1) Regulations, 1954 (S.I. 1954 No. 166).

A form part of the " resources " with which the Act is concerned, it certainly cannot be a part of the " income " of the person claiming it.

My Lords, in my view, it would be incorrect to say that the alimony, which was, in substance, the only " resource " of the appellant, had at any time been the subject of a dispute, and the board rightly refused to exclude its value in computing the rate of income of the appellant. Your Lordships have been B informed by counsel that the husband had opposed the application for interim alimony, but the income now in question did not come into existence until that dispute had been determined by the order of the registrar. A dispute, the subject-matter whereof was the alimony of £450 per annum less tax, could only come into existence after the alimony was in existence, and no such dispute has ever arisen, so far as the evidence goes. Certainly no such dispute had arisen C at the time when the board computed the rate of income of the appellant.

At this point, my Lords, it is convenient to contrast with the present case *Thorogood* v. *Thorogood* (1) ((1955), Oct. 19, The Times), on which counsel for the appellant strongly relied. That case was not reported, but the learned President referred to it in his judgment in the present case, and I quote his words ([1956] 2 All E.R. at p. 460):

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> " Before proceeding further, I must mention one other matter. It appears that the only authority dealing with the construction of the words ' subject-matter of the dispute ' is *Thorogood* v. *Thorogood* (1), a case in a Divisional Court of this Division (consisting of COLLINGWOOD, J., and myself), heard on Oct. 19, 1955. That was an appeal by a husband from the decision E of the justices of the North Aylesford Petty Sessional Division of Kent, sitting at Chatham, on his complaint to reduce the amount of an order in favour of his wife from the maximum amount of £5 a week, with the addition of the maximum sum of 30s. in respect of a child, of whom she had been given the custody. The order had in 1954 been increased to those figures from the original amounts of £2 and 10s. respectively (which were the maximum F amounts prevailing at the time when the order was first made in 1943). The ground of the complaint was that since the 1954 order the husband's means had decreased. The justices had decided that there was no sufficient change to justify a revision of the order. The wife had been granted a civil aid certificate to resist the appeal, and her disposable income had been computed at £83. It was quite plain, from the figures under discussion, that G the amount computed as the disposable income of the wife could not have been arrived at without taking into account the amount of the order, and I am reported as having said: ' I am sure, and I have verified my references, that legal aid committees are doing that which the Act of Parliament expressly forbids them to do, namely taking into account in assessing the income the actual subject of the litigation, namely the amount of the order; and that is utterly wrong.' "

H

The President continued (ibid.):

> " If those observations were ill-founded and govern the present case, I ought not to deal with the present application, and I made it clear that I should decline to do so in those circumstances. However, I was assured categorically, by counsel both for the board and the Law Society, that my I observations were perfectly correct, in connexion with that particular case. Seeing that the sole question was whether the amount of the order should be reduced, it is difficult to see how that amount could well be anything else than the subject-matter of the dispute. It was conceded by both counsel that this was manifestly so, and that one of the issues in the present application was to establish a distinction between the two cases."

In the Court of Appeal, DENNING, L.J. ([1957] 1 All E.R. at p. 187) did not accept the view expressed by the learned President in *Thorogood* v. *Thorogood* (1), and I think it is plain from the judgments of Hodson, L.J., and Ormerod, J., that they, too, were unable to accept the President's view, though they did not say so in terms. For my part, I am satisfied that the view expressed by the learned President in *Thorogood* v. *Thorogood* (1) was entirely correct, but, in my opinion, the last-mentioned case is distinguishable from the present case. I feel no doubt that, in a case where an order for alimony or maintenance of a wife is actually in operation, and the husband takes proceedings to reduce the sum payable, or to discharge the order, the income which the wife is receiving by way of alimony or maintenance is the " subject-matter of the dispute ". The only dispute is whether or not the wife is to retain that income or is to lose it wholly or in part. The test suggested by counsel for the respondents, as I understood it, was: " Does the ownership of the ' resource ' in question depend on the result of the proceedings? " I would accept this test, but would insert the words " wholly or in part " after the word " depend " and, if the test is applied to *Thorogood* v. *Thorogood* (1), it entirely confirms the view of the President. On the other hand, if this test is applied to the alimony ordered in the present case, it is, in my view, fatal to the argument for the appellant, because the ownership of that alimony was not being attacked in any proceedings at the time when the rate of income of the appellant was being computed by the board.

Counsel for the appellant relied strongly on the fact that, in reg. 2, " the dispute" is defined as being "the dispute in respect of which application has been made for a certificate ". I have already stated that the appellant, in her application, asked for a civil aid certificate " to claim maintenance ", but, in my opinion, that fact does not assist the appellant in this appeal. At the date of the application there could be no " dispute " whereof this income of the appellant was the subject-matter, for the simple reason that this income was not then in existence. Thus the appellant at that time did not, and could not, apply for a certificate for legal aid in a dispute whereof the subject-matter was this income.

Counsel on each side suggested that anomalous results would follow from a decision in favour of the other side. These arguments fairly balance each other, in my opinion, and do not lead me to alter the opinion which I have formed on the construction and effect of the Act and the regulations.

For the reasons already stated, which are not the same in every respect as the reasons which moved the Court of Appeal to the same result, I would dismiss the appeal.

LORD TUCKER: My Lords, I agree that this appeal should be dismissed for the reasons which have been stated by my noble and learned friends.

LORD COHEN: My Lords, I have had the opportunity of reading the speech which has been delivered by my noble and learned friend, Viscount Simonds. I agree with his conclusion and the reasons he gives for that conclusion.

Had it not been that, in the Court of Appeal, Denning, L.J., expressed the opinion ([1957] 1 All E.R. at p. 187) that *Thorogood* v. *Thorogood* (1) was wrongly decided, I should have been content to say no more; but in view of that expression of opinion I desire to add that, for the reasons given by my noble and learned friend, Lord Morton of Henryton, I think the opinion expressed by the learned President in *Thorogood's* case (1) was correct.

I would dismiss the appeal.

LORD KEITH OF AVONHOLM: My Lords, I concur.

Appeal dismissed.

Solicitors: *Kenneth Brown, Baker, Baker* (for the appellant); *Solicitor, National Assistance Board* (for the first respondents, the National Assistance Board); *Hempsons* (for the second respondents, the Law Society).

[*Reported by* G. A. Kidner, Esq., *Barrister-at-Law.*]

WINCHESTER *v.* FLEMING.

[QUEEN'S BENCH DIVISION (Devlin, J.), October 30, 31, November 1, 4, 5, 6, 7, 8, 11, 12, 26, 1957.]

Husband and Wife—Harbouring of husband—Husband living apart from wife on property near and belonging to woman friend—Husband maintained by her—Whether tort of harbouring actionable at suit of wife.

In October, 1953, the husband, having decided that he did not wish to live with his wife again although the wife wanted him to return to her, went to live at a cottage on F.'s property, as F.'s guest; in effect, F. provided him with board and lodging. The husband was aged ninety and was unable to live within his means; F. was a widow with considerable means who, previously, had been engaged to the husband and who had continued her affectionate association with him after his marriage, and later, had indicated her willingness to marry him when his marriage was terminated. As a result of the husband going to live on F.'s property, the wife brought an action against F. alleging enticement of the husband but the action was compromised by an agreement, dated July, 1956, whereby the wife and F. agreed not to "interfere" with each other. After the agreement, the husband continued to live on F.'s property as her guest, and the wife now brought an action against F. alleging that she had harboured the husband against the wife's will and thereby interfered with the wife in breach of the agreement; the wife did not suggest that, after July, 1956, the enticement still operated.

Held: if the tort of harbouring, viz., the separate offence without enticement, were actionable it was not actionable at the suit of the wife; and F. did not, by continuing to support the husband on her property, interfere with her within the meaning of the agreement.

Philp v. *Squire* ((1791), Peake, 114) considered.

Per CURIAM: the reason why harbouring was considered objectionable was because it interfered with the economic process by which a wife, refused food and shelter elsewhere than in the matrimonial home, would be forced to return to it . . . In a society in which everyone is in the last resort to be housed and fed by the state, the bottom has dropped out of the action for harbouring (see p. 714, letters F and G, post).

[**Editorial Note.** A tort of harbouring is known also in the law of master and servant; a recent example of an action for maliciously harbouring the servant of another will be found in *Jones Brothers* (*Hunstanton*), *Ltd.* v. *Stevens* ([1954] 3 All E.R. 677).

As to action by husband or wife for loss of consortium, enticement and harbouring, see 19 HALSBURY'S LAWS (3rd Edn.) 820, 821, paras. 1340-1342; for cases on actions by a wife for loss of consortium, see 27 DIGEST (Repl.) 90, 91, *680-683*.]

Cases referred to:

(1) *Philp* v. *Squire*, (1791), Peake, 114; 170 E.R. 99; 27 Digest (Repl.) 89, *674*.

(2) *Gottlieb* v. *Gleiser*, (1955), post, p. 715.

(3) *Neville* v. *London "Express" Newspaper, Ltd.*, [1919] A.C. 368; 88 L.J.K.B. 282; 120 L.T. 299; 17 Digest (Repl.) 168, *638*.

(4) *Best* v. *Samuel Fox & Co., Ltd.*, [1952] 2 All E.R. 394; [1952] A.C. 716; 3rd Digest Supp.

Action.

This was an action by the Most Honourable Bapsy, Marchioness of Winchester, the plaintiff, brought by writ issued on Aug. 8, 1956, against Mrs. Evelyn Beatrice Sainte Croix Fleming, the defendant, for damages for breach of a written agreement, dated July 19, 1956, whereby an action, pending between the plaintiff and the defendant, was compromised.

In May, 1954, the plaintiff brought an action against the defendant claiming damages for libel and damages for enticement of the plaintiff's husband, the Marquess of Winchester (referred to hereinafter as "the husband"); the defendant counterclaimed for damages for libel. On July 18, 1956, this action was compromised on terms set out in a memorandum dated July 19, 1956, cl. 3 of which provided:

> "The parties mutually agree with and undertake to each other that neither of them shall at any time hereafter or in any manner directly or indirectly disturb or interfere with the other of them."

The memorandum of terms of settlement was not made an order of the court. In the present action, the plaintiff alleged that, in breach of cl. 3 of the memorandum, the defendant had committed the following acts which amounted to interference within the meaning of the clause:—(i) the defendant persuaded and induced the husband to file a petition of nullity of his marriage to the plaintiff*, and persuaded, assisted and induced him to remain separate and apart from the plaintiff; (ii) the defendant financed the husband in prosecuting the petition; and (iii) the defendant harboured the husband against the will of the plaintiff. The case is reported only on the issue that the defendant harboured the plaintiff's husband.

The following facts were found by DEVLIN, J. In July, 1952, the plaintiff and the husband were married, the husband then being aged eighty-nine; the plaintiff was the daughter of a distinguished Parsee. The husband did not live within his means which at the time of the marriage consisted of an income of £250 a year, derived from a family trust, which was later increased by a further £200. In 1951, the year before the marriage, the husband, while in the Bahamas, had met the defendant, a widow of considerable means who owned a property called Emerald Wave at Cable Beach near Nassau, and they had become close friends; the husband had lived for nine months, as the defendant's guest, at a cottage on her property situated about three minutes' walk from the defendant's main house, and during this time, the husband and the defendant became unofficially engaged. In May, 1952, the husband and the defendant came to London, and the defendant, having taken advice regarding her financial position if she married the husband and also regarding her health, broke off the engagement. After the husband's marriage to the plaintiff in July, 1952, the affectionate association between the husband and the defendant was continued by correspondence which contained their plans for meeting again, and later, contained plans for their marriage. In January, 1953, the husband returned to Nassau where he stayed with friends while the plaintiff went on a visit to India; the plaintiff and the husband never resumed their married life. In October, 1953, after the husband had written to the plaintiff that he did not wish to live with her, although the plaintiff wanted him to return to her, and after he had unsuccessfully tried to obtain a divorce in Mexico, the husband returned to live on the defendant's property near Nassau on the same terms as he had lived there before his marriage, viz., as the defendant's guest. This step led to the issue by the plaintiff of the writ in the action begun in May, 1954, which was later compromised on the terms of the memorandum dated July 19, 1956, breach of cl. 3 of which was the subject of the present action. The husband continued to live on the defendant's property until the summer of 1957 when the property was sold; the husband and the defendant then moved to Monte Carlo where they now lived in the same hotel, as companions, the defendant paying all the expenses and looking after the husband who was beginning to be crippled with arthritis.

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* The petition of nullity, dated July 26, 1956, which was brought in the Bahamas, was dismissed in the spring of 1957 on the ground that the husband was not domiciled there.

Neville Faulks and *Brian T. Neill* for the plaintiff.
Gilbert Beyfus, Q.C., and *H. P. J. Milmo* for the defendant.

Cur. adv. vult.

Nov. 26. **DEVLIN, J.**, read the following judgment in which, after reviewing the facts and summarising the alleged breaches of cl. 3 of the memorandum of terms of settlement, he continued: I shall consider first the third head of breach* because the relevant facts are admitted and only the law is in dispute. While the husband lived at the cottage, he had all his meals at the house and so the defendant in effect provided him with board and lodging in her home although she knew the plaintiff wanted him to return and live with her. Counsel for the plaintiff submits that this is "harbouring"; and that whether or not the defendant's conduct was actionable under the ordinary law, under the contract it was an interference. If one is going to leave out of account the ordinary law, I think that one should leave out of account also the expression "harbouring", for it is one which is derived from the law of tort. Therefore I ask myself simply whether the defendant was interfering with the plaintiff within the meaning of the contract by failing to turn her husband out of doors on July 19†. The contract must be construed in the light of the surrounding circumstances; and these include the fact that for nearly three years before its execution the husband had been living at Emerald Wave‡ under an arrangement which had all the appearances of being permanent. If the plaintiff wanted it to be a term of the settlement that that arrangement should end, I think that much more precise words were required; and I do not think that the object was achieved by the general provision that the parties should refrain from interfering with each other. But I cannot, as counsel for the defendant would have me do, take precisely the same view of the defendant's conduct if apart from the contract it was wrongful. If the harbouring was a wrongful invasion of the plaintiff's legal rights, I should find it difficult to hold that it was not also an interference under the contract; and on this reading I can find nothing in the contract which would be held to condone it. I therefore find it relevant to inquire whether the defendant's conduct was wrongful under the law of tort.

There is no doubt that enticement and harbouring in combination constitute a tort. The form of the action which I am trying, however, requires this combination to be split up, for I have not to concern myself with anything that happened before the date of the contract, July 19, 1956, and it is not suggested that after that the enticement was still operating. Counsel for the defendant submits that there is no tort of harbouring simpliciter. In support of his contention that there is, counsel for the plaintiff has been able to produce only one case, a decision by LORD KENYON. In *Philp* v. *Squire* (1) ((1791), Peake, 114) the claim failed but the cause of action was clearly recognised. The plaintiff's wife came to the house of the defendant to whom she was a relation by marriage and represented herself to have been very ill-used. The defendant received her and allowed her to live there after he had received notice from the husband not to harbour her. LORD KENYON said (ibid., at p. 115):

> "The ground of this action is that the defendant retains the plaintiff's wife against the inclination of her husband, whose behaviour he knows to be proper; or from selfish and criminal motives. But where she is received from principles of humanity the action cannot be supported."

The industry of counsel has not been able to discover any later case in which harbouring has been recognised as a separate tort. In *Gottlieb* v. *Gleiser* (2)

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* Viz., that the defendant harboured the plaintiff's husband.

† The date of the agreement, breach of which was now alleged; see p. 712, letter B, ante.

‡ The defendant's property at Nassau.

(see p. 715, post) the plaintiff sued his mother-in-law alleging that she wrongfully enticed his wife to withdraw herself from her married life and received her and harboured her against the will of the plaintiff. The action was tried by Denning, L.J., sitting as a judge of first instance, and he decided that there was no cause of action. He held that the rule had never been extended so as to enable a husband to sue his mother-in-law for enticement and that such actions should not be started now. It is unfortunate that this important decision is nowhere fully reported*. If the action for enticement and harbouring can be brought only against persons in the position of a lover or a mistress, it seems to me that the action for harbouring simpliciter, which involves no element of seduction anyway, cannot exist at all; and for the purposes of this case I have to ignore any element of seduction or enticement that was alleged against the defendant in the previous action. But if this is the right view of *Gottlieb* v. *Gleiser* (2), then it seems to me that it must also follow that it is in conflict with *Philp* v. *Squire* (1). This decision does not appear to have been cited to Denning, L.J., and I cannot treat it as disapproved.

I think that the tort of harbouring as a separate offence and without enticement, is one that was known to the common law. Lord Kenyon is clear on the point and there is other authority cited in Winfield on Torts (6th Edn.) p. 272. But it may be that the time has come to treat it in the way Lord Shaw of Dunfermline was prepared to treat parts of the law of maintenance, when he said in *Neville* v. *London* " *Express* " *Newspaper, Ltd.* (3) ([1919] A.C. 368 at p. 414):

> " Needless to say, these things, once claimed as being part of the common law of England, have long since disappeared. They are repugnant to sensible and modern ideas."

No doubt such disappearances are more fittingly announced in appellate courts than by judges of first instance; but if a refusal to recognise obsolescence leads to complete absurdity, a judge in any court would have to notice it. The reason why harbouring was considered objectionable was because it interfered with the economic process by which a wife, refused food and shelter elsewhere than in the matrimonial home, would eventually be forced to return to it. This is no longer an accepted method of effecting a matrimonial reconciliation. Parliament recognised that such methods were obsolete when by the Matrimonial Causes Act, 1884, s. 2, it abolished the process by which spouses who refused to obey a decree for restitution of conjugal rights were imprisoned until they did. Society would not today tolerate a vindictive husband who hounded his wife, however grievously she might have erred, from house to house through the ranks of her friends and relations in order to recapture her, as one might a fugitive slave. What if she was driven to seek public assistance? Would the Crown or some local authority then be liable for harbouring? In a society that is organised on the basis that everyone is in the last resort to be housed and fed by the state, the bottom has dropped out of the action for harbouring.

It would not, however, be proper for me to lay down new law and reject the old unless the facts of this case ineluctably required me to do so. In my judgment they do not. This is a case where the wife and not the husband is suing, and there is no authority at all for the proposition that the action, in the absence of enticement, lies at the suit of the wife. If the tort of harbouring is too firmly established in the law to be removed by judicial action, then I think that until the time comes when it is abolished, or at least regulated, by statute, it should be kept strictly within the limits at present established by authority. No doubt according to modern ideas wives should have the same marital rights as husbands; but where the choice lies between leaving a decaying form of action in the shape in which it was originally constructed and adding on up-to-date extensions, the

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* The passage in the judgment of Denning, L.J., containing his consideration of the law is at p. 716, post.

A court may refuse to embark on the task of modernisation. That was the view taken by the House of Lords of a wife's claim for loss of consortium in *Best* v. *Samuel Fox & Co., Ltd.* (4) ([1952] 2 All E.R. 394). It is true that there is authority for the view that in enticement cases the wife's position is the same as that of the husband; but that consideration did not sway the House of Lords and in my judgment it is not one that is appropriate here. While there is no
B way by which one can bring the notion of submission by starvation into harmony with modern ideas, the task of modernising the action for enticement need not be quite so unrewarding; enticement involves the deliberate break-up of marriage and that is still regarded as reprehensible, whether it be done by a man or a woman. Moreover, if the action for harbouring simpliciter was extended to include a complaint by a wife, it would become a mongrel product to be regarded
C as unnatural by whatever age produced it. The idea that it is wrong to harbour a husband would have found no greater favour in the eighteenth century than it does in the twentieth. In the eighteenth century there would have been no sympathy with the idea that a wife should have the same quasi-proprietary rights over a husband as he had over her, and also it would have been impossible to imagine that a husband could be forced by necessity to return to the bounty
D of his wife. In the twentieth century there can be no sympathy with the idea at all, whether the initiator is the husband or the wife. There is no sense in seeking to unite the ideas of two different centuries if the offspring of the union is going to be one which would be repudiated by both its parents.

In my judgment, the law is that if harbouring is actionable at all, it is not actionable at the suit of the wife. I hold therefore that the defendant did not, by
E continuing to support the husband, interfere with the plaintiff's rights.

[HIS LORDSHIP then went on to consider the issue that the defendant had financed the husband's petition for an annulment of his marriage with the plaintiff, thereby committing a breach of cl. 3 of the agreement, and concluded that, on the evidence, it must be inferred that she had financed the petition. The defendant was therefore in breach of the agreement.]

F *Judgment for the plaintiff.*

Solicitors: *Theodore Goddard & Co.* (for the plaintiff); *Gordon, Dadds & Co.* (for the defendant).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

G

GOTTLIEB *v.* GLEISER AND ANOTHER.

H [QUEEN'S BENCH DIVISION (Denning, L.J., sitting as an additional judge of the Division), February 21, 22, 23, 28, March 1, 2, 3, 4, 1955.]

Husband and Wife—Harbouring of wife—Wife living with her parents and apart from the husband.

Cases referred to:

(1) *Place* v. *Searle*, [1932] 2 K.B. 497; 101 L.J.K.B. 465; 147 L.T. 188; 27 Digest (Repl.) 89, *678*.

I (2) *Best* v. *Samuel Fox & Co., Ltd.*, [1952] 2 All E.R. 394; [1952] A.C. 716; 3rd Digest Supp.

(3) *Balfour* v. *Balfour*, [1919] 2 K.B. 571; 88 L.J.K.B. 1054; 121 L.T. 346; 27 Digest (Repl.) 201, *1604*.

Action.

The plaintiff (referred to hereinafter as the husband) brought an action against his wife's mother, alleging that the defendant wrongfully enticed the wife to withdraw herself from her married life. He also brought an action against the wife's father and mother, alleging that the defendants received the wife and harboured her against the will of the husband. The two actions were consolidated.

The husband and wife were married in March, 1946. Differences arose between the husband and the wife's mother as early as May, 1946, when the mother visited the couple in Sheffield, where the husband was a medical practitioner. A child was born in December, 1946. Differences between the husband and the wife's mother increased when in July, 1947, she stayed with the young couple when the wife was seriously ill. By the beginning of January, 1949, the tension between the husband and the wife's mother, who was again visiting the wife in Sheffield, had increased to such an extent that the husband decided that he and the wife ought to separate, and that the wife should go with her mother and the child to her parents' home in London, which the wife did. At that time the wife was two months' pregnant with her second child. Subsequently there were attempts at reconciliation and a protracted history of disputes, in which the father-in-law did what he could to effect a reconciliation. In 1949, the husband took the elder child out for the day and failed to return the child to the wife. In 1950, after months of searching and after litigation in the courts of Israel, the wife recovered the child and brought him back to England. Divorce proceedings in England were begun by the wife on the ground of cruelty, and in August, 1952, the husband commenced the present action. In February, 1954, the wife's petition for divorce was dismissed. On the evidence His Lordship found that the wife's mother was unduly protective and had interfered too much, though that was done out of devotion to her daughter; that, on the other hand, the husband was determined to get his own way so far as the wife and child were concerned and lacked kindness and consideration for her; that these were the two reasons for the marriage breaking up, but that the marriage would probably have continued, had it not been for the tension and interference between the wife's mother and the husband.

The husband, the plaintiff, appeared in person.

D. Weitzman, Q.C., and *S. Seuffert* for the defendants, the wife's parents.

DENNING, L.J., stated the facts and continued: How does the matter stand in law? In most of the United States of America they allow an action to be brought for what is called "alienation of affections." We know no such action in this country, nor is it to be desired. If a husband is to keep the affection of his wife, he must do it by the kindness and consideration which he himself shows to her. He must put his faith in her, trusting that she will be strong enough to thrust away both the possessiveness of her parents and the designs of would-be lovers. If she is weak and false to her trust, the harm done cannot be righted by recourse to law; nor is money any compensation. The only thing for the husband to do is to set to work as best he can to mend his broken life, a task in which these courts cannot help him. Although the law of England does not permit an action for alienation of affections, it does, however, allow an action for enticement. Even this action is not in keeping with the times; it is a survival from the days when the wife was considered to be the property of her husband. She was regarded as little better than the servant in his house. If anyone deliberately and maliciously persuaded her to leave him, the husband could recover damages for the loss of her services and companionship. That is still the law in this respect. The husband can still sue the wife's paramour who entices her away from him. That was established by the Court of Appeal in *Place* v. *Searle* (1) ([1932] 2 K.B. 497), where the doctor said to the wife: "Come on, Gwen. We will go." The converse has since been held; that the wife can sue the husband's mistress if the mistress entices the husband away. But this action for an enticement is an anomaly which the House of Lords have said should not be extended. They said so in *Best* v. *Samuel Fox & Co., Ltd.* (2) ([1952] 2 All E.R. 394). I do not know that the rule has ever been extended so as to enable a husband to sue his mother-in-law for enticement. An action against parents-in-law has been allowed in America, but, so far as I am aware, not in this country, and I do not think that it should be started now. When a man takes to himself a wife, he takes her parents to be his parents and they become his parents-in-law; he becomes part of their family. In this new situation the infirmities of human nature are such that stresses and strains are often set up without any malice on either side. The mother-in-law may be unduly possessive of her daughter and seek to protect her from the unkindness, as she regards it, of the husband. The wife may be immature and unduly reliant on her mother, instead of placing her trust in her husband, as she ought to do. These psychological defects may break up the marriage and cause the wife to leave the husband; but I do not think that this should be made the subject of an action for damages. It is altogether unseemly that families should bring these troubles into the courts of law. Take this very case. I have had to inquire into things which happened nine years ago, such as whether the mother telephoned the daughter too often whilst they were on their honeymoon, how many times the mother-in-law visited the house in Sheffield, whether she knocked before taking in the early morning tea, whether she gave the child a chocolate biscuit when the husband had said that he ought not to have had it, and so forth. The rights and wrongs of these matters are outside the realm of law altogether. They come under the realm of the domestic relations of the family, which they must work out themselves. As ATKIN, L.J., said in *Balfour* v. *Balfour* (3) ([1919] 2 K.B. 571 at p. 579):

> "The parties themselves are advocates, judges, courts, sheriff's officer and reporter. In respect of these promises each house is a domain into which the King's writ does not seek to run, and to which his officers do not seek to be admitted."

Even if an action for enticement did lie against the mother-in-law, however, it would, I think, be a good defence for her to show that all that she did was done, as she believed, for the good of her daughter and not out of any malice towards her daughter's husband. She may have been unduly possessive, interfering and unreasonable, but so long as she was honestly acting, as she believed, for her daughter's good, she is not liable for an action in law. The husband could not succeed against her in any case unless he could prove that she was actuated by express malice, a thing very difficult to prove.

Applying those principles to this case, I am satisfied here that the mother-in-law did not persuade or advise her daughter to leave the husband; the wife left because the husband told her to go. When the husband changed his mind and wanted her back, the mother-in-law did not persuade her or advise her to stay, nor did the father-in-law; the wife stayed because she was determined not to go back to her husband. When the husband did the grievous wrong of taking the child away, he destroyed what little hope there was of any reconciliation. The wife, in an attempt to get the child back, offered to rejoin the husband wherever he was, but he refused because he was determined to avoid any chance of having the child taken away from him. Throughout the history of the matter, it seems to me that those subsequent actions of the husband bear out the assessment of character which I said in the beginning he exhibited during his married life; he had a hard streak in him, he was determined to get his own way, and he failed to treat his wife with the kindness and consideration which would have kept her. I believe that it was because he failed to show her that kindness and consideration that the mother-in-law interfered, and she, no doubt, was guilty of faults on her side. She was unduly possessive and unduly protective of the daughter. Those are all troubles that arise owing to the infirmities of human nature. In my judgment, they do not give rise to an action at law, and the claim, therefore, must be dismissed.

Judgment for the defendants.

Solicitors: *Miller, Clayton & Co.* (for the defendants).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

MORIARTY (INSPECTOR OF TAXES) *v.* EVANS MEDICAL SUPPLIES, LTD.

EVANS MEDICAL SUPPLIES, LTD. *v.* MORIARTY (INSPECTOR OF TAXES).

[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Tucker, Lord Keith of Avonholm and Lord Denning), October 30, 31, November 4, 6, December 4, 1957.]

Income Tax—Income—Payment of lump sum for imparting secret processes and for furnishing plans, etc., for creating factory—Whether income or capital receipt—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *Sch. D, Case I.*

The taxpayer company carried on business as manufacturers of pharmaceutical products and wholesale druggists with world-wide sales and an agency in Burma. Under an agreement with the Burmese government, it undertook (by Part 1 of the agreement) to supply the government with information (which the government undertook not to divulge) relating to the manufacture of pharmaceutical products and also technical data, drawings, designs and plans for the erection of a factory and the installation of machinery suitable for the manufacture of pharmaceutical and other products in Burma. Some of this information related to secret processes. As consideration for the undertaking, it received a " capital sum " of £100,000. In an assessment to income tax made on the company under Case I of Sch. D to the Income Tax Act, 1952, the £100,000 was treated as a receipt of its trade liable to be included in the computation of its profits. The Special Commissioners of Income Tax held that the sum was properly so included, on the ground that it was received in respect of the provision of services and arose to the company " either in the course of the trade which it had hitherto carried on or in the course of a new trade which it commenced " at the date of the agreement.

Held (LORD MORTON OF HENRYTON and LORD KEITH OF AVONHOLM dissenting): the whole of the £100,000 should be excluded from the computation of the company's profits because—

(a) (per VISCOUNT SIMONDS and LORD TUCKER) on the true construction of the agreement the payment of the £100,000 was solely referable to the promises given by the company under Part 1 of the agreement, and by disclosing secret processes in accordance with those promises the company was parting with a capital asset for which it was receiving a capital sum (*Butterworth* v. *Page*, [1935] All E.R. Rep. 943, applied) and

(b) (per LORD DENNING) though the £100,000 was income, being received for the supply of " know-how " over years, yet it was not established that the £100,000 was received in the course of the existing trade which was being taxed, as the commissioners had made the alternative finding of its being received in the course of a new trade.

Decision of the COURT OF APPEAL (sub nom. *Evans Medical Supplies, Ltd.* v. *Moriarty* (*Inspector of Taxes*), [1957] 1 All E.R. 336) reversed in part.

[**Editorial Note.** LORD MORTON OF HENRYTON agreed, in his opinion, with the conclusion of the Court of Appeal. There was, therefore, a majority of the House of Lords in favour of the view that the consideration attributable to the company's divulging secret processes was capital and not income, though there was not a majority in favour of the view that the whole £100,000 was capital.

As to what constitutes trade receipts and income as opposed to capital for income tax purposes, see 20 HALSBURY'S LAWS (3rd Edn.) 150, para. 263; as to casual payments and isolated transactions, see ibid., p. 120, para. 213; and for cases on the subject, see 28 DIGEST 17-20, *87-99*.]

Cases referred to:

(1) *Butterworth* (*Inspector of Taxes*) v. *Page*, [1935] All E.R. Rep. 943; 153 L.T. 34; sub nom. *Handley Page* v. *Butterworth*, (1935), 19 Tax Cas. 328; Digest Supp.

(2) *Edwards* v. *Bairstow*, [1955] 3 All E.R. 48; [1956] A.C. 14; 36 Tax Cas. 207; 3rd Digest Supp.

(3) *British Dyestuffs Corpn.* (*Blackley*), *Ltd.* v. *Inland Revenue Comrs.*, (1923), 12 Tax Cas. 586; 129 L.T. 538; 28 Digest 19, *96*.

(4) *Trustees of Earl Haig* v. *Inland Revenue Comrs.*, (1939), 22 Tax Cas. 725; Digest Supp.

(5) *Californian Copper Syndicate, Ltd.* v. *Harris* (*Surveyor of Taxes*), (1905), 5 Tax Cas. 159; 28 Digest 23, *b*.

(6) *Ducker* v. *Rees Roturbo Development Syndicate, Inland Revenue Comrs.* v. *Rees Roturbo Development Syndicate*, [1928] A.C. 132; 97 L.J.K.B. 317; 138 L.T. 598; sub nom. *Rees Roturbo Development Syndicate, Ltd.* v. *Ducker, Rees Roturbo Development Syndicate, Ltd.* v. *Inland Revenue Comrs.*, 13 Tax Cas. 366; Digest Supp.

(7) *Nethersole* v. *Withers*, [1946] 1 All E.R. 711; *affd.* H.L., sub nom. *Withers* v. *Nethersole*, [1948] 1 All E.R. 400; [1948] L.J.R. 805; 28 Tax Cas. 501; 2nd Digest Supp.

(8) *Leeming* v. *Jones*, [1930] 1 K.B. 279; *affd.* H.L., (1930), 15 Tax Cas. 333; sub nom. *Jones* v. *Leeming*, [1930] A.C. 415; 99 L.J.K.B. 318; 143 L.T. 50; Digest Supp.

(9) *Kates* v. *Jeffery*, [1914] 3 K.B. 160; 83 L.J.K.B. 1760; 111 L.T. 459; 78 J.P. 310; 33 Digest 420, *1308*.

(10) *London County Council* v. *Farren*, [1956] 3 All E.R. 401; 120 J.P. 542; 3rd Digest Supp.

(11) *Herbert Morris, Ltd.* v. *Saxelby*, [1916] 1 A.C. 688; 85 L.J.Ch. 210; 114 L.T. 618; 43 Digest 24, *154*.

(12) *Trego* v. *Hunt*, [1896] A.C. 7; 65 L.J.Ch. 1; 73 L.T. 514; 43 Digest 9, *44*.

Appeal.

Appeal by the Crown and cross-appeal by the taxpayer company, Evans Medical Supplies, Ltd., from an order of the Court of Appeal (LORD EVERSHED, M.R., BIRKETT and ROMER, L.JJ.), dated Dec. 13, 1956, and reported sub nom. *Evans Medical Supplies, Ltd.* v. *Moriarty* (*Inspector of Taxes*), [1957] 1 All E.R. 336, reversing in part an order of UPJOHN, J., dated May 18, 1956, and reported [1956] 2 All E.R. 706. The taxpayer company appealed to the Special Commissioners of Income Tax against an assessment to income tax for 1954-55 made on it under Case I of Sch. D to the Income Tax Act, 1952, in the sum of £281,163, less capital allowances £56,305, in respect of its profits as wholesale druggists. The sole question for determination was whether a sum of £100,000 paid to the company by the Government of the Union of Burma was a receipt of the company's trade liable to be included in the computation of its profits for the purposes of the assessment. The facts appear in the opinion of VISCOUNT SIMONDS, pp. 720, et seq., post.

Sir Frank Soskice, Q.C., and *A. S. Orr* for the Crown.
J. Senter, Q.C., and *D. C. Miller* for the taxpayer company.

The House took time for consideration.

Dec. 4. The following opinions were read.

VISCOUNT SIMONDS: My Lords, the taxpayer company, Evans Medical Supplies, Ltd., and its predecessors have for a long time carried on in the United Kingdom and elsewhere the business of manufacturing chemists, wholesale druggists and kindred trades. It has a world-wide trade and reputation. In the year 1953 it carried on business in Burma through an agency in that country. On Oct. 20, 1953, it entered into an agreement with the Government of the Union of Burma, under which it became entitled to receive, and received, the sum of £100,000 and certain other sums therein mentioned. It will be necessary for me to refer in some detail to this agreement.

The company was duly assessed in respect of its profits as wholesale druggists for the year 1954-55 under Case I of Sch. D, and in this assessment the sum of £100,000 was treated as a receipt of its trade liable to be included in the computation of its profits. Against this assessment the company appealed to the Commissioners for the Special Purposes of the Income Tax Acts who upheld the assessment but, at the instance of the company, stated a Case for the opinion of the High Court. The case came on for hearing before UPJOHN, J., who allowed the appeal of the company and reversed the determination of the Special Commissioners. From his judgment, the Crown appealed to the Court of Appeal. That court discharged the order of the learned judge, and ordered that the case be remitted to the Special Commissioners with the direction

> " to ascertain in accordance with the judgments and subsequent proceedings of the Court of Appeal what part, if any, of the amount of £100,000 should be attributed to the imparting of the secret processes to the Government of Burma, such part to be treated as a capital receipt, and to adjust the assessment accordingly, and with power to the parties to call such evidence as they may consider necessary ",

and it was further ordered that the commissioners should (if required by either party) state a supplemental Case setting forth the facts of their determination. Neither party had asked for, or suggested the propriety of, such an apportionment. The Crown has appealed against the order, inviting your Lordships to restore the determination of the commissioners; the company has cross-appealed, claiming that the judgment of UPJOHN, J., should be restored. Both sides have argued throughout on the basis of " all or nothing ".

My Lords, largely, I think, as a result of the way in which the case was originally presented on behalf of the Crown and the consequent form of the commissioners' determination, a number of difficulties have been created which might well have been avoided. Essentially the case seems to me to be a very simple one, except only on one point which has caused me some anxiety.

Inasmuch as the Case Stated raises, amongst other questions, the familiar one whether there was evidence on which they could make their determination, it will be necessary to refer to the Case in some detail. The commissioners, after stating the question as I have already stated it, refer to the fact that, at the hearing of the appeal, evidence was given by a Mr. Fergusson, the chairman and managing director of the company, and that certain documents (including the agreement of Oct. 20, 1953) had been put in evidence and formed part of the Case. They then refer to the incorporation and objects of the company as stated in its memorandum of association, and mention that it took over a business which began in the year 1809 and is one of the leading pharmaceutical manufacturers with a world-wide trade. Paragraph 4 and para. 5 of the Case have been relied on by one side or the other and I set them out verbatim.

> " 4. The company carries on its trade abroad, in some cases by means of subsidiary companies in various countries, in other cases by means of foreign agencies, and for a considerable period prior to the year 1953 it had an agency in Burma. In the year 1953 the Burmese government decided to build a factory and laboratories in Burma for the purpose of establishing an industry there for the production of pharmaceutical and other products. Accordingly, the Burmese government despatched a trade mission to Europe, with

> a view to inducing some leading firm of manufacturing chemists to advise as to the erection of such a factory, the supply of equipment for manufacture, and to impart to them the processes, formulae, and knowledge necessary to the production and manufacture of pharmaceutical products in Burma.
>
> " 5. The said trade mission got into touch with firms of wholesale manufacturing chemists on the continent of Europe and, also, through the medium of the United Kingdom government departments, with the Association of the British Pharmaceutical Industry and finally treated with three leading firms of manufacturing chemists in the United Kingdom of which the company is one. There was keen competition with several continental firms and the British government was anxious that a British firm should, if possible, come to terms with the Burmese government. Negotiations were opened between the company and the trade mission on behalf of the Burmese government, and the company at first suggested a lump sum of £350,000 for the sale of drawings, designs, plans, and technical and other data, and ' know-how ' necessary for the establishment, erection and installation of the factory and the commencement of production, and for management services for a period of years. The Burmese government were unwilling to agree upon a single lump sum, but desired that part of the consideration should take the form of fees based on production. The company then made fresh proposals, which were accepted on behalf of the Burmese government and embodied in the agreement of Oct. 20, 1953 (Exhibit A)."

I come, then, to the agreement, and, as I regard it as the vital point of this case, I must refer to it at length. The recitals have rightly been regarded as of importance. They are as follows:

> " (1) The Government of the Union of Burma propose to build in Burma a factory and laboratories (hereinafter referred to as ' the factory ') for the purpose of establishing an industry there for the production of pharmaceutical and other products
>
> " (2) Evans Medical [i.e. the company] has developed and owns processes formulae and knowledge relating to the manufacture of pharmaceutical products and to the use of machinery plant appliances and devices used in such manufacture
>
> " (3) For facilitating the building and running of such factory [the company] propose to supply the Government of the Union of Burma with information and to organise the factory in the manner hereinafter mentioned "

The operative part of the agreement is divided into five parts, and again I think it desirable to set out the provisions of Part 1 in full. They are as follows:

> " In consideration of the payment to [the company] by the Government of the Union of Burma of the capital sum of £100,000 (One hundred thousand pounds sterling) payable in the United Kingdom free from any deduction whatsoever
>
> " (A) [the company] will provide and make available to the Government of the Union of Burma all drawings designs and plans and technical and other data and ' know-how ' necessary for the establishment erection and installation of the factory and the commencement of production thereat of the pharmaceutical and other products mentioned in the schedule hereto
>
> " (B) [the company] will supply to the Government of the Union of Burma designs and lay-out for the erection of plant including machinery and equipment and all other requisites and shall supply full data and specifications with drawings and instructions and all other information relating to the sources and manufacturers and suppliers of such machinery and equipment

> " (C) [the company] will make available to the Government of the Union of Burma all information relating to the supply of prototype machinery and equipment for the manufacture of the pharmaceutical and other products mentioned in the schedule hereto
>
> " (D) [the company] hereby undertake that during the currency of this agreement the facilities hereby agreed to be furnished to the Government of the Union of Burma under the preceding sub-clauses of this clause shall be exclusive to the said government and shall not during the currency hereof be furnished to any other person or corporation in Burma "

Part 2 of the agreement provides for the giving of advice and rendering of services by the company to the government. It is, for instance, to advise the government as to the building and operation of the factory, to act as purchasing agent for the government, to act as managers, to engage and train the staff, to procure and train as quickly as possible Burmese nationals in Europe and Burma and cause such nationals to be appointed to positions of responsibility in the factory and to render similar services. It then provides that, as remuneration for the services provided for in that Part of the agreement, the government would pay to the company a fee in respect of each year of the continuance of the agreement of either five per cent. of the value of all products whether or not specified in the schedule thereto produced at the factory in accordance with the provisions of that agreement, or the sum of £25,000, whichever sum should be the greater. This Part contained a number of other provisions to which I need not refer. Nor need I refer to Part 3. Part 4 provided that the agreement should remain in force for seven years, but might be renewed as therein mentioned, and contained the term that the government would not, without the consent of the company, export to any other country any of the goods manufactured in accordance with the provisions of that agreement except as therein mentioned. Part 5 contained the perhaps important term that the government would not divulge to anyone the information conveyed to them by the company under that agreement without the written consent of the company, such consent not to be unreasonably withheld.

Having referred to this agreement, the commissioners proceed, in para. 10 and para. 11, as follows:

> " 10. (i) The schedule referred to, forming part of the said agreement (Exhibit A), specifies two main classes of biological products (A) and (B) and a number of pharmaceutical products enumerated under a few broad descriptions (C), (D) and (E). All the products referred to are general types and do not include any of the company's proprietary products. By far the most valuable from the company's point of view were the secret processes involved in the preparation, storage, and packaging of certain human and veterinary anti-toxins, sera and vaccines.
>
> " (ii) The secret processes referred to in sub-para. (i) above have been evolved at great cost in several fields over a period of fifty years and the company considers that such secret processes are superior to those evolved by other companies. At least two other companies in the United Kingdom, and firms in Western Germany and Holland, have the necessary knowledge to prepare such products and do, in fact, prepare them. The company has, however, over a number of years experimented and perfected its own methods of preparing and conserving these products and has never, until it entered into this agreement with the Burmese government, communicated these methods to any other person or corporation.
>
> " (iii) The pharmaceutical products, as broadly classified in the schedule to the agreement, number about 3,500 out of 6,500 such products, actually manufactured by the company. Here again, there is no secret as to the composition of the various ointments, pastes, tablets and capsules. The ingredients are set out in the British Pharmacopoeia, and similar products

A are manufactured by other British and foreign manufacturing chemists. The secret processes consist in the actual methods of preparation of the products and, also, in the method of storing and packaging. For example, a special type of ampoule is used by the company for certain of its products, and the company, by its agreement, undertook to impart its own methods of manufacture and packing to the Burmese government.

B "(iv) The processes referred to in sub-para. (i), sub-para. (ii) and sub-para. (iii) above cannot be learned by the study of text-books. Knowledge of these processes is in some cases imparted by the company to the Burmese government by training suitable Burmese or European staff for employment in the factory in Burma. In other cases the knowledge is being imparted by the direct communication of written information.

C "11. The company might have erected its own factory in Burma, but its directors were convinced that the Burmese government was determined to have its own chemical industry in Burma and that several continental firms were willing and able to provide the Burmese government with the means to do so. In entering into the agreement, the company chose the method of developing its business which seemed to its directors to be D the best available in the circumstances. No similar agreement with any other foreign government or any other party had been made by the company. Since entering into the agreement, the company has retained its agency in Burma and has continued to supply this agency with its own products. The company's Burmese agency will become progressively less important as the government factory in Burma comes into production. At the time E of the hearing of this appeal (February, 1955) the factory was not completed but, as provided by para. 1, Part 4, of the agreement, the minimum sum of £25,000 was being paid as from Oct. 20, 1953."

I have thought it necessary to set these findings out at length, because, in a case such as this in which one question is whether there was evidence on which the F commissioners could properly arrive at their determination, it may do them less than justice to attempt a paraphrase. The same consideration applies to their statement of the contentions of the parties and their own determination. Accordingly I set out these also.

"13. It was contended on behalf of the company: (i) that under Part 1 of the agreement, to which the sum of £100,000 was solely annexed, the G company was parting with items of fixed capital; (ii) that, in the alternative, the said sum of £100,000 was a sum received by the company for an exclusive licence to the Burmese government; (iii) that, in either event, the said sum of £100,000 was, as described in Part 1 of the said agreement, a capital sum; (iv) that, in any event, the sum received by the company for disposing of the fruits of its experience did not arise in the course of a trade carried on by the H company; (v) that, in any event, the said sum of £100,000 was not properly included in computing for income tax purposes the profit of the company for the said year 1954-55.

"14. It was contended on behalf of the [Crown]: (i) that, on the true construction of the said agreement, the said sum of £100,000, no less than the annual sum of £25,000, was received by the company for providing services I in the course of carrying on its trade as wholesale druggists; (ii) that, on the true construction of the said agreement, Parts 1 and 2 were inter-locking and inter-dependent, and involved services to be rendered to the Burmese government, and that the payment of the said sum of £100,000 was only the first instalment of remuneration for such services; (iii) that the disposal of secret processes by the company was not the sale or assignment of property of the company, but a method of developing and exploiting its business by imparting its knowledge and experience to the Burmese government in return for a consideration of an income nature; (iv) that the provision of the facilities agreed to be furnished under Part 1 of the said agreement was within the trading objects of the company, and, in so far as the said sum of £100,000 was received in consideration for provision of these facilities, it arose to the company either from the trade it had previously carried on, or from a new trade which it had commenced to carry on on Oct. 20, 1953; (v) that, in any event, the said sum of £100,000 was properly included in computing for income tax purposes the profits of the company for the said year 1954-55. A B

"15. We, the commissioners who heard this appeal:

"(i) held that it was not possible, on the evidence set out in paras. 3-12 above, to consider each Part of the agreement of Oct. 20, 1953, separately. While the factory was in course of erection; while the training of staff was proceeding; and while plant and machinery were being obtained, payments, which the company admitted to be of an income nature, were being made, and we were unable to take the view that the said sum of £100,000 was paid simply for the sale or assignment to the Burmese government of secret processes analogous to patents; C

"(ii) even if the view were taken that the main part of the consideration of £100,000 was received by the company for imparting these secret processes to the Burmese government, we were still of opinion that the company had not sold or assigned any property. For example, other British and continental firms admittedly had the knowledge and did prepare anti-toxins, and the company after the signing of the agreement, as much as before, was still in a position to prepare such products according to the formulae and methods which it had perfected, which remained secret, except to the extent that some of them had been imparted to the Burmese government; D E

"(iii) considering as we do that the whole agreement must be read together, we think that it is one for the provision of services. The provision by the company under Part 1 of the agreement of what, in cl. (D) of that Part, are called 'facilities' is not in our opinion the sale or assignment of a capital asset in consideration of a capital price, nor is it the grant of a licence in consideration of a capital payment; F

"(iv) we also rejected the company's alternative contention that the said sum did not arise to the company as a receipt of its trade as wholesale druggists because it had never previously entered into such an agreement. On the contrary, we held that the company had, on the evidence in this case, chosen the method which appeared to its directors to be the best means of exploiting its business as wholesale druggists in Burma, such method being in our opinion clearly within the powers taken by the company in its memorandum of association. We, therefore, held that the said sum of £100,000 arose to the company either in the course of the trade which it had hitherto carried on or in the course of a new trade which it commenced to carry on on Oct. 20, 1953, and that in either event the said sum was properly included in the computation for income tax purposes of the company's profits as wholesale druggists for the said year 1954-55;" G H

Finally they stated the point of law for the opinion of the High Court in these terms:

"17. The point of law for the opinion of the High Court is whether, on the facts found by us and set forth in paras. 3-12 inclusive, there is evidence on which we could properly arrive at our determination that the said sum of £100,000 was properly included in the computation for income tax purposes of the profits of the company's trade for the said year 1954-55, and whether on the facts so found our determination was correct in law." I

My Lords, it is always easy to be wise after the event, and I would not be unduly critical of the way in which the commissioners discharge their very difficult task. But it is clear that much confusion has arisen in this case from the fact that the

Crown was permitted to put forward alternative contentions, and that the commissioners' determination was stated in an alternative form. That part of para. 15 (iv) of the Case which begins with the words "We, therefore . . ." clearly cannot be supported unless there is a finding of fact that the company did commence to carry on a new trade on Oct. 20, 1953, in the course of which this sum of £100,000 arose to the company. But there is no such finding and, if there was, the sum could not possibly be included in the computation of the company's profits as wholesale druggists for the year 1954-55. It would not, I think, on this ground alone be improper to say that the commissioners' determination cannot stand. But I prefer to rest my opinion on broader grounds, which are substantially those of UPJOHN, J., and the Court of Appeal.

In my opinion, the fundamental error of the commissioners lay in a misconstruction of the agreement which is the basis of their determination in para. 15 (i), (ii) and (iii) of the Case. I agree so fully with the way in which ROMER, L.J., has dealt with this part of the case that I will adopt his words. After a careful analysis of the agreement he says ([1957] 1 All E.R. at p. 348):

> "From this it follows, and is in my opinion the fact, that the £100,000 was solely referable to the promises given by the company under Part 1 of the agreement and none the less because there appears to be some degree of overlap between those promises and the services which it agreed to perform under Part 2. Accordingly, the only relevant investigation, for the purposes of this aspect of the matter, is as to what the company had to do in order to earn the £100,000 as distinct from what it had to do before it could claim the annual remuneration."

This is wholly at variance with the view of the commissioners that the whole agreement must be read together. I repeat their words: first,

> "We . . . held . . . that it was not possible . . . to consider each Part of the agreement of Oct. 20, 1953, separately "

and secondly,

> " considering as we do that the whole agreement must be read together, we think that it is one for the provision of services."

I could not accept the conclusion that the agreement, even if its Parts are read together, could be regarded as one for the provision of services and nothing else. For Part 1 is still there. It was an error of the commissioners to treat the consideration which moved from the company under that Part as being for services and nothing else. This argument was persisted in before the House, but it so flatly contradicts the language of the agreement that I need say no more about it.

It was, no doubt, the corollary of their view, that the agreement was one for the provision of services, that the commissioners should say that, in any event, the company had not " sold or assigned any property " to the government. Here, again, they fell into an error which vitiates their determination. For it is manifest that a secret process, whether in composition or methods of storing and packing, is something which can be disposed of for value, and that, by imparting the secret to another, its owner does something which could not fairly be described as " rendering a service ". I would not think that authority is needed for so obvious a proposition, but it may be found in *Butterworth* (*Inspector of Taxes*) v. *Page* (1) ([1935] All E.R. Rep. 943).

It still remains to ask whether, assuming that the £100,000 was in whole or in part consideration for the sale and purchase of an asset or assets, such assets were, to use the language of the company's first contention, " items of fixed capital ". This is a question frequently arising in income tax cases, and I should be disposed in general to accept the determination of the commissioners. For the line is often difficult to draw. But in the present case, bearing in mind particularly what LORD RADCLIFFE said in *Edwards* v. *Bairstow* (2) ([1955] 3 All E.R. 48), I come to the conclusion that the view of the commissioners cannot be sustained. It was, perhaps, a doubt in the mind of the inspector of taxes whether this sum could be regarded as an income receipt of the company's trade as " wholesale druggists " which led to the alternative suggestion of a new trade. But, however that may be, the evidence (I am now looking at the question propounded in the Case) is overwhelming that the company parted with a capital asset and received for it a capital sum. Of paramount, if not decisive, importance is the agreement itself. I need not repeat its recitals or its terms. The company parted with something for which the government was prepared to pay no less than £100,000. Its possession had secured for the company a substantial share of the Burmese market; its loss will mean (in the words of the commissioners) that the " company's Burmese agency will become progressively less important " or, in other words, that the company has parted with an asset which was the source, or one of the sources, of its profit. I venture to repeat the question stated by BANKES, L.J., in *British Dyestuffs Corpn. (Blackley), Ltd.* v. *Inland Revenue Comrs.* (3) ((1923), 12 Tax Cas. 586 at p. 596):

> ". . . looking at this matter, is the transaction in substance a parting by the company with part of its property for a purchase price, or is it a method of trading by which it acquires this particular sum of money as part of the profits and gains of that trade ? "

I look accordingly at this transaction and, with all respect to those who take a different view, do not see how the question can be answered except by saying that the company has parted with its property for a purchase price, and when I say " its property " I mean, as the lord justice meant, a capital asset. In this respect I see no difference between a patent and a secret process, and for that view I find ample authority in the decision of the Court of Appeal in *Butterworth* v. *Page* (1).

A contention was put forward on behalf of the Crown that, even if the divulging of a secret process to the whole world could be regarded as parting with a capital asset, the same could not be said of divulging it to one other. This does not make sense. The whole value of the secret might conceivably not be lost at once to the original owner, but that its value must be greatly diminished is obvious; in the present case, it is doubtful whether, within a measurable time, it will have any value at all, at any rate so far as the Burmese market is concerned. I adopt with respect the apt words of LORD FLEMING in *Trustees of Earl Haig* v. *Inland Revenue Comrs.* (4) ((1939), 22 Tax Cas. 725 at p. 735):

> ". . . the transaction here in question was not merely a use of the subject salva rei substantia but necessarily involved the realisation of a considerable part of its capital value."

My Lords, I think that the commissioners have in this part of the case been led into error by two things: first, by the introduction by the Crown of the suggestion of a new trade, consisting, presumably, of imparting information as to secret processes and other matters, with which I have already dealt; secondly, by the construction they put on, and the weight they gave to, the evidence of Mr. Fergusson. In para. 11 of the Case it is summarised thus:

> " In entering into the agreement, the company chose the matter of developing its business which seemed to its directors to be the best available in the circumstances."

In para. 15 (iv) they say:

> " . . . we held that the company had, on the evidence in this case, chosen the method which appeared to its directors to be the best means of exploiting its business as wholesale druggists in Burma . . . "

I am inclined to agree with learned counsel for the company that there has been a significant change in the language of the two paragraphs, but I do not attach much importance to it. For the decisive fact is not what was the company's motive in entering into the agreement but what it in fact effected. I cannot, however, suppose that Mr. Fergusson, if he spoke of the best available method of developing the company's business, had in mind any fine distinction between an income or a capital receipt or, indeed, had anything in mind except that, if the government were to become competitors in Burma, the company's prudent course was to cut its loss as best it could and use the proceeds in the development of its business elsewhere. I should not care to attribute to any man of business the notion that the best way of developing the company's business in Burma was to take a step which might effectually put an end to it.

I conclude, therefore, that the Crown's appeal must be dismissed and I come to the cross-appeal. Here I have felt greater difficulty.

My Lords, as I observed at the outset of this opinion, both sides have argued this case from the beginning, before the commissioners and Upjohn, J., and the Court of Appeal, on what I have called the " all or nothing " basis. The Crown, appealing from the order of Upjohn, J., moved that his order should be reversed and the determination of the commissioners affirmed. It is true that the usual formal words followed " or that such further or other order be made as to the court may seem just ". But there was no specific suggestion that the sum of £100,000 could, or should, be split up, part being regarded as a capital, and part as an income, receipt. It is probable that, if such a suggestion had been made at the outset, evidence would have been directed to the point. Should the company now, when it has been decisively determined that the £100,000 was not a sum paid for the provision of services and nothing else, at this stage be subjected to the further or alternative claim that some part at least of that sum was so paid ? I have been persuaded by what has fallen from your Lordships that it should not, and, in particular, by the opinion, which I have had the privilege of reading, of my noble and learned friend, Lord Denning. It would have been reasonable to come to a different conclusion if there had been any concealment by the company of relevant facts which have now come to light. But that has not been the case. Knowing all that was material to know, the revenue authorities deliberately made a challenge which has been rejected. I do not think they should be allowed to make another. I may add that I am the more ready to adopt this view because I think that both sides were probably right in throughout regarding the whole sum of £100,000 as indivisible. It would, I believe, pass the wit of man to apportion the sum between the items comprised in Part 1 of the agreement which are clearly, less clearly, or doubtfully of a capital nature. Nor would the problem be rendered easier by the fact that an item which might in isolation not be regarded as a capital asset could in its context be so regarded. I should, for instance, think it difficult to separate the value of a secret imparted to the government and the value of the service rendered in imparting it.

I have, therefore, come to the conclusion that the cross-appeal should be allowed. In the result I move your Lordships that the appeal of the Crown should be dismissed and the cross-appeal of the company allowed, that the judgment of Upjohn, J., should be restored, and that the Crown should pay the costs of the company here and in the Court of Appeal.

LORD MORTON OF HENRYTON: My Lords, the relevant facts of this case have been fully stated by my noble and learned friend, Viscount Simonds, and I shall not repeat them. The case has given rise to a remarkable difference of opinion on the question whether the sum of £100,000 now in question was, in the hands of the taxpayer company, an income receipt or a capital receipt. The Special Commissioners found that it was wholly income, Upjohn, J., held that it was wholly capital, and the Court of Appeal took the view that it was capital in so far only as it was to be attributed to the imparting to the Government of Burma of the secret processes mentioned in para. 10 of the Case Stated, and remitted the case to the Special Commissioners to ascertain what part, if any, of the £100,000 should be so attributed.

My Lords, I think that this is a difficult and border-line case, but, in my opinion, the Court of Appeal arrived at the right conclusion. I am content to adopt the reasoning of the Master of the Rolls (Lord Evershed) and Romer, L.J., in which Birkett, L.J., concurred, and I shall not take up your Lordships' time by repeating that reasoning in language of my own; but, having regard to the course of the argument in your Lordships' House, I shall add a few words on two questions. They are, first, whether, having regard to the evidence and to the terms of the agreement of Oct. 20, 1953, it is possible to sever the imparting of the secret processes from the rest of the consideration moving from the company under Part 1 of that agreement; secondly, whether the course of the proceedings in this House and in the courts below affords any reason for reversing the order made by the Court of Appeal.

My Lords, I realise fully that, if the order of that court stands, it will be no easy task for the commissioners to ascertain what part, if any, of the £100,000 should be attributed to the imparting of the secret processes to the Government of Burma, but I do not regard the difficulties as insuperable. Paragraph 10 of the Case Stated shows that the commissioners already have a considerable amount of knowledge as to the nature of these secret processes, and, no doubt, further evidence would be given before them as to the value to be attributed to the imparting thereof, on the terms set out in the agreement, as compared with the value of the other matters mentioned in Part 1 of the agreement. And, to my mind, the imparting of these secret processes, even if it can properly be described as a " service ", is a service different in kind from all other services mentioned in Part 1. However the imparting may be carried out, it is completed when the secret processes come into the knowledge of the Government of Burma; and I agree with the Court of Appeal in thinking that, when that event happens, the company will have sold a part of its property, which is a capital asset. It appears to me that this part of the company's property could have been sold by itself, even if nothing else had been included in Part 1; and, if so, it must surely be possible to identify it and single it out from the rest of Part 1.

As to the course of the proceedings, counsel for the Crown have contended strenuously that the £100,000 is wholly income, while counsel for the company have contended, no less strenuously, that it is wholly capital; but counsel for the company not unnaturally asked your Lordships, if you could not accept his primary contention, to uphold the order of the Court of Appeal. I see no injustice, either to the company or to the Crown, in taking this course; indeed, it seems to me the only possible course if the true view is that the part of the £100,000 paid for the imparting of the secret processes was a capital receipt, and that there was evidence which justified the Special Commissioners in finding that the balance thereof was an income receipt.

I would dismiss the appeal and the cross-appeal.

LORD TUCKER: My Lords, for the reasons which have been stated by my noble and learned friend, Viscount Simonds, I agree that the appeal should be dismissed and the cross-appeal allowed.

LORD KEITH OF AVONHOLM: My Lords, this appeal relates to an assessment made under Case I of Sch. D to the Income Tax Act, 1952, and so is concerned with a tax charged in respect of a trade carried on in the United Kingdom or elsewhere. As stated by the Special Commissioners in the Case Stated, the sole question for their determination was whether a sum of £100,000 paid to the taxpayer company by the Burmese government in the circumstances described in the Case was a receipt of the company's trade liable to be included in the computation of its profits for the purposes of the assessment for 1954-55.

The commissioners have found that the said sum was properly included in such computation, and the question is whether, on the facts found, their determination was correct in law.

I do not repeat the facts found which have already been sufficiently stated. If I may summarise the position in a few words, the company, which had for many years prior to 1953 been selling its pharmaceutical and other products through an agency in Burma, found itself faced with a challenge to the continuance of this trade in the decision of the Burmese government to set up a factory in Burma and acquire from some firm of manufacturing chemists the processes, formulae and knowledge necessary for the production of pharmaceutical products there. The company, in the face of keen competition and with the encouragement of the British government, secured an agreement with the Burmese government to give effect to this purpose. It is expressly found as a fact by the commissioners that

> "In entering into the agreement, the company chose the method of developing its business which seemed to its directors to be the best available in the circumstances."

This finding cannot, in my opinion, be challenged, and it may be supplemented by a quotation from a brochure of the company which is made part of the Case:

> "The agreement will, during the next seven years, add several million pounds to U.K. exports. A considerable part of the exports will consist entirely of 'know-how' and will require no raw materials."

UPJOHN, J., took the view that the effect of the agreement was to contradict the determination of the commissioners which he took to mean, I think correctly, that the receipt of the £100,000 under the agreement was a trading receipt in the course of carrying on the trade. If the learned judge was correct, that, I think, was an end of the case, for it was only on a trading receipt that the company was being assessed. He went on, however, to consider whether the £100,000 was a receipt of an income or capital nature. The Court of Appeal, on the other hand, took the view that the £100,000 was received by the company in the course of its trade, but appear to have taken the view that, in so far as part of the £100,000 can be attributed to the imparting of secret information, or secret processes, to the Burmese government, there was the realisation of a capital asset and that only the balance of the £100,000 can be regarded as a trading receipt.

I find myself unable to agree with the learned judge or wholly with the learned lords justices of the Court of Appeal. I turn at once to the agreement, which is the crucial part of the case. I do not, however, regard the circumstances in which the agreement was made as unimportant. The company intended it, as the commissioners found, to be a trading agreement. But it may, of course, contain terms which, as regards some or part of the sums received under the agreement, prevent them from being treated as trading receipts. I accept it that the £100,000 was the consideration for what the company undertook to do under Part 1 of the agreement. What did it undertake to do ? A large part of Part 1 covers, in my view, nothing but the provision of services which might have been supplied by other concerns with whom the company had been in competition to secure the agreement. Such are the provision of drawings, designs, plans and other data for the establishment, erection and installation of the factory; designs and lay-out for the erection of plant, etc., and data and specifications with drawings and instructions and all other information relating to the sources and manufacturers and suppliers of machinery and equipment. I shall assume, though it is not expressly stated in Part 1 of the agreement, that the information to be supplied included information on secret processes used by the company. There is a reference to "know-how", and this may be significantly related to the reference to "know-how" in the quotation from the brochure already given.

A person in trade or business who has a secret process which he decides to sell may do so in various situations. He may be retiring from business and selling his business to a purchaser. Obviously, this is a capital transaction that attracts no tax. Again, he may remain in business, but, being unable from lack of capital or otherwise to develop his secret process, he may sell it outright to another trader. That, again, would be the sale of a capital asset which would not attract tax. A third type of case would be where the trader imparts his secret knowledge to some other trader, but retains the right to use it in his own business and, it may be, to share it further with other traders. In such a case, it may be said that the secret knowledge is no longer secret knowledge. But that is not, perhaps, strictly accurate. It is not so secret as it was, but it may still retain a value. And, if a trader, having developed some secret process, made a practice of turning it to profit by selling it like a commodity to other interested parties, possibly with restrictive conditions attached, there would seem to be no sound reason for saying that he was doing anything other than trading in know-how. Like stock in trade it might ultimately run down. But, in the manifold opportunities of commercial and trading life, it might remain a source of profit for a very considerable time. The point to be emphasised is that there is really no difference between trading in know-how consisting of a secret process and any other kind of know-how. I would observe that trading in know-how is not quite the same thing as turning one's property to a profitable use. A man may rent his house, or license the use of his patent, without being engaged in trade. With either the trader or the property owner, similar considerations may come into play in deciding whether a receipt is a capital or a revenue receipt, but, where the receipt is a receipt in the course of trade, that may be sufficient to turn the scale in favour of holding a receipt which has the appearance of a capital receipt to be a revenue receipt. Illustrations may be seen in *Californian Copper Syndicate, Ltd.* v. *Harris (Surveyor of Taxes)* (5) ((1905), 5 Tax Cas. 159) and *Rees Roturbo Development Syndicate, Ltd.* v. *Ducker* (6) ((1928), 13 Tax Cas. 366). The issue in this case is well focussed in a sentence of BANKES, L.J., in *British Dyestuffs Corpn. (Blackley), Ltd.* v. *Inland Revenue Comrs.* (3) ((1923), 12 Tax Cas. 586 at p. 596):

> "The real question is, looking at this matter, is the transaction in substance a parting by the company with part of its property for a purchase price, or is it a method of trading by which it acquires this particular sum of money as part of the profits and gains of that trade?"

The question then, and the only question as I see it, is: Was the company trading in know-how or realising know-how? In my opinion, there was ample evidence on which the commissioners could arrive at the conclusion that it was trading in know-how. I find it impossible to hold that they

> ". . . acted without any evidence, or on a view of the facts which could not reasonably be entertained",

to use the language of my noble and learned friend, VISCOUNT SIMONDS, in *Edwards* v. *Bairstow* (2) ([1955] 3 All E.R. 48 at p. 53).

If the company had undertaken to build and equip the factory for production, it could hardly be doubted that any profit would have been a profit or gain of trade. Instead, it undertook to supply the necessary know-how for building and equipping the factory. It is, to my mind, immaterial if, included in this know-how, was information known only to itself. That only goes to show that secret information was thrown into the general pool of things provided. If part of the information, facilities and services was provided as a trading operation, and this, to my mind, is an inescapable conclusion, then the whole, in my opinion, was supplied as a trading operation. I find it impossible to split the £100,000 into a non-trading receipt and a trading receipt according as the information supplied was secret and non-secret.

A Further, alongside and contemporaneously with the obligation of Part 1, the company was carrying out the obligations of Part 2 of the agreement. These included training Burmese and others in what must, ex hypothesi, have been both secret and non-secret. The annual payments made by the Burmese government under Part 2 are accepted as payments that attract tax and, as I see it, necessarily so because they are payments for the supply of services. The Special B Commissioners have held that the payment under Part 1 was also for the supply of services, and I think they were right in so holding. The services may have been different in kind from those given under Part 2, but both were directed to the same end. I cannot see any essential difference that would lead to the conclusion that one set of services led to a profit earning or trading receipt and the other to the realisation of a capital asset.

C Lastly, though this is more by way of addendum to what I have already said, the agreement imposed on the Burmese government an obligation of secrecy not to divulge such information as was conveyed to them by the company without the written consent of the company which was not to be unreasonably withheld. Also the Burmese government was not, without the written consent of the company, to export any goods manufactured under the agreement, with certain D exceptions, and, if consent was given, the company was to be paid a royalty on exports for a period not exceeding fourteen years. These stipulations in themselves go a long way to prevent the agreement resulting in the dissipation of a valuable asset. There is a great difference between giving away knowledge to the world at large or for the exclusive use of a buyer to the exclusion of the seller and selling the knowledge to selected individuals from time to time while retaining E the right to continue using the knowledge oneself. In the present case, the company could repeat the process, if not ad infinitum, at least for a very considerable time, to governments or individuals all over the world with considerable profit to itself.

I would refer to only a few of the cases cited during the hearing. None of them seems to me to touch the particular circumstances of this case, and they are more F useful to point differences rather than similarities. Reference was made to *Withers* v. *Nethersole* (7) ([1948] 1 All E.R. 400). It was, I think, relied on by UPJOHN, J., to some extent. I do not get much assistance, however, from that case. The critical finding of the commissioners was that Miss Nethersole was not carrying on a profession or vocation at the material time. The question was whether Miss Nethersole was liable in tax under Case VI of Sch. D* as having G received sums of a revenue nature. What the Court of Appeal and the House of Lords held was that there was a sale or assignment by Miss Nethersole of her rights in a play and that the sums received were capital, the price, in other words, received from the realisation of her property. VISCOUNT SIMON said (ibid., at p. 403):

> " Here we have the sale and transfer outright of an item of property which H previously belonged to the taxpayer, not the licence to use it granted by its unchanged owner, and this does not give rise to annual profits or gains *unless the sale takes place in the course of carrying on a trade or profession.*"

The emphasis on the concluding words in this passage is mine. The other members of the House took the same view, though LORD PORTER and LORD UTHWATT prayed in aid the language of the Copyright Act, 1911. I would I emphasise, again, however, the words of LORD UTHWATT (ibid., at p. 405):

> " A sale, *not in the way of trade*, of an asset does not attract tax on the consideration. Whatever else comes within the ambit of annual profits and gains, the consideration received by the taxpayer [Miss Nethersole] does not."

If Miss Nethersole had been carrying on the business or profession of authoress or dramatist, very different considerations would have arisen. It would, in my

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* To the Income Tax Act, 1918. See now the Income Tax Act, 1952, s. 135; 31 HALSBURY'S STATUTES (2nd Edn.) 132.

opinion, have been very difficult to reach the conclusion that the sums received A
by her were not business or trading receipts. A very similar case was that of *Trustees of Earl Haig* v. *Inland Revenue Comrs.* (4) ((1939), 22 Tax Cas. 725). There, again, it was found that the trustees were not carrying on a trade or adventure, and the Court of Session sitting as Court of Exchequer held that sums received by the sale of publication rights in Earl Haig's war diaries were capital receipts, not revenue receipts, under Case VI of Sch. D*. The court pro- B
ceeded largely on the view that the transaction involved the realisation of a considerable part of the value of the diaries, a very material factor in a case under Case VI, but of relatively little importance in a case under Case I or Case II.

Lastly I should mention *Butterworth* (*Inspector of Taxes*) v. *Page* (1) ([1935] All E.R. Rep. 943). This again raised no question of trading. The case was concerned with the nature of sums received under awards made by the Royal C
Commission on Awards to Inventors in respect of the user of aeroplane designs and patents by H.M. Government and the U.S. Government during the 1914-18 war. Mr. Handley Page was, at the time of the user, the owner of the patents and designs. An assessment to income tax was made on him in respect of the awards. The case was thus one of receipts of ownership, not receipts of trading and would fall under Case III or Case VI. In this House, the assessment was D
discharged on a point that was not considered by the Court of Appeal. The Court of Appeal had discharged the assessment on the ground that the payment was in the nature of a capital payment and not taxable under Sch. D. The ratio of this decision was that Mr. Handley Page had been compelled by the government to part with the whole of his property, which was mainly in the designs. As SLESSER, L.J., put it (ibid., at p. 954): E

> " His property was his secret process and his knowledge, and that property was, at the request or by compulsion of the government, dissipated among all his competitors."

The case was cited chiefly, however, for a passage in the judgment of ROMER, L.J., where, assimilating the knowledge of the owner of a secret process to that of the F
monopoly of a patentee, he says (ibid., at p. 955):

> " The owner of a secret process such as was possessed by Mr. Handley Page stands in a very analogous position; he has not a monopoly at law, but he has a monopoly in fact—a monopoly in fact arising from the possession by him of the secret knowledge of the process that G
> he is carrying on. That secret knowledge is as much his capital asset as is the patent monopoly the capital asset of the patentee, and, like the patentee, he can use that capital asset in either or both of the following ways: he can himself carry on the secret process, or he may—it is very seldom done owing to the obvious danger involved—grant a licence to a third person to carry on the secret process, securing him- H
> self against his secret process being divulged by that third party to others. In both these cases the profits he derives from carrying on the secret process himself and the royalty he might derive from the licensee would be annual profits or gains within the meaning of Sch. D. But supposing he sells his secret process or supposing, as here, he surrenders his quasi monopoly by making it public to the world, then I say that, if he gets paid for doing either one or I
> the other of those things, the money he receives in payment is a capital asset. Here, at the invitation of the government, he surrendered to the world his secret knowledge, and his capital asset thereupon ceased to exist."

While that case is not, I think, strictly in point where a man is using his secret process for purposes of trade as here, I would place this case if necessary in the

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* See footnote p. 731, ante.

A second category specified by ROMER, L.J., and, on that view, the sum received would, on the learned lord justice's analysis, be a profit or gain under Sch. D.

Since preparing this opinion I have had the opportunity of reading the speech about to be delivered by my noble and learned friend, LORD DENNING. The reference by the commissioners in para. 15 (iv) of the Case Stated to a new trade is a puzzling feature of the case. It does not appear in the statement of facts and B it is not, I think, a finding in fact. It is, at best, an inference in law, and I can find nothing in the findings in fact to support it. What the company did was, in my opinion, no more than a legitimate extension of their existing trade.

In this case it is, I consider, impossible to disturb the determination of the commissioners. I would allow the appeal, dismiss the cross-appeal and answer the question in law in the Case in the affirmative.

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LORD DENNING: My Lords, the Case stated that the *sole* question was whether " a sum of £100,000 " paid to the taxpayer company by the Burmese government was a receipt of the company's trade liable to be included in the computation of its profits for the year 1954-55; and the Special Commissioners held that it was. The Case treated the £100,000 as being a single undivided D amount. Yet the Court of Appeal have remitted the case to the commissioners with a direction to divide it up. They have directed the commissioners to ascertain " what part, if any " of the £100,000 is a capital receipt and to adjust the assessment accordingly. Both parties now appeal to this House against the order of the Court of Appeal; and well they may, seeing that they had throughout fought their battle on the footing that either the whole £100,000 was a taxable E receipt or none of it was. It was " all or nothing ". Yet this order exposes them, not to the one battle they reckoned on, but a long-drawn out war. The Master of the Rolls (LORD EVERSHED), after he made the order, said:

> " It would not surprise me if it were years before this case was finally settled after going back to the Special Commissioners ",

F and BIRKETT, L.J., said: " I can imagine endless controversy ".

I very much doubt whether it was open to the Court of Appeal to remit this case as they did. The only point of law stated for the opinion of the court is whether " the said sum of £100,000 " was properly included in the profits. It should be noticed that it does not say " or any part thereof ". I realise, of course, that a whole is often taken to include a part without anything being said; but G that is not a universal rule. I call to mind covenants against assignment or underletting where it has been held that the whole does not include a part. When this case is construed in its setting, I think " the said sum of £100,000 " does not include a part of it. The Case refers to the agreement under which the £100,000 was paid. It was paid as an entire sum for a specified consideration. The consideration was the imparting of information and technical data, all of which may H be summed up in the new and expressive word " know-how ". The Court of Appeal would seek to divide it into two parts: (i) information about secret processes; (ii) information about other things. The information about secret processes had in the past been kept confidential to the company and their staff, and was especially valuable on that account. The information about other things was technical knowledge which was not secret but was, no doubt, valuable in that it I could only be obtained from firms who were expert in it. I can see no sensible distinction between money paid for information of secret processes and money paid for the other information. The only difference is that, in the one case, the money was paid for information which up till then had been *secret*, being obtainable only from the one firm; whereas in the other case it was paid for information which was *scarce*, being obtainable from three or four firms. But the money was paid for the same sort of thing in either case. At any rate, the parties to this agreement did not seek to draw any distinction between the two. £100,000 was paid for the lot. It was a single payment for " know-how ". The Case Stated follows suit. It does not attempt to divide the £100,000 into parts. No evidence was given before the commissioners about splitting it up. No point was taken on it either before the commissioners or UPJOHN, J. It is a new point which appeared for the first time in the Court of Appeal.

Seeing that the Case Stated does not raise this new point about splitting up the £100,000, I do not think it was open to the Court of Appeal to raise it. The court has, of course, power to remit a case to the commissioners for further findings when such are necessary to determine the point of law which is raised in the case. That was done in *Leeming* v. *Jones* (8) ([1930] 1 K.B. 279 at p. 284). But I do not know of any power to remit it for a finding on a new point which has not been raised before. The general rule of every appellate court is not to allow a new point to be raised except on a question of law which no evidence could alter; and this applies equally to a Case Stated under a statute worded like s. 64 (6) of the Income Tax Act, 1952: see *Kates* v. *Jeffery* (9) ([1914] 3 K.B. 160), and *London County Council* v. *Farren* (10) ([1956] 3 All E.R. 401).

I turn, therefore, to consider the entire sum of £100,000. It was payable to the company on the execution of the agreement of Oct. 20, 1953, and was no doubt received soon afterwards. The revenue authorities included it in their assessment on the company for the year 1954-55 under Case I of Sch. D. The question is whether it was properly so included.

Applying the statute, this question can be divided into two parts: (i) Was the £100,000 to be included in the " annual profits or gains ? "; (ii) Did it arise or accrue to the company " from any trade " carried on by it ? The first of these, for all practical purposes, can be turned into the question—Was it capital or income ? The second into the question—Was it received in the course of the company's trade ?

So far as the first question is concerned, the Special Commissioners made findings which show that, in their view, the £100,000 was in the nature of income and not capital—see findings (i), (ii) and (iii): and LORD EVERSHED, M.R., made it clear that, if he had to treat it as one entire sum, he, too, would say it was income and not capital. I find his reasoning on this part of the case very convincing; and it is forced home by the speech of my noble and learned friend, LORD KEITH OF AVONHOLM, to which we have just listened. I would just mention, if I may, that ROMER, L.J., made what looks to me like a slip at a critical point of his reasoning. He assumed that the £100,000 was only payable after the consideration for it was fully performed. It was, in truth, payable in advance—and, indeed, so paid—for information to be given over an indefinite period in the future. This period might run into years, and has, in fact, done so, for the factory was not even built three years later when the case reached the Court of Appeal.

The way I look at it is this: the company were faced with a difficult problem. The Burmese government were determined to make these products themselves. This would mean that the company would be forced out of the Burma market, or at any rate would lose a good deal of business there. Their goodwill in that country would be diminished in value. But that would not be due to any sale by them of a capital asset. It would take place no matter which of the competing firms obtained the contract. To make up for this coming loss of market, the company did a sensible thing. They secured the contract to supply the "know-how " to the Burmese government. This did not purport to be—and was not in fact—a *sale* of secret processes. All that the company did was to tell the Burmese government about those processes so that they could use them too. The company still retained the right to use the processes themselves, and stipulated that the Burmese government should not divulge the information without their consent. So regarded, the supply of information about the secret processes was nothing more nor less than the supply of " know-how "—a particularly valuable part of it, no doubt—but still the supply of " know-how ". And that is how the parties to this agreement treated it. They drew no distinction between it and the other kinds of " know-how " to be supplied in return for the £100,000.

What, then, is the position of " know-how " for tax purposes ? It is undoubtedly a revenue-producing asset. The possessor can use it to make things for sale; or he can teach it to others for reward. But he cannot sell it outright. It is rather like the " know-how " of a professional man. He can use it to earn fees from his clients; or he can teach it to pupils for reward; and so produce revenue. But he cannot sell it as a capital asset for a capital sum. He cannot sell his brains. So with a company which has special manufacturing skill and experience, but has no secret processes. Its "know-how" is inseparable from the " know-how " of its staff and servants. It cannot prevent them using it any more than it can prevent them using their own brains: see *Herbert Morris, Ltd.* v. *Saxelby* (11) ([1916] 1 A.C. 688 at p. 704). It cannot sell it as a capital asset. It can only use it or teach it. Even with a company, which owns secret processes, the supply of " know-how " is not like the sale of goodwill or a secret process, for such a sale imports that the seller cannot thereafter avail himself of the special knowledge with which he has parted: see *Trego* v. *Hunt* (12) ([1896] A.C. 7 at pp. 24, 25), and it may then rightly be regarded as the sale of a capital asset: see *Butterworth* (*Inspector of Taxes*) v. *Page* (1) ([1935] All E.R. Rep. 943). But the supplier of " know-how " always remains entitled to use it himself, as was the case here.

For my own part, therefore, I see nothing wrong in the findings (i), (ii) and (iii) of the commissioners, and am prepared to accept the view that the £100,000 was received for the supply of " know-how "—call it services if you like—over the ensuing years. But I feel difficulty in saying that it was received " in the course of the company's trade " as wholesale druggists and so forth. It may be said to be an activity of a different kind altogether. The revenue authorities appear to have felt the same difficulty, but thought it did not matter so long as the £100,000 was received in the course of some trade or other. They took the view that it did not matter whether it arose from *the existing trade* which the company had theretofore carried on, or *from a new trade* which it commenced on Oct. 20, 1953. Being in this state of mind, they formulated their contention on this point in the alternative. They contended that the £100,000

> " arose to the company either from the trade it had previously carried on, or from a new trade which it had commenced to carry on on Oct. 20, 1953."

Even if the revenue authorities did not formulate the contention themselves, the commissioners so understood it and inserted it in the case. It was, no doubt, submitted to the revenue authorities and approved by them, so they cannot now disavow it. The commissioners accepted the contention in the very formula which the revenue authorities had adopted. They said:

> " We, therefore, held that the said sum of £100,000 arose to the company either in the course of the trade which it had hitherto carried on or in the course of a new trade which it commenced to carry on on Oct. 20, 1953 . . . "

It is very unfortunate for the revenue authorities that they formulated their contention in that alternative form or approved it as they did; for it has since become quite apparent that it does matter very much whether the £100,000 was received in the course of the existing trade or at the beginning of a new trade. If it was received in the course of a new trade, it could not be brought into the assessment of the company's existing trade for 1954-55 which was the only assessment here in question, but would have to come into a new assessment for the new trade calculated in the special way that profits are calculated at the commencement of a new trade. When UPJOHN, J., pointed out this difficulty to counsel for the Crown, he abandoned any reliance on a new trade; but this abandonment does not get the revenue authorities out of the difficulty. Counsel for the Crown, for all his wit, cannot cancel half a line of the finding nor can his tears wash out a word of it. The finding by the commissioners still remains an alternative finding. The revenue authorities have no right to take the first alternative which suits them and reject the second alternative which does not. For aught we know, the commissioners, if asked to decide between the two alternatives, might have come down in favour of the second.

Counsel found himself, therefore, forced to say that the only proper inference from the primary facts was that the £100,000 was received in the course of the *existing* trade. He relied on the fact found by the commissioners that

> " In entering into the agreement, the company chose the method of developing its business which seemed to its directors to be the best available in the circumstances."

But this fact is neutral. " Its business " may mean either its existing business or its new business. When read with the alternative finding, it is clear that the commissioners did not intend by that sentence to decide whether the company was developing its existing business or starting a new one. The Case Stated read as a whole seems to me quite consistent with the view—which UPJOHN, J., thought was the only reasonable view—that ([1956] 2 All E.R. at p. 711)

> ". . . the company was not ' exploiting ' its business in the only sense in which that word is relevant, i.e., of carrying on its trade of wholesale druggists in Burma, but in and by the agreement it entered into the *entirely new activity* of acting as adviser of the Burmese government by assisting to set up a completely new industry there . . ."

Such new activity might have been taxable as being an adventure in the nature of trade but it cannot be brought into the assessment of the company's existing trade for 1954-55.

The upshot of it all is that, although the revenue authorities have a finding in their favour that the £100,000 was income and not capital, nevertheless they have no finding that it was received in the course of the existing trade which is being taxed. It may equally well have been received in the course of a new activity which is not being taxed. That is not good enough to enable the revenue authorities to succeed in this Case Stated. The law never gives judgment in favour of a plaintiff when the only finding is equally consistent with liability or non-liability. The revenue authorities have themselves to thank for this result because of the way they formulated their contentions. They are hoist with their own petard. They can go away and ponder again the words of LORD CAIRNS*:

> " . . . if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free . . . "

I would, therefore, dismiss the appeal and allow the cross-appeal.

Appeal dismissed; cross-appeal allowed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Whitfield, Byrne & Dean*, agents for *Whitley & Co.*, Liverpool (for the taxpayer company).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

[END OF VOLUME THREE.]

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* *Partington* v. *A.-G.* ((1869), L.R. 4 H.L. 100 at p. 122).